



**New South Wales  
Law Reform Commission**

# **Review of the Guardianship Act 1987**

## **Question Paper 6**

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### **Cataloguing-in-publication**

Cataloguing-in-publication data is available from the National Library of Australia.

ISBN 978-1-922254-23-8 (electronic)

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## Table of contents

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<b>Make a submission</b> .....	iii
<b>Table of contents</b> .....	iv
<b>Participants</b> .....	vi
<b>Terms of reference</b> .....	vii
<b>Recent Australian reviews of guardianship laws</b> .....	viii
<b>Questions</b> .....	ix
<b>1. Introduction</b> .....	1
This Question Paper .....	1
Any other issues? .....	2
<b>2. Objectives, principles and language</b> .....	3
Statutory objects .....	3
General principles .....	5
The current law.....	5
Issues for consideration.....	6
Accommodating multicultural communities.....	8
Accommodating Aboriginal people and Torres Strait Islanders .....	9
Language .....	11
Language of disability.....	12
Language of guardianship .....	13
Incorporating Aboriginal and Torres Strait Islander concepts of family.....	14
<b>3. Relationship with Commonwealth laws</b> .....	15
Commonwealth provisions .....	15
Interaction with the NSW guardianship system.....	17
Different regimes for decision-makers.....	17
Where there are no relevant appointments under NSW law.....	18
Where there are relevant appointments under NSW law.....	19
<b>4. Adoption information directions</b> .....	22
<b>5. Age</b> .....	23
Age at which a person can come under guardianship or financial management .....	23
Guardianship and young people aged 16 – 18 years .....	24
Financial management and young people.....	25
Age at which a person may become a guardian or financial manager .....	26
Young people as guardians.....	27
Young people in Tribunal proceedings.....	27
An option for reform: seeking young people’s views in the Tribunal.....	28
Appointing parents as guardians.....	29
Challenges for parents and carers .....	29

<b>6. Interstate appointments and orders</b> .....	<b>33</b>
Interstate court or tribunal appointments.....	33
Power of review .....	35
Enduring guardianship appointments.....	36
When an enduring appointment “has effect” in NSW .....	37
Power of review.....	37
Should NSW introduce a system of registration? .....	37
Interstate tribunal appointments .....	38
Personal appointments.....	38
<b>7. Orders for guardianship and financial management</b> .....	<b>39</b>
A single order? .....	39
Effect of orders on enduring appointments .....	41
Guardianship orders.....	41
Financial management orders.....	41
Allowing enduring orders a limited operation.....	41
Resolving disputes between decision-makers .....	42
<b>8. Search and removal powers</b> .....	<b>44</b>
Order for search and removal by Tribunal.....	44
Application for order for search and removal from premises.....	45
Reasonable force .....	46
<b>9. Enforcing guardians’ decisions</b> .....	<b>47</b>
Current law.....	47
Application where the guardian has an accommodation function.....	48
Options for reform .....	49
Limits on any powers given to guardians.....	49
Amount of force permitted .....	49
Who can be authorised to act.....	49
<b>10. Handling personal information</b> .....	<b>51</b>
Access to information.....	51
Disclosure of information.....	53
<b>11. The Supreme Court</b> .....	<b>55</b>
Inherent protective jurisdiction .....	55
Use of the protective jurisdiction in practice .....	56
Interactions between the Supreme Court and the Tribunal.....	57
Guardianship orders.....	57
Financial management orders.....	58
Supervision, review and appeals .....	58
<b>Appendix A Preliminary submissions</b> .....	<b>60</b>
<b>Appendix B Submissions</b> .....	<b>62</b>

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## Terms of reference

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Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review and report on the desirability of changes to the *Guardianship Act 1987* (NSW) having regard to:

1. The relationship between the *Guardianship Act 1987* (NSW) and
  - The *NSW Trustee and Guardian Act 2009* (NSW)
  - The *Powers of Attorney Act 2003* (NSW)
  - The *Mental Health Act 2007* (NSW)
  - other relevant legislation.
2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.
3. The report of the 2014 ALRC Equality, Capacity and Disability in Commonwealth Laws.
4. The UN Convention on the Rights of Persons with Disabilities.
5. The demographics of NSW and in particular the increase in the ageing population.

In particular, the Commission is to consider:

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.
2. The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.
3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model including the costs of implementation.
4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation.
5. Whether the language of 'disability' is the appropriate conceptual language for the guardianship and financial management regime and to what extent 'decision making capacity' is more appropriate.
6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision making incapacity.
7. In the light of the requirement of the UNCRPD that there be regular reviews of any instrument that has the effect of removing or restricting autonomy, should the *Guardianship Act 1987* provide for the regular review of financial management orders.

8. The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.
9. Any other matters the NSW Law Reform Commission considers relevant to the Terms of Reference.

[Reference received 22 December 2015]

## Recent Australian reviews of guardianship laws

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In this Question Paper, we refer extensively to a number of recent Australian reviews:

- NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010).
- Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010).
- Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) – reflected in part in the Guardianship and Administration Bill 2014 (Vic) which the Victorian Parliament did not pass.
- Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014).
- Australian Capital Territory Law Reform Advisory Council, *Guardianship Report* (2016).
- Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016).



# Questions

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## 1. Introduction

### **Question 1.1: Other issues**

Are there any issues you would like to raise that we have not covered in Question Papers 1–6?

## 2. Objectives, principles and language

### **Question 2.1: Statutory objects**

What, if anything, should be included in a list of statutory objects to guide the interpretation of guardianship law?

### **Question 2.2: General principles**

- (1) What should be included in a list of general principles to guide those who do anything under guardianship law?
- (2) Should there be multiple statements of principles that are tailored to particular decision-making situations? What are those situations and what principles should be included?

### **Question 2.3: Accommodating multicultural communities**

How should multicultural communities be accommodated in guardianship law?

### **Question 2.4: Accommodating Aboriginal people and Torres Strait Islanders**

How should Aboriginal people and Torres Strait Islanders be accommodated in guardianship law?

### **Question 2.5: Language of disability**

- (1) Is the language of disability the appropriate conceptual language for the guardianship and financial management system?
- (2) What conceptual language should replace it?

### **Question 2.6: Language of guardianship**

What terms should be used to describe participants in substitute and supported decision-making schemes?

**Question 2.7: Aboriginal and Torres Strait Islander concepts of family**

How could relationships be defined in the *Guardianship Act 1987* (NSW) to take into account Aboriginal and Torres Strait Islander concepts of family?

**3. Relationship with Commonwealth laws**

**Question 3.1: Relationship between Commonwealth and NSW laws**

What should be done to ensure an effective interrelationship between Commonwealth nominee or representative provisions and state-based arrangements for managing a person's financial and personal affairs?

**4. Adoption information directions**

**Question 4.1: Adoption information directions**

What changes, if any, should be made to the part of the *Guardianship Act 1987* (NSW) that relates to adoption information directions?

**5. Age**

**Question 5.1: Age threshold for guardianship orders**

What should the age threshold for guardianship orders in the *Guardianship Act 1987* (NSW) be?

**Question 5.2: Financial management orders for young people**

Should the NSW Civil and Administrative Tribunal have the power to make financial management orders for children and young people?

**Question 5.3: Appointing young people as guardians**

Under what circumstances, if any, should the NSW Civil and Administrative Tribunal be able to appoint 16- and 17-year-olds as guardians?

**Question 5.4: Young people in NSW Civil and Administrative Tribunal proceedings**

- (1) Should young people have standing in the NSW Civil and Administrative Tribunal?
- (2) In what circumstances should the Tribunal be required to take the views of a young person into account?

**Question 5.5: Process for appointing parents as guardians**

- (1) Should NSW introduce a streamlined method for parents of adult children with profound intellectual disability to become their guardian when they turn 18 without the need for a NSW Civil and Administrative Tribunal hearing?

- (2) What other mechanisms could be made available for parents to make decisions for an adult with profound decision-making incapacity?

## 6. Interstate appointments and orders

### Question 6.1: Interstate court or tribunal appointments

- (1) Are the arrangements in relation to interstate appointments in the *Guardianship Act 1987* (NSW) operating well?
- (2) Should the legislation clarify what the effect of registration of interstate appointments is and when it is required?
- (3) Should the NSW Civil and Administrative Tribunal have the discretion not to recognise an appointment in certain circumstances?
- (4) What, if any, other changes should be made?

### Question 6.2: Tribunal powers of review of interstate court or tribunal appointments

Should the *Guardianship Act 1987* (NSW) clarify the powers of the NSW Civil and Administrative Tribunal to vary an interstate recognition order?

### Question 6.3: Interstate enduring appointments

- (1) Should interstate enduring appointments be reviewable in NSW?
- (2) Should NSW introduce a system of registration for interstate appointments? If so, should there be a process for confirming the powers confirmed by the interstate instrument or order?

## 7. Orders for guardianship and financial management

### Question 7.1: A single order for guardianship and financial management

- (1) Should there continue to be separate orders for guardianship and financial management?
- (2) What arrangements would be required if a single order were to cover both personal and financial decisions?

### Question 7.2: Effect of orders on enduring appointments

What arrangements should be made for the operation of enduring appointments when the NSW Civil and Administrative Tribunal or Supreme Court of NSW has also appointed a guardian or financial manager?

### Question 7.3: Resolving disputes between decision-makers

- (1) How should disputes between decision-makers be resolved?
- (2) Who should conduct or facilitate any dispute resolution process?

- (3) What could justify preferring the decision of one substitute decision-maker over another?

## 8. Search and removal powers

### Question 8.1: Search and removal powers

- (1) Is there a need for provisions in the *Guardianship Act 1987* (NSW) that empower police or NSW Civil and Administrative Tribunal employees to search premises and remove people deemed in need of protection?
- (2) What changes, if any, should be made to these provisions?

## 9. Enforcing guardians' decisions

### Question 9.1: Enforcing guardians' decisions

- (1) What provision (if any) should be made for a guardianship order to permit guardians to enforce their decisions?
- (2) What limits should be placed on any part of an order that permits such enforcement?
- (3) Should any such provision expressly mention groups of people who may be permitted to enforce a guardian's decision, such as, for example, police officers or ambulance officers?
- (4) What limits should be placed on the amount of force authorised to enforce any such decision?

## 10. Handling personal information

### Question 10.1: Access to personal information

In what circumstances should different decision-makers and supporters be able to access a person's personal, health or financial information?

### Question 10.2: Disclosure of personal information

- (1) In what circumstances should various decision-makers and supporters be permitted to disclose a person's personal, health or financial information?
- (2) In what circumstances should various decision-makers and supporters be prohibited from disclosing a person's personal, health or financial information?

## 11. Supreme Court

### Question 11.1: Supreme Court's inherent protective jurisdiction

What, if anything, should legislation say about the relationship between the Supreme Court of NSW's inherent protective jurisdiction and the operation of guardianship law?

**Question 11.2: Interactions between the Supreme Court and the Tribunal**

- (1) Are the provisions that deal with the interaction between the Supreme Court of NSW and the NSW Civil and Administrative Tribunal adequate?
- (2) What changes, if any, should be made to these provisions?

**Question 11.3: Supervision, review and appeals**

Are there any issues that should be raised about the Supreme Court of NSW's supervisory, review and appellate jurisdictions?



# 1. Introduction

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## In brief

This Question Paper covers topics that have not been covered by Question Papers 1-5.

This Question Paper .....	1
Any other issues .....	2

- 1.1 The NSW Attorney General has asked us to review the *Guardianship Act 1987* (NSW) ("*Guardianship Act*"). This question paper is part of a series of papers in which we seek your views on changing the *Guardianship Act*.

## This Question Paper

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- 1.2 This Question Paper covers topics that have not been covered by Question Papers 1–5, either because they cut across the topics covered by the other papers (for example, legislative objects and general principles) or because they do not fit into the topic areas (for example, adoption information).
- 1.3 This Question Paper addresses the following topics:
- **Chapter 2 – Objects, principles and language:** Considers whether to introduce legislative objects into the *Guardianship Act*, and the need to update the general principles and the language of disability and guardianship used in the *Guardianship Act*.
  - **Chapter 3 – Relationship with Commonwealth laws:** Considers the interaction of the guardianship system with Commonwealth laws about social security, aged care and the National Disability Insurance Scheme.
  - **Chapter 4 – Adoption information directions:** Considers the process where a person can apply to the Tribunal for an adoption information direction on behalf of a person with disability.
  - **Chapter 5 – Age:** Considers the age at which a person can come under guardianship or financial management, and the age at which a person may become a guardian or financial manager. There are also questions about young people in tribunal proceedings and whether there should be a streamlined process to appoint parents of some young people as guardians once they turn 18.
  - **Chapter 6 – Interstate appointments and orders:** Considers the recognition of appointments made under orders that have been made outside of NSW and the recognition of enduring appointments made outside of NSW.
  - **Chapter 7 – Orders for guardianship and financial management:** Considers the question of whether there should be a single order for both guardianship and financial management; what effect orders should have on enduring

appointments; and how to resolve disputes between appointees under the same or different orders.

- **Chapter 8 – Search and removal powers:** Considers the use of tribunal orders to search premises and remove people from them and the use of search and removal powers that have been approved by an “authorised officer”.
- **Chapter 9 – Enforcing guardians’ decisions:** Considers the powers the Tribunal can give to guardians to do what is necessary to ensure that a person complies with their decisions.
- **Chapter 10 – Handling personal information:** Considers when someone can access a person’s personal information and when they can disclose that personal information to others.
- **Chapter 11 – The Supreme Court:** Considers the Supreme Court’s inherent protective jurisdiction (*parens patriae*); interactions between the Supreme Court and the Guardianship Division of the NSW Civil and Administrative Tribunal; and the Supreme Court’s supervisory, review and appellate functions as they relate to guardianship matters.

## Any other issues?

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- 1.4 We welcome submissions on any issues that we may have overlooked in Question Papers 1–6.
- 1.5 In the next phase of this review, during our consultations with stakeholders, we will raise any new issues that you draw to our attention.

### Question 1.1: Other issues

Are there any issues you would like to raise that we have not covered in Question Papers 1–6?

## 2. Objectives, principles and language

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### In brief

Society has changed in the 30 years since the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) became law. In particular, the way people think about disability has changed. The statutory objects, general principles and language used in the *Guardianship Act* should reflect and support these changes.

Statutory objects .....	3
General principles .....	5
The current law.....	5
Issues for consideration.....	6
Accommodating multicultural communities.....	8
Accommodating Aboriginal people and Torres Strait Islanders .....	9
Recognising cultural context.....	10
Language.....	11
Language of disability.....	12
Language of guardianship.....	13
Incorporating Aboriginal and Torres Strait Island concepts of family.....	14

- 2.1 Since the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) became law 30 years ago, society has changed and the way people think about disability has changed. This is partly due to developments in human rights law, in particular the United Nations *Convention on the Rights of Persons with Disabilities* (“UN *Convention*”).<sup>1</sup> The principles of the UN *Convention* include the right of people with disability to dignity, autonomy, full and active participation in society, and equal recognition before the law.
- 2.2 The statutory objects, general principles and language used in the *Guardianship Act* should reflect and support these changes. This Chapter asks for your views about how we can best achieve this.

### Statutory objects

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- 2.3 A list of statutory objects provides guidance on what the government wants a law to achieve. In particular, it guides the courts and others on how to interpret an Act. The *Guardianship Act* does not have a list of general objects to guide interpretation.
- 2.4 However, there is a specific objects clause in Part 5 of the *Guardianship Act*, which deals with medical and dental treatment. It states that the Part’s objects are to ensure that:
- people are not “deprived of necessary medical or dental treatment” merely because they lack the capacity to consent, and

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1. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008).

- any medical or dental treatment promotes and maintains their health and well-being.<sup>2</sup>
- 2.5 Some guardianship and disability Acts both in NSW and elsewhere include general objects clauses, although in some cases these are combined with general principles (discussed below).
- 2.6 The *Disability Inclusion Act 2014* (NSW) ("*Disability Inclusion Act*") provides an example of an objects clause. Some relevant objects of this Act are as follows:
- (a) to acknowledge that people with disability have the same human rights as other members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights,
  - (b) to promote the independence and social and economic inclusion of people with disability,
  - (c) to enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports and services,
  - (d) to provide safeguards in relation to the delivery of supports and services for people with disability,
  - (e) to support, to the extent reasonably practicable, the purposes and principles of the *United Nations Convention on the Rights of Persons with Disabilities*.<sup>3</sup>
- 2.7 Victoria also has a list of objects that seeks to guide interpretation and the exercise of functions under the Victorian Act:
- It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that—
- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
  - (b) the best interests of a person with a disability are promoted; and
  - (c) the wishes of a person with a disability are wherever possible given effect to.<sup>4</sup>

### Question 2.1: Statutory objects

What, if anything, should be included in a list of statutory objects to guide the interpretation of guardianship law?

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2. *Guardianship Act 1987* (NSW) s 32.  
 3. *Disability Inclusion Act 2014* (NSW) s 3.  
 4. *Guardianship and Administration Act 1986* (Vic) s 4(2).

## General principles

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- 2.8 Lists of general principles set out the matters that people should take into account when doing something under an Act.

### The current law

- 2.9 There is one statement of general principles that all people acting under the *Guardianship Act* must take into account. This includes individuals, government agencies and the Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”):

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.<sup>5</sup>

- 2.10 We have already considered some of these general principles in other places where they are relevant, for example in determining whether a person has decision-making capacity.<sup>6</sup> The *NSW Trustee and Guardian Act 2009* (NSW) contains an almost identical list of principles that apply to people exercising management functions under a financial management order.<sup>7</sup>

- 2.11 The *Guardianship Act* also has a number of sections that add to the general principles in particular decision-making situations.<sup>8</sup>

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5. *Guardianship Act 1987* (NSW) s 4.

6. NSW Law Reform Commission, *Preconditions for Alternative Decision-Making Arrangements*, Review of the Guardianship Act 1987 Question Paper 1 (2016) ch 5.

7. *NSW Trustee and Guardian Act 2009* (NSW) s 39.

8. For example, *Guardianship Act 1987* (NSW) s 14(2). See NSW Law Reform Commission, *Preconditions for Alternative Decision-Making Arrangements*, Review of the Guardianship Act 1987 Question Paper 1 (2016) [5.4].



## Issues for consideration

- 2.12 One issue is whether there should be one statement of general principles that applies across the board, or whether principles should be tailored to particular decision-making situations. For example, one option is to have separate decision-making principles for guardians and financial managers.
- 2.13 Preliminary submissions have raised a number of issues that they think are inadequately addressed, or not addressed at all, by the general principles, including:
- the need for people to be encouraged and empowered to exercise self-advocacy (for example, older people experiencing abuse and neglect in health care settings)<sup>9</sup>
  - the need to recognise a person’s right to privacy<sup>10</sup>
  - the need to reflect better human rights standards, such as acknowledging the will and preferences of a person as distinct from their welfare and interests,<sup>11</sup> and
  - the need to include the concept of choice, supporting the person’s decisions and building their capacity to make decisions with the aid of supported decision-making arrangements.<sup>12</sup>
- 2.14 It has been suggested that some lists of general principles in disability legislation deal with some of these issues better than the *Guardianship Act’s* general principles. For example, the NSW Mental Health Commission submits that “of the legislation in NSW aimed at protecting, supporting or caring for people with disabilities”, the *Disability Inclusion Act* “is the most recent and gives the clearest expression to contemporary understanding of disability”.<sup>13</sup> The *Disability Inclusion Act* sets out the following general principles:
- (2) People with disability have an inherent right to respect for their worth and dignity as individuals.
  - (3) People with disability have the right to participate in and contribute to social and economic life and should be supported to develop and enhance their skills and experience.
  - (4) People with disability have the right to realise their physical, social, sexual, reproductive, emotional and intellectual capacities.
  - (5) People with disability have the same rights as other members of the community to make decisions that affect their lives (including decisions involving risk) to the full extent of their capacity to do so and to be supported in making those decisions if they want or require support.
  - (6) People with disability have the right to respect for their cultural or linguistic diversity, age, gender, sexual orientation and religious beliefs.

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9. Mental Health Coordinating Council, *Preliminary Submission PGA08*, 6.

10. Mental Health Coordinating Council, *Preliminary Submission PGA08*, 3.

11. Disability Council NSW, *Preliminary Submission PGA26*, 8.

12. NSW Trustee and Guardian, *Preliminary Submission PGA50*, 10.

13. NSW Mental Health Commission, *Preliminary Submission PGA39*, 5.

(7) The right to privacy and confidentiality for people with disability is to be respected.

...

(8) People with disability have the right to live free from neglect, abuse and exploitation.

(9) People with disability have the right to access information in a way that is appropriate for their disability and cultural background, and enables them to make informed choices.

(10) People with disability have the same right as other members of the community to pursue complaints.

(11) The crucial role of families, carers and other significant persons in the lives of people with disability, and the importance of preserving relationships with families, carers and other significant persons, is to be acknowledged and respected.

...

(12) The needs of children with disability as they mature, and their rights as equal members of the community, are to be respected.

(13) The changing abilities, strengths, goals and needs of people with disability as they age are to be respected.<sup>14</sup>

2.15 We give separate consideration (below) to questions about recognising the cultural context of Aboriginal people and Torres Strait Islanders and people from culturally and linguistically diverse backgrounds.

2.16 Some preliminary submissions approach the question of expanded lists of general principles with caution. One suggests that introducing complex human rights considerations and principles into decision-making may disqualify some representatives or supporters who are well-suited to the role but cannot understand the theoretical principles.<sup>15</sup> Another argues that the human rights or autonomy approach may prevent people from intervening to support other human rights such as the right to freedom from exploitation, violence and abuse.<sup>16</sup>

### Question 2.2: General principles

- (1) What should be included in a list of general principles to guide those who do anything under guardianship law?
- (2) Should there be multiple statements of principles that are tailored to particular decision-making situations? What are those situations and what principles should be included?

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14. *Disability Inclusion Act 2014* (NSW) s 4.

15. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 4.

16. V Brown, *Preliminary Submission PGA29*, 6–7.

## Accommodating multicultural communities

2.17 One of the general principles of the *Guardianship Act*, as noted above, is the recognition of “the importance of preserving the family relationships and the cultural and linguistic environments”.<sup>17</sup>

2.18 In its submission on Question Paper 1, Multicultural NSW observes that legally appointing someone to make decisions for another person may be an “unfamiliar concept” to people from different backgrounds:

Although it is not uncommon in many cultures for family or friends to provide care, amongst non-Anglo-Celtic cultural groups there may be little expectation or understanding of any other non-familial care mechanisms to take care of personal, financial and medical decisions for someone who may be incapacitated. Policy and decision makers should be aware that amongst some diverse groups, bringing the family situation to the ‘law’ or the ‘government’ could lead to a perception of shame or loss of face. A situation in which ‘someone else’, be it the government or any other non-familial party, makes decisions, questions or interferes in decision making related to a vulnerable family member, may be a difficult concept for people from some diverse groups to accept.

In addition, limited understanding of Australian law and fear of government agencies within some diverse communities, coupled with a lack of culturally responsive services, amplifies difficulties faced by government when attempting to ensure that impacted individuals and their families understand that the objective of the Act is to protect against abuse and exploitation.<sup>18</sup>

2.19 Multicultural NSW also highlighted the vastly different responses that some communities may have to people with disability:

Often, in tight knit cultures, a person's identity is based on family clan or tribe. The person interacts and has multi-strand relationships with the extended family and community. Integrating the person with a disability into family and community life is normal and that person is expected and encouraged to participate in normal life to the best of the person's abilities. On the other hand, there are some cultures that traditionally stigmatise disabilities, believing people with a disability are contaminated. In some cases, people with a disability may be treated as out-casts.<sup>19</sup>

2.20 The Victorian Law Reform Commission (“VLRC”) observed that a consistent theme in consultations during its review was “the need for laws to be sufficiently flexible to preserve and uphold the diverse cultural values and practices of people with impaired decision-making ability”.<sup>20</sup> The VLRC concluded that “there is value in principles of guardianship laws specifically recognising the cultural and linguistic circumstances and values of people with impaired decision-making ability”.<sup>21</sup> One submission to Question Paper 1 noted that “in some cultures, extended families have a greater involvement in the care of family members than other cultures”, noting:

17. *Guardianship Act 1987* (NSW) s 4(e).

18. Multicultural NSW, *Submission GA32*, 2.

19. Multicultural NSW, *Submission GA32*, 2.

20. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [6.83].

21. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [6.84].

We live in a multicultural society with different beliefs, support systems, languages and customs. Such factors must be taken into account when making an order.<sup>22</sup>

- 2.21 One possible approach to these issues is to follow the *Disability Inclusion Act* which sets out specific principles relating to people from culturally and linguistically diverse backgrounds:

Supports and services provided to people with disability from culturally and linguistically diverse backgrounds are to be provided in a way that:

- (a) recognises that cultural, language and other differences may create barriers to providing the supports and services, and
- (b) addresses those barriers and the needs of those people with disability, and
- (c) is informed by consultation with their communities.<sup>23</sup>

- 2.22 One preliminary submission preferred the expression “culturally and linguistically diverse backgrounds” to the “cultural and linguistic environments” used in the *Guardianship Act’s* general principles.<sup>24</sup>

### Question 2.3: Accommodating multicultural communities

How should multicultural communities be accommodated in guardianship law?

## Accommodating Aboriginal people and Torres Strait Islanders

- 2.23 There are no provisions in either the *Civil and Administrative Tribunal Act 2013* (NSW) or the *Guardianship Act* that relate specifically to the cultural needs of Aboriginal and Torres Strait Islander people.

- 2.24 There are strong reasons for dealing with the needs of Indigenous communities separately from other cultural communities. These are based on Australia’s history of colonisation and dispossession.

- 2.25 At one level, guardianship and other related concepts may be incompatible with Aboriginal practices and customs. The VLRC reported the views of the Victorian Aboriginal Disability Network that:

the concept of ‘guardian’ is culturally specific. Therefore, regardless of the word used to refer to guardianship, some communities that have a more collective approach to decision making, support and community contribution may find it difficult to understand what it means. Despite cultural differences, however, the Victorian Aboriginal Disability Network suggested that there would still be situations in which independent guardianship arrangements could be helpful for Indigenous communities and families.<sup>25</sup>

22. NSW Trustee and Guardian, *Submission GA28*, 9.

23. *Disability Inclusion Act 2014* (NSW) s 5(3).

24. Carers NSW, *Preliminary Submission PGA17*, 2.

25. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [5.95].

- 2.26 The VLRC raised the question of the accessibility of guardianship systems to Indigenous people, pointing to academic literature that suggests that cultural barriers may mean that guardianship systems are failing to meet Indigenous people’s needs. This literature also identifies a significant lack of research in this area.<sup>26</sup>
- 2.27 One preliminary submission raises the issue of reduced access to guardianship and administration systems for Aboriginal people, noting that this is due to a range of factors, including:
- the inappropriateness of taking decision-making outside of the family, the view that decision-making is a communal responsibility, language barriers and a simple lack of information about legal and civil justice remedies.<sup>27</sup>

### *Recognising cultural context*

- 2.28 There are a number of examples of provisions that recognise Aboriginal and Torres Strait Islander cultural contexts, both in guardianship law and other related legislation.
- 2.29 Queensland specifically recognises Aboriginal and Torres Strait Islander cultural contexts in its guardianship law. Anyone performing a function under the *Guardianship and Administration Act 2000* (Qld) must take into account the “importance of maintaining an adult’s cultural and linguistic environment, and set of values (including any religious beliefs)”.<sup>28</sup> The Act provides that for a person who is “a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult’s Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom)”.<sup>29</sup> One submission to Question Paper 1 applauds these specific requirements.<sup>30</sup>
- 2.30 In Queensland, the Queensland Civil and Administrative Tribunal must also take all reasonable steps to:
- ensure proceedings are conducted in a way that recognises and is responsive to ... cultural diversity, Aboriginal tradition and Island custom, including the needs of a party to or witness in the proceeding who is from another culture or linguistic background or is an Aboriginal person or Torres Strait Islander ...<sup>31</sup>
- 2.31 In NSW, the *Disability Inclusion Act* includes specific principles that relate to Aboriginal people and Torres Strait Islanders:
- Supports and services provided to Aboriginal and Torres Strait Islander people with disability are to be provided in a way that:
- (a) recognises that Aboriginal and Torres Strait Islander people have a right to respect and acknowledgment as the first peoples of Australia and for

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26. Victorian Law Reform Commission, *Guardianship*, Final Report 24, (2012) [21.184]–[21.186]; N Clements and others, “Indigenous Australians and Impaired Decision-Making Capacity” (2010) 45 *Australian Journal of Social Issues* 383.

27. Confidential, *Preliminary Submission PGA46*.

28. *Guardianship and Administration Act 2000* (Qld) sch 1 cl 9(1).

29. *Guardianship and Administration Act 2000* (Qld) s 11, sch 1 cl 9(2). *Acts Interpretation Act 1954* (Qld) sch 1 defines “Aboriginal tradition” and “Island custom”.

30. NSW Trustee and Guardian, *Submission GA28*, 9.

31. *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29(1)(c)(i).



their unique history, culture and kinship relationships and connection to their traditional land and waters, and

- (b) recognises that many Aboriginal and Torres Strait Islander people with disability may face multiple disadvantage, and
- (c) addresses that disadvantage and the needs of Aboriginal and Torres Strait Islander people with disability, and
- (d) is informed by working in partnership with Aboriginal and Torres Strait Islander people with disability to enhance their lives.<sup>32</sup>

2.32 The *Mental Health Act 2007* (NSW) includes principles for care and treatment which include recognising “the cultural and spiritual beliefs and practices of people with a mental illness or mental disorder who are Aboriginal persons or Torres Strait Islanders”.<sup>33</sup>

2.33 Another preliminary submission suggests:

The Guardianship Act should acknowledge that an individual may be situated within a social and cultural milieu that presumes a more collective approach to decision-making. In an Aboriginal context, decisions are often made with reference to, if not direct consultation with, family members. In this regard a supported decision-making approach more closely reflects Aboriginal decision-making models but it still presupposes an individual making decisions for and by themselves ... this may mean consultation with the Aboriginal community as to what decision-making processes are to be seen as legitimate.<sup>34</sup>

#### Question 2.4: Accommodating Aboriginal people and Torres Strait Islanders

How should Aboriginal people and Torres Strait Islanders be accommodated in guardianship law?

## Language

2.34 Changes over the past 30 years also demand a general review of the language used in the *Guardianship Act* to ensure that it is accessible and that terms that are outdated and may be offensive to people with disability are removed.

2.35 One preliminary submission observes that the *Guardianship Act* uses “unnecessarily complex and circuitous language which serves to confuse rather than clarify”.<sup>35</sup> Another supports a review of defined terms and concepts in the legislation to promote consistency and the use of plain language.<sup>36</sup>

2.36 Obviously, any changes to the law as a result of this review should be expressed as simply and clearly as possible.

32. *Disability Inclusion Act 2014* (NSW) s 5(2).

33. *Mental Health Act 2007* (NSW) s 68(g2).

34. Confidential, *Preliminary Submission PGA46*.

35. Mental Health Carers Arafmi NSW Inc, *Preliminary Submission PGA53*, 2. See also Mental Health Coordinating Council, *Preliminary Submission PGA8*, 7–9.

36. Law Society of NSW, *Preliminary Submission PGA43*, 2.

- 2.37 In addition to these general considerations, the following paragraphs consider more specific questions of the language of disability, the language of guardianship and the need for definitions to incorporate Indigenous concepts of family.

### Language of disability

- 2.38 One of the particular issues in our terms of reference is:

Whether the language of ‘disability’ is the appropriate conceptual language for the guardianship and financial management regime and to what extent ‘decision making capacity’ is more appropriate.

- 2.39 We have already considered the desirability of moving away from the language of disability in our discussion of the link between disability and capacity in Question Paper 1.<sup>37</sup>
- 2.40 The *Guardianship Act* directly refers to disability and people “who have disabilities” in many places.<sup>38</sup> The question of outdated language goes further than the use of the term “disability”. One preliminary submission observed that “the tone of the principles as they exist is outdated and primarily demonstrates a deficits perspective”.<sup>39</sup> For example, the phrase “normal life in the community” in the general principles<sup>40</sup> has been identified as being highly subjective and in need of review.<sup>41</sup>
- 2.41 The Australian Law Reform Commission (“ALRC”) in its 2014 report observed that the language about disability has shifted significantly over time so that words that have come to have negative connotations or that are used pejoratively are replaced with different expressions. The ALRC decided not to use words or terms that “tend to lower the dignity” of people with disability. It preferred to adopt words that signal the paradigm shift reflected in the UN *Convention* towards promoting, protecting and ensuring “the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, and [promoting] respect for their inherent dignity”<sup>42</sup> even where the offending terms have an established usage.<sup>43</sup>
- 2.42 A number of preliminary submissions call for a review of the use of the language of disability.<sup>44</sup> In considering the terms of reference, one preliminary submission suggests a more appropriate question might be “to what extent the vocabulary and

37. NSW Law Reform Commission, *Preconditions for Alternative Decision-Making Arrangements*, Review of the Guardianship Act 1987 Question Paper 1 (2016) [3.26]–[3.28].

38. *Guardianship Act 1987* (NSW) s 3(1) definition of “person in need of a guardian”, s 3(2), s 4, s 6G(b), s 6N, s 18(1B), s 21C(b), s 31B–31E.

39. Mental Health Coordinating Council, *Preliminary Submission PGA08*, 5.

40. *Guardianship Act 1987* (NSW) s 4(c).

41. Mental Health Coordinating Council, *Preliminary Submission PG08*, 5.

42. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 1.

43. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [2.20]–[2.23].

44. See, eg, Seniors Rights Service, *Preliminary Submission PGA07*, 22; Council on the Ageing NSW, *Preliminary Submission PGA10*, 5; Alzheimer’s Australia NSW, *Preliminary Submission PGA14*, 5; NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 6; BEING, *Preliminary Submission PGA22*, 4; B Ripperger and L Joseph, *Preliminary Submission PGA31*, 11; Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 5; NSW Trustee and Guardian, *Preliminary Submission PGA50*, 10; Australian Lawyers Alliance, *Preliminary Submission PGA52*, 6.

language of the ... system appropriately reflects the people it represents".<sup>45</sup> Another preliminary submission suggests that the legislation's language should be "empowering" and reflect a focus on rights and autonomy.<sup>46</sup>

### Question 2.5: Language of disability

- (1) Is the language of disability the appropriate conceptual language for the guardianship and financial management system?
- (2) What conceptual language should replace it?

## Language of guardianship

- 2.43 A related issue is the need to review the language of the guardianship system itself, including the terms used for guardians, people under guardianship, financial managers, and any proposed decision-making supporters.
- 2.44 It has been argued, for example by the ALRC, that these terms may be too tied up in substitute decision-making and the best interests approach to continue to be used to describe the system, especially if there is a move to a more subjective model based on a person's will and preferences.<sup>47</sup> The ALRC preferred to use the terms "supporter" and "representative" rather than "guardian".<sup>48</sup> In its most recent discussion paper on elder abuse, the ALRC has adopted "representative" to refer to substitute decision-makers including holders of powers of attorney, guardians and financial administrators under state and territory laws.<sup>49</sup>
- 2.45 One preliminary submission favours using the terms "supporter", "supported person" for decision-making supporters and those they help, and "representative" and "represented person" for substitute decision-makers and those they make decisions for. The submission believes that "this change in language will promote a shift away from the traditional paternalistic approach towards people with limited decision-making capacity".<sup>50</sup>
- 2.46 Ultimately, the terms that the law adopts should be ones that properly reflect the functions and aims of the components of the system being proposed.

### Question 2.6: Language of guardianship

What terms should be used to describe participants in substitute and supported decision-making schemes?

45. NSW Family and Community Services, *Preliminary Submission PGA54*, 4.

46. B Ripperger and L Joseph, *Preliminary Submission PGA31*, 11.

47. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [2.71].

48. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [2.72].

49. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [1.118].

50. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 5.

## Incorporating Aboriginal and Torres Strait Islander concepts of family

- 2.47 Provisions in the *Guardianship Act* that deal with family and relationships do not expressly refer to Aboriginal and Torres Strait Islander concepts of family and relationships. For example, the importance of preserving “family relationships” is referred to in the general principles, and the factors that the Tribunal must have regard to when making a guardianship order or when giving directions to a guardian.<sup>51</sup> Also, “close friend or relative” and “spouse” are terms used in the hierarchy of those responsible for a person’s medical and dental treatment,<sup>52</sup> and a “spouse” (“if the relationship between the person and spouse is close and continuing”) is someone whose views the Tribunal must take into account when deciding on a guardianship order.<sup>53</sup>
- 2.48 No problems appear to have occurred in practice because of this omission, even though the definition of spouse may not be broad enough to encompass some Aboriginal customary marriages. However, in other NSW Acts and guardianship law elsewhere, concepts relating to family and relationships are now defined to include Aboriginal and Torres Strait Islander concepts of family and relationships.
- 2.49 For example, the Northern Territory simply defines “relative” as, among other things, “a person who is related to the adult in accordance with customary law or tradition (including Aboriginal customary law or tradition)”.<sup>54</sup>
- 2.50 In South Australia, people married according to Aboriginal tradition are recognised as married, and a “prescribed relative” includes a person who is regarded as a relative under Aboriginal kinship rules or Torres Strait Islander kinship rules.<sup>55</sup>
- 2.51 The Queensland Law Reform Commission recommended defining “relation” to include a person who is regarded as such under Aboriginal tradition or Torres Strait Islander custom.<sup>56</sup>
- 2.52 One preliminary submission suggests that the *Guardianship Act* should specify whether “close friend or relative” includes the broader definition of “relative” in an Aboriginal and Torres Strait Islander context, as the *Mental Health Act 2007* (NSW) currently provides:<sup>57</sup>

**relative** of a patient who is an Aboriginal person or a Torres Strait Islander includes a person who is part of the extended family or kin of the patient according to the indigenous kinship system of the patient’s culture.<sup>58</sup>

### Question 2.7: Aboriginal and Torres Strait Islander concepts of family

How could relationships be defined in the *Guardianship Act 1987* (NSW) to take into account Aboriginal and Torres Strait Islander concepts of family?

51. *Guardianship Act 1987* (NSW) s 4(e), s 14(2)(b), s 28(2)(b).
52. *Guardianship Act 1987* (NSW) s 33A(4)(d), s 3E, s 3F.
53. *Guardianship Act 1987* (NSW) s 14(2)(a)(ii).
54. *Guardianship of Adults Act* (NT) s 7(1)(j).
55. *Guardianship and Administration Act 1993* (SA) s 3(1) definition of “prescribed relative” (e); s 3(5).
56. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) rec 10-4.
57. Carers NSW, *Preliminary Submission PGA17*, 2.
58. *Mental Health Act 2007* (NSW) s 71(2).

### 3. Relationship with Commonwealth laws

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#### In brief

Commonwealth Acts governing social security payments, aged care and the National Disability Insurance Scheme allow for the appointment of nominees or representatives who can make decisions on behalf of another person. Problems may arise between these Commonwealth schemes and NSW guardianship law.

Commonwealth provisions .....	15
Interaction with NSW guardianship laws .....	17
Different regimes for decision-makers .....	17
Where there are no relevant appointments under NSW law.....	18
When the Tribunal will appoint a person to deal with Commonwealth agencies .....	18
Where there are relevant appointments under NSW law.....	19
Giving greater recognition to state arrangements.....	20

#### Commonwealth provisions

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- 3.1 Our terms of reference require us to give particular consideration to “the appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation”.
- 3.2 We have identified three Commonwealth schemes that allow someone to help a person to make decisions or otherwise act on their behalf. The relevant Commonwealth Acts are:
- *Social Security (Administration) Act 1999* (Cth) which administers the system of Commonwealth pensions, benefits and allowances
  - *Aged Care Act 1997* (Cth) which administers the provision of aged care and accommodation, and
  - *National Disability Insurance Scheme Act 2013* (Cth) which aims to help people with disability get the support they need.
- 3.3 These Commonwealth schemes can provide alternatives to formal guardianship regimes. Each potentially allows nominees or representatives to make significant decisions about financial arrangements, residence and care. The details vary considerably between schemes as follows:
- ***Social Security (Administration) Act 1999 (Cth)*** allows the Secretary of the Department to appoint a someone (including a body corporate) to be a “payment nominee” and direct that social security payments be paid to the nominee, and/or a “correspondence nominee”.<sup>1</sup> The Secretary must obtain the nominee’s

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1. *Social Security (Administration) Act 1999* (Cth) s 123B, s 123C.

consent in writing and must consider any wishes of the person who is going to be represented by the nominee.<sup>2</sup> The correspondence nominee may (subject to some exceptions) perform any act that the person may perform under social security law including making applications or claims.<sup>3</sup> The Secretary can require a payment nominee to provide a statement about the disposal of any money paid to the nominee, subject to a penalty for failure or refusal to comply.<sup>4</sup> A nominee has a duty “at all times” to act in the person’s “best interests”. To meet this duty, the nominee need only have reasonable grounds for believing that they are acting in the person’s best interests.<sup>5</sup> The Administrative Appeals Tribunal (“AAT”) has treated this as an objective test, warning that “a payment nominee must take care not to impose his or her subjective views about the best interests of the principal when dealing with payments made on the principal’s behalf”.<sup>6</sup>

- ***Aged Care Act 1997 (Cth)*** allows someone (other than an approved service provider) to enter into an aged care service agreement as a representative of a person if that person is “because of any physical incapacity or mental impairment, unable to enter into the agreement”. The representative can also make applications or give information on the other person’s behalf.<sup>7</sup> It appears that, apart from the requirement that the person have a physical incapacity or mental impairment, there is no appointment procedure like that set out in the *Social Security (Administration) Act 1999 (Cth)*. In addition, the Act gives no guidance to the decision-maker and there is no relevant case law from courts or tribunals.
- ***National Disability Insurance Scheme Act 2013 (Cth)***, like the *Social Security (Administration) Act 1999 (Cth)*, allows the Chief Executive Officer (“CEO”) of the National Disability Insurance Agency (“NDIA”) to appoint a “plan nominee” and/or a “correspondence nominee” to act on behalf of a participant in the National Disability Insurance Scheme (“NDIS”) either at the request of the participant or on the CEO’s initiative.<sup>8</sup> One particular difference is the statement that it is a nominee’s duty to ascertain the participant’s wishes and to act in a manner that promotes the participant’s “personal and social wellbeing”.<sup>9</sup>

3.4 The Victorian Law Reform Commission has observed that such Commonwealth arrangements “are important because they assist a significant number of people and sometimes provide an appropriate alternative to a guardianship or administration order by [the Victorian Civil and Administrative Tribunal]”.<sup>10</sup> However, they are far from consistent and the Australian Law Reform Commission (“ALRC”) has recommended that they be amended to include provisions dealing with supporters and representatives consistent with the ALRC’s proposed Commonwealth decision-making model.<sup>11</sup> The Commonwealth Government is still

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2. *Social Security (Administration) Act 1999 (Cth)* s 123D(2).

3. *Social Security (Administration) Act 1999 (Cth)* s 123H.

4. *Social Security (Administration) Act 1999 (Cth)* s 123L.

5. *Social Security (Administration) Act 1999 (Cth)* s 123O.

6. *Confidential v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 745 [20].

7. *Aged Care Act 1997 (Cth)* s 96-5, s 96-6.

8. *National Disability Insurance Act 2013 (Cth)* ch 4 pt 5 div 2.

9. *National Disability Insurance Act 2013 (Cth)* s 80(1).

10. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [3.28].

11. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 5-2, rec 5-3, rec 6-1, rec 6-2.



considering whether to adopt the ALRC's suite of recommendations. If adopted, they may affect any recommendations we make.

## Interaction with the NSW guardianship system

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- 3.5 A number of issues arise about the interaction of the above Commonwealth provisions with the NSW guardianship system.
- 3.6 First, there are general concerns about the interaction between Commonwealth and State regimes and what this may mean for individuals who must act under both. Second, there are more specific concerns about appointments of nominees or representatives under a Commonwealth regime and how these appointments might interact with appointments under the State guardianship regime.

## Different regimes for decision-makers

- 3.7 There may be some confusion for individuals who have roles under both a state and a Commonwealth regime. The confusion may be increased with the possible roll out of the ALRC's proposed Commonwealth decision-making model which incorporates supported decision-making principles. Some preliminary submissions highlight the potential for confusion. For example, in its preliminary submission the Mental Health Review Tribunal notes:

with the NDIS being introduced with its own supported decision-making model in NSW, some consumers, their advisors and practitioners may be faced with a confusing level of change and complexity, having to deal with multiple institutions, different legislation and different decision-making models.<sup>12</sup>

- 3.8 Another preliminary submission has called for clarification and clear guidelines as to how state legislation and the *Guardianship Act 1987* (NSW) ("*Guardianship Act*") will interact with NDIS legislation.<sup>13</sup>
- 3.9 We also need to ensure that state and Commonwealth oversight mechanisms interact effectively to guarantee the safety of people with disabilities and prevent abuse. This is especially important considering there are no federal agencies equivalent to the gatekeepers and monitors that operate at the state level, such as the NSW Office of the Public Guardian and the NSW Trustee and Guardian. One key issue is providing appropriate oversight of the use of restrictive practices. We discuss this in Question Paper 5.<sup>14</sup>
- 3.10 In its preliminary submission the NSW Ombudsman argues the case for information exchange mechanisms to ensure NSW bodies and the NDIA are making informed decisions about appointments:

This includes, for example, where information provided to one body raises concerns about the conduct of a person who may be considered by another body as a nominee, guardian or financial manager.<sup>15</sup>

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12. Mental Health Review Tribunal, *Preliminary Submission PGA21*, 2.

13. Mental Health Carers Arafmi NSW, *Preliminary Submission PGA53*, 2.

14. NSW Law Reform Commission, *Medical and Dental Treatment and Restrictive Practices*, Review of the Guardianship Act 1987 Question Paper 5 (2017) ch 7.

15. NSW Ombudsman Office, *Preliminary Submission PGA41*, 7.



### Where there are no relevant appointments under NSW law

- 3.11 Commonwealth agencies can appoint nominees and representatives without them being a guardian or manager under state law. For example, it is possible to become a nominee to manage a person's disability pension, without being that person's financial manager. The Supreme Court and the Guardianship Division of the NSW Civil and Administrative Tribunal ("Tribunal") have acknowledged this possibility.<sup>16</sup>
- 3.12 There is, however, a concern that the NDIS may be implemented in a way that requires a person to be appointed under state law before they can be appointed as a nominee. The Tribunal has already seen a number of guardianship applications under the *Guardianship Act* because of the NDIS.<sup>17</sup> The Australian Guardianship and Administration Council has credited this to the fact that the NDIS has created "a number of decision-making 'events' and a greater degree of scrutiny of informal substitute decision-makers or supporters".<sup>18</sup>

### *When the Tribunal will appoint a person to deal with Commonwealth agencies*

- 3.13 The Tribunal will often not appoint a guardian or financial manager if being a nominee or representative under Commonwealth schemes is sufficient to manage a person's personal and financial affairs.
- 3.14 For example, the Tribunal will generally not appoint a guardian only so they can deal with the NDIA, at least where the person has adequate existing support networks.<sup>19</sup> This is consistent with the legislative intention for such arrangements. For example, the explanatory memorandum to the bill that introduced the provisions into the *Social Security (Administration) Act 1999* (Cth) states their purpose:
- It is reasonably common for children of an elderly person who can no longer manage their own affairs to manage the financial affairs of their parent and to handle their correspondence relating to their age pension. It is also common for parents of children with a disability to manage the financial affairs of their children and to handle their correspondence relating to disability support pension. The new provision facilitates such arrangements.<sup>20</sup>
- 3.15 However, where a person has no support network, the Tribunal has appointed the Public Guardian to help them make decisions within the NDIS. The Tribunal has emphasised that such an appointment is not intended to influence the appointment of nominees under the scheme. The Public Guardian could, under such an appointment, represent the person, apply to be appointed as a nominee and challenge decisions of the NDIA. The Tribunal observed that without such a formal appointment, a person "may be left without independent support and scrutiny of decisions made by the NDIA on her behalf".<sup>21</sup>
- 3.16 The ALRC has recommended that the CEO of the NDIA, before appointing a "representative" under the NDIS, may apply to a state or territory body to appoint a

16. *Re W* [2014] NSWSC 1106 [72]; *KTT* [2014] NSWCATGD 6 [30].

17. NSW Civil and Administrative Tribunal, *NCAT Annual Report, 2014-2015* (2015) 39.

18. Australian Guardianship and Administration Council, AGAC, *Submission 51* quoted in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report 124 (2014) [5.90].

19. See, eg, *KTT* [2014] NSWCATGD 6.

20. Explanatory Memorandum, Family and Community Services Legislation Amendment (Budget Initiatives and Other Measures) Bill 2002 (Cth) 3.

21. *KCG* [2014] NSWCATGD 7 [72].

“person with comparable powers and responsibilities”. The CEO would then appoint that person as a “representative” under the NDIS Act.<sup>22</sup> This proposal could clarify the NDIA’s ability to seek the appointment of the Public Guardian in cases where a person has no support network and nobody prepared to take on the role of representative for NDIS purposes.

### Where there are relevant appointments under NSW law

3.17 There is no requirement in the Commonwealth law to appoint as a nominee or representative a person who is already a guardian, manager or attorney.

3.18 For example, the NDIS Act does not require the CEO to appoint a guardian or financial manager. However, when appointing a nominee, the CEO must have regard to whether there is a guardian or “a person appointed by a court, tribunal, board or panel (however described) who has power to make decisions for the participant and whose responsibilities in relation to the participant are relevant to the duties of a nominee” (that is, in NSW, a financial manager).<sup>23</sup> These provisions in the NDIS Act go further than the other Commonwealth Acts listed above, which are silent on the question of the appointment of guardians, managers or attorneys.

3.19 Evidence before a Commonwealth parliamentary inquiry suggests that, in practice, decision makers take existing arrangements into account:

The nominee arrangements are specific to and quite explicit in the Social Security Act and, when we are making judgements on establishing those nominee arrangements, we take into account any current arrangement that may exist, such as a power of attorney.<sup>24</sup>

3.20 The AAT has also filled the legislative gap in some cases by considering the factors that agencies should take into account when determining, for example, who should be a payment nominee:

In essence, factors should be taken into account which will ensure that the person nominated will, at all times, act in the best interests of the principal when viewed objectively, not viewed from his or her personal perspective. The issues which I consider relevant in making this assessment are:

- (a) evidence of sound decisions regarding financial management;
- (b) past conduct in dealing with the principal’s finances;
- (c) the person most likely to be responsible for the majority of the expenditures to be made on behalf of the principal; and
- (d) the financial circumstances of the nominee.<sup>25</sup>

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22. Australian Guardianship and Administration Council, *Submission 51* quoted in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report 124 (2014) rec 5-5.

23. *National Disability Insurance Scheme Act 2013* (Cth) s 88(4).

24. Evidence of Paul Cowan to Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs (Reference: *Older People and the Law*, Canberra, 23 March 2007) LCA 5.

25. *Confidential v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 745 [21].

- 3.21 The result is that a nominee or representative under Commonwealth law may be a guardian, financial manager or attorney under NSW guardianship law – but need not be. It should, however, be noted that the Queensland Law Reform Commission has previously reported that there have been problems with Commonwealth agencies recognising some of the positions under state law.<sup>26</sup>
- 3.22 It is possible, for example, that a financial management order for a person whose only income is social security payments could be rendered ineffective by the Secretary appointing another person as a nominee. It may also be possible to challenge the appointment of a guardian or financial manager as a representative or nominee through Commonwealth avenues for review.<sup>27</sup>

### *Giving greater recognition to state arrangements*

- 3.23 The ALRC has recommended that the provisions about the appointment of “representatives” under the NDIS:
- should make it clear that the CEO’s powers are to be exercised as a measure of last resort, with the presumption that an existing state or territory appointee will be appointed ...<sup>28</sup>
- 3.24 One preliminary submission agrees that there should be a presumption that an existing NSW appointed decision-maker with comparable powers and responsibilities is appointed as an NDIS representative.<sup>29</sup>
- 3.25 Another preliminary submission suggests that “a substitute decision-maker appointed under state or territory laws should have their role respected by new and emerging NDIS arrangements” and encouraged close dialogue between the relevant agencies to “clarify roles and responsibilities”.<sup>30</sup>
- 3.26 Any Commonwealth recognition of state financial management and other appointments would require legislative amendment by the Commonwealth.
- 3.27 The ALRC has also recommended amendments to the legislation governing state and territory decision-makers to facilitate Commonwealth recognition of state appointments. For example, by ensuring that the powers that can be granted to guardians and financial managers will allow them to act as nominees or representatives under the Commonwealth provisions.<sup>31</sup> We are not aware that anything in the *Guardianship Act* prevents functions being granted to guardians and financial managers that would allow them to act as nominees or representatives.

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26. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [16.213].

27. See, eg, *Rickleman v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2009] FMCA 20.

28. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report 124 (2014) rec 5-4.

29. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 5–6.

30. Australian Lawyers Alliance, *Preliminary Submission PGA52*, 6.

31. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report 124 (2014) [5.103]–[5.104].

**Question 3.1: Relationship between Commonwealth and NSW laws**

What should be done to ensure an effective interrelationship between Commonwealth nominee or representative provisions and state-based arrangements for managing a person's financial and personal affairs?

## 4. Adoption information directions

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### In brief

A person can apply to the Guardianship Division of the NSW Civil and Administrative Tribunal for an adoption information direction on behalf of a person with disability.

- 4.1 The *Adoption Act 2000* (NSW) (“*Adoption Act*”) entitles a person who is adopted or is the biological parent of someone given up for adoption to obtain information about their birth parents or biological child, or to lodge a contact veto or advance notice request.<sup>1</sup>
- 4.2 The *Adoption Act* and the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) allow a person to act on behalf of a person with disability who has entitlements under the *Adoption Act* but cannot exercise them because of their disability.<sup>2</sup>
- 4.3 Anyone may apply to the Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”) for an adoption information direction on behalf of the person with disability.<sup>3</sup> After a hearing, the Tribunal may give directions about the adoption information actions that the applicant may take on behalf of the person.<sup>4</sup> An adoption information action is something that must be done before a person can receive a birth certificate or prescribed information, or lodge a contact veto or advance notice request.<sup>5</sup> The Tribunal must consider the views of the person with a disability, if they have any, and the views of the applicant, as well as the objects of the *Adoption Act*.<sup>6</sup>
- 4.4 If the Secretary of the Department of Community Services (“the Secretary”) believes the applicant cannot ensure the person with a disability will not contact, or attempt to contact, the person who has lodged a contact veto, the Secretary can refuse to supply the birth certificate endorsed with the contact veto, or direct an information source not to supply it.<sup>7</sup>
- 4.5 A direction made by the Tribunal under the adoption provisions is subject to appeal. A decision of the Secretary under s 199 of the *Adoption Act* is reviewable.<sup>8</sup>

### Question 4.1: Adoption information directions

What changes, if any, should be made to the part of the *Guardianship Act 1987* (NSW) that relates to adoption information directions?

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1. *Adoption Act 2000* (NSW) s 7(c), s 7(h).
  2. *Adoption Act 2000* (NSW) s 199(2), *Guardianship Act 1987* (NSW) Part 4A.
  3. *Guardianship Act 1987* (NSW) s 31B.
  4. *Guardianship Act 1987* (NSW) s 31D(1).
  5. *Guardianship Act 1987* (NSW) s 31A.
  6. *Guardianship Act 1987* (NSW) s 31D(2).
  7. *Adoption Act 2000* (NSW) s 199(3).
  8. *Adoption Act 2000* (NSW) ch 10.

## 5. Age

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### In brief

We look at the age at which a person can come under guardianship or financial management and the age at which a person can become a guardian or financial manager. We also ask questions about young people in NSW Civil and Administrative Tribunal proceedings and consider a streamlined process for appointing the parents of children who lack decision-making capacity as their guardian once they turn 18.

Age at which a person can come under guardianship or financial management .....	23
Guardianship and young people aged 16–18 years .....	24
Financial management and young people.....	25
Power of courts to make financial management orders.....	26
Age at which a person may become a guardian or financial manager.....	26
Young people as guardians.....	27
Young people in Tribunal proceedings.....	27
An option for reform: seeking young people’s views in the Tribunal.....	28
Appointing parents as guardians.....	29
Challenges for parents and carers .....	29
A streamlined process for appointing parents as guardians.....	30
The National Disability Insurance Scheme.....	31

- 5.1 In this chapter we consider whether the age thresholds in the *Guardianship Act 1987* (“*Guardianship Act*”) should be changed, in particular:
- the age at which a person can come under guardianship or financial management, and
  - the age at which a person can be appointed as a guardian or financial manager
- 5.2 We also examine the issue of young carers. We look at whether the *Guardianship Act* should expressly acknowledge them and whether they should be included as parties in guardianship proceedings in the NSW Civil and Administrative Tribunal (“Tribunal”).
- 5.3 Lastly, we consider the option of introducing a new, simplified process for parents of children with moderate to profound intellectual disability to become their child’s guardian when they turn 18.

### Age at which a person can come under guardianship or financial management

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- 5.4 A person must be at least 18 years old to appoint an enduring guardian.<sup>1</sup> However, the Tribunal may make a guardianship order for someone who is aged 16 years or above.<sup>2</sup> The Tribunal must be satisfied the young person is in need of a guardian.<sup>3</sup>

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1. *Guardianship Act 1987* (NSW) s 6.

- 5.5 An adult (“the appointor”) can appoint another adult (“the appointee”) as their enduring power of attorney. This gives the appointee control over the appointor’s estate when the appointor loses capacity.
- 5.6 The Tribunal has the power to make a financial management order in respect of a person of any age,<sup>4</sup> including a child or young person who is not capable of managing his or her own affairs.<sup>5</sup> This gives the Tribunal power over a wider group of people than tribunals in most other jurisdictions.<sup>6</sup>

### Guardianship and young people aged 16 – 18 years

- 5.7 NSW is the only state with a guardianship regime that includes 16- and 17-year-olds.<sup>7</sup> There is no clear rationale for why NSW chose 16 as the age at which a person can come under guardianship.<sup>8</sup> It has been suggested it was to address delays with the transition of children out of the child protection system into the guardianship system.<sup>9</sup> However, some other states and territories have overcome this by allowing a tribunal to make a guardianship order for a minor without the order coming into effect until the person turns 18.<sup>10</sup>
- 5.8 The question of age was considered by a ministerial committee in Victoria (“the Cocks Committee”) in the early 1980s. The Cocks Committee recommended that guardianship legislation should not extend to children.<sup>11</sup> It concluded that appointing a guardian for a child living at home would interfere with the legal rights of the parents, while extending guardianship to children in care would discriminate against children with intellectual disability because the existing child welfare legislation already provided a way to bring all children, including children with intellectual disabilities, under guardianship until they turned 18.<sup>12</sup>
- 5.9 In NSW, the Children’s Court can appoint a guardian for a child who is in out-of-home care and who is in need of care and protection.<sup>13</sup> The Court can make orders allocating full parental responsibility to one or more people<sup>14</sup> or to the Minister for

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2. *Guardianship Act 1987* (NSW) s 15(1)(a).

3. *Guardianship Act 1987* (NSW) s 14(1).

4. Information provided by NSW Civil and Administrative Tribunal (30 January 2017).

5. *Guardianship Act 1987* (NSW) s 25G.

6. See [5.11]–[5.14].

7. See, eg, *Guardianship and Administration Act 1990* (WA) s 43(1)(a), s 43(2a), s 43(2c); *Guardianship and Administration Act 2000* (Qld) s 11A, s 12; *Guardianship and Administration Act 1986* (Vic) s 19(1).

8. There is no mention of age in the Second Reading Speech or Explanatory Note introducing the Disability Services and Guardianship Bill 1987 (NSW), as it was then.

9. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [22.32].

10. See, eg, *Guardianship and Administration Act 1990* (WA) s 43(2a), (2c); *Guardianship and Management of Property Act 1991* (ACT) s 8C.

11. Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) [14.2].

12. Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) [14.2].

13. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79A.

14. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79A(1), s 79(4).



Family and Community Services (“the Minister”)<sup>15</sup> and this remains in force until the child turns 18.<sup>16</sup>

- 5.10 The Tribunal cannot make a guardianship order in respect of a young person who is the subject of an order made by the Court unless the Court consents to the order being made.<sup>17</sup> Similarly, the Court cannot make a guardianship order for a young person if the order would be inconsistent with a guardianship order made by the Tribunal.<sup>18</sup> It is arguable this overlap between the child protection and guardianship systems is confusing and unnecessary.<sup>19</sup>

### Question 5.1: Age threshold for guardianship orders

What should the age threshold for guardianship orders in the *Guardianship Act 1987* (NSW) be?

## Financial management and young people

- 5.11 Between July 2015 and June 2016, the Tribunal received four applications for the appointment of a financial manager for children under 16.<sup>20</sup> The Tribunal made three short-term financial orders.
- 5.12 The Tribunal’s power to make financial management orders for people of any age is out of step with most other Australian states and territories, which can only make financial management or administration orders for adults.<sup>21</sup>
- 5.13 It is arguably inappropriate that the Tribunal can make financial management orders for children and young people, particularly given it is easier to satisfy the Tribunal of the need for a financial management order.<sup>22</sup> For example, the Tribunal is not required to take into account existing informal support arrangements before making an order.<sup>23</sup>
- 5.14 One stakeholder noted that young people transitioning from the child protection system into the adult guardianship system may simply lack experience in managing their personal finances, rather than have an inability to do so. Placing a young person’s estate under financial management in those circumstances could prevent them from learning how to manage their money.

15. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79(1).

16. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79A(6).

17. *Guardianship Act 1987* (NSW) s 15(1)(c).

18. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79A(5)(b).

19. See, eg, YGC [2014] NSWCATGD 41, in which the Tribunal revoked a financial management order for a 17-year-old where there was already an order under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

20. The ages of the children were 9, 11, 14 and 15 respectively.

21. *Guardianship and Administration Act 1986* (Vic) s 43; *Guardianship and Administration Act 2000* (Qld) s 12; *Guardianship and Management of Property Act 1991* (ACT) s 8C; *Guardianship and Administration Act 1995* (Tas) s 50(2). The South Australian Civil and Administrative Tribunal does not appoint a guardian for children under 18, see <[www.sacat.sa.gov.au/types-of-cases/guardianship](http://www.sacat.sa.gov.au/types-of-cases/guardianship)>.

22. Financial management orders apply a needs-based test, while guardianship is a measure of last resort. See NSW Young Lawyers, *Preliminary Submission PGA32*, 7-8.

23. NSW Young Lawyers, *Preliminary Submission PGA32*, 8.

### *Power of courts to make financial management orders*

- 5.15 There are other ways of bringing the estate of a child or young person under financial management in NSW than through a Tribunal order.
- 5.16 The NSW Supreme Court has an inherent jurisdiction to make orders to protect the welfare of children.<sup>24</sup> This includes the power to make orders in respect of a child's or a young person's estate. The Children's Court may make a parenting or guardianship order, or a care plan for a child in need of care and protection. Such orders include the power to make financial decisions.
- 5.17 For a young person under the care of the Minister, the Minister has the responsibility for managing the young person's finances. NSW Trustee and Guardian can act as an agent for the Minister.<sup>25</sup>
- 5.18 Given the practice of other states and the powers of other NSW courts to make orders in respect of children, it is arguably an anomaly that the NSW Tribunal has such wide powers in respect of financial management orders. Some stakeholders note that a financial management order is highly restrictive and are not automatically reviewed.<sup>26</sup> We seek your views as to whether such a restrictive type of order is appropriate for a child or young person.<sup>27</sup>

#### **Question 5.2: Financial management orders for young people**

Should the NSW Civil and Administrative Tribunal have the power to make financial management orders for children and young people?

## Age at which a person may become a guardian or financial manager

- 5.19 An adult with capacity can appoint a person to be their enduring guardian or enduring power of attorney when they lose capacity.<sup>28</sup> Alternatively, the Tribunal may appoint a person as the guardian or financial manager for someone it considers to be in need of a guardian.<sup>29</sup> In both scenarios, the appointee must be at least 18 years old.<sup>30</sup>

24. See Chapter 11.

25. See YGC [2014] NSWCATGD 41 [27]–[28].

26. See Seniors Rights Service, *Preliminary Submission PGA07*, 10; Council on the Aging NSW, *Preliminary Submission PGA10*, 6; NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 6; NSW Young Lawyers, *Preliminary Submission PGA32* [3.2]; Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 7–8.

27. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 7.

28. *Guardianship Act 1987* (NSW) s 6; *Powers of Attorney Act 2003* (NSW) pt 4 div 2.

29. *Guardianship Act 1987* (NSW) s 14(1), s 25E, s 25F.

30. *Guardianship Act 1987* (NSW) s 16(1)(a); NSW Civil and Administrative Tribunal, Guardianship Division, *Information for Applicants: Appointment of a Financial Manager and/or Guardian*, Fact Sheet (2016).

## Young people as guardians

- 5.20 One stakeholder proposes amending the *Guardianship Act* to allow a 16- or 17-year-old who is the primary carer for another person to be appointed as the person's guardian.<sup>31</sup>
- 5.21 One in 10 Australian carers are under the age of 25, according to the Australian Bureau of Statistics.<sup>32</sup> Carers Australia NSW reports an estimated 104,500 young carers in NSW are aged between 15 and of 25.<sup>33</sup> The figure is likely higher due to under-reporting.<sup>34</sup>
- 5.22 Research has shown that despite being a significant group, service providers and medical professionals often do not recognise or acknowledge young carers.<sup>35</sup> According to one stakeholder, medical practitioners and clinical treating teams in particular often fail to consult with young carers whose parents are in hospital.<sup>36</sup> Allowing young carers to become guardians would oblige medical practitioners to consult with them and take their views more seriously.
- 5.23 If the law was changed to allow young carers to be appointed guardians, there may be some decisions which would be inappropriate for young people to make, for example a power to make decisions about certain types of medication. The Tribunal defines the scope of a guardian's functions and powers when it makes a limited guardianship order, so could tailor a guardianship appointment to make the young person's decision-making powers consistent with the young person's decision-making ability.<sup>37</sup>

### Question 5.3: Appointing young people as guardians

Under what circumstances, if any, should the NSW Civil and Administrative Tribunal be able to appoint 16- and 17-year-olds as guardians?

## Young people in Tribunal proceedings

- 5.24 A young person who is the subject of Tribunal proceedings is a party to the proceedings.<sup>38</sup> The *Guardianship Act* specifies that a person who has the care of the person to whom the application relates is a party to proceedings, however it is not clear whether a minor could commence an application in the Tribunal. A child under the age 18 is considered to be under a legal disability and may not engage in

31. Mental Health Coordinating Council, *Preliminary Submission PGA08*, 7.

32. Australian Bureau of Statistics, *Survey of Disability Ageing and Carers*, ABS cat no 4430.0 (2015).

33. Carers Australia NSW, "Young Carers" <[www.carersnsw.org.au/how-we-help/support/yc/](http://www.carersnsw.org.au/how-we-help/support/yc/)>.

34. T Hill, and others, *Young Carers: Their Characteristics and Geographical Distribution*, Report to the National Youth Affairs Research Scheme (2009) 2.

35. Australia, Department of Social Services, *Young Carers Research Project: Final Report* (2002) [5.3.1].

36. Information provided by Mental Health Coordinating Council (12 December 2016).

37. *Guardianship Act 1987* (NSW) s 15(4), s 16(2).

38. *Guardianship Act 1987* (NSW) s 3F(2)(b).

legal proceedings,<sup>39</sup> therefore it is likely they could not make an application in their own right.

- 5.25 A minor can be represented by a guardian ad litem (“GAL”) in legal proceedings, including in the Tribunal.<sup>40</sup> We understand that the Tribunal does not appoint GALs due to limited resources. A party to proceedings can seek leave to be represented by another person, including a legal practitioner.<sup>41</sup> Alternatively, the Tribunal may order that a party be separately represented.<sup>42</sup> A separate representative is an independent person appointed to represent the interests of the party.<sup>43</sup>
- 5.26 The Tribunal may order that a person be joined as a party to proceedings if the Tribunal considers that person should be joined as a party.<sup>44</sup> Again, it is not clear whether a young person could be joined to proceedings without a separate representative or a lawyer.

### An option for reform: seeking young people’s views in the Tribunal

- 5.27 One stakeholder submits that the Tribunal does not take into account the views of children and young people.<sup>45</sup> The Mental Health Coordinating Council says that the Tribunal often fails to acknowledge that there might be a young person behind the scenes in the role of primary carer. Where there is family conflict, young people’s voices are often drowned out by those of adults.<sup>46</sup>
- 5.28 While the Tribunal is obliged to take into account the importance of preserving a person’s existing family relationships,<sup>47</sup> there is no onus on the Tribunal to seek the views of young people, regardless of whether they are primary carers, or the children or siblings of the person.
- 5.29 One option for reform is to amend the *Guardianship Act* to allow a young person aged 16 years or above, who is a designated primary carer, to participate directly in proceedings. This would allow, for example, a 17-year-old who is the primary carer for her mentally ill mother, to make a guardianship application in the Tribunal, or be joined to a proceeding and have her voice heard.
- 5.30 Another option is to amend the *Guardianship Act* to require the Tribunal to obtain and consider the views of any child or young person who has a relationship to the person who is the subject of guardianship proceedings. The *Children and Young Persons (Care and Protection) Act 1998* (NSW), for example, requires the Children’s Court to take the views of siblings into account before making an order.<sup>48</sup>

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39. *Civil Procedure Act 2005* (NSW) s 3(1) definition of “person under legal incapacity”; *Minors (Property and Contracts) Act 1970* (NSW) s 11.

40. *Civil and Administrative Tribunal Act 2013* (NSW) s 45(4)(a).

41. *Civil and Administrative Tribunal Act 2013* (NSW) s 45(1)(b)(i),(ii).

42. *Civil and Administrative Tribunal Act 2013* (NSW) s 45(4)(c).

43. NCAT Guardianship Division, *Separate representatives*, Fact Sheet (2016) 1.

44. *Guardianship Act 1987* (NSW) s 3F(2)(f); *Civil and Administrative Tribunal Act 2013* (NSW) s 44.

45. Mental Health Coordinating Council, *Preliminary Submission PGA08*, 7.

46. Information provided by Mental Health Coordinating Council (14 December 2016).

47. *Guardianship Act 1987* (NSW) s 4(e), s 14(2)(b), s 28(2)(b).

48. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 103.

**Question 5.4: Young people in Tribunal proceedings**

- (1) Should young people have standing in the NSW Civil and Administrative Tribunal?
- (2) In what circumstances should the Tribunal be required to take the views of a young person into account?

## Appointing parents as guardians

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- 5.31 Parents of children with lifelong profound intellectual disability fall into a special category. A parent cannot be appointed as their child's enduring guardian or power of attorney due to their child's lifelong incapacity. Their children need help making decisions on a daily basis and there is no prospect of them regaining capacity.
- 5.32 Until a person turns 18, their parents can legally make decisions for them. However, once they turn 18, they are legally an adult with the right to make their own decisions. For young people with lifelong profound intellectual disability, turning 18 does not alter their decision-making capacity. However it can prevent parents who have been making decision on their behalf from continuing to do so.
- 5.33 In this section we discuss whether an appointment under the *Guardianship Act* is the right course for parents of adults with complex needs and whether the process of being appointed a guardian should be made easier for them. We also consider how the rollout of the National Disability Insurance Scheme ("the NDIS") in NSW will affect this group, particularly the provisions which allow a carer to be appointed as a person's nominee.

## Challenges for parents and carers

- 5.34 Parents of children with profound intellectual disability and complex needs report problems with government agencies, service providers and financial institutions once their child turns 18.<sup>49</sup> They face difficulties in opening or operating a bank account, dealing with Centrelink, and accessing information on behalf of a person who lacks decision-making capacity.<sup>50</sup> One mother of a severely developmentally delayed 22-year-old woman was unable to obtain a statement of benefits from her daughter's private health insurer without a power of attorney or financial management order.<sup>51</sup>
- 5.35 One stakeholder says that Family and Community Services Department of Ageing Disability and Home Care ("FACS") policy encourages service providers to make guardianship applications for clients who do not have a legally appointed guardian.<sup>52</sup> FACS policy documents support this: a guardian is required to consent to decisions about accommodation, medical and dental treatment, forensic procedures and behaviour support if the person is unable to consent themselves.<sup>53</sup>

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49. Our Voice Australia, *Preliminary Submission PGA38*, 5; N Brown, *Preliminary Submission PGA42*; Confidential, *Preliminary Submission PGA6*.

50. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 4.

51. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 5.

52. Our Voice Australia, *Preliminary Submission PGA38*, 2.

53. NSW, Family and Community Services, Ageing, Disability and Home Care, *Decision Making and*

- 5.36 Difficulties such as these often lead parents to apply to the Tribunal for a guardianship or financial management order to get the legal authority to make decisions for their child. However, stakeholders report that the Tribunal does not encourage guardianship applications, which is a source of frustration for them.<sup>54</sup>
- 5.37 In deciding whether to make a guardianship order, the Tribunal must consider the practicability of services being provided to the person without the need for an order. The Tribunal will only make a guardianship order as a last resort and in most cases decides that informal decision-making is appropriate.<sup>55</sup>
- 5.38 It is arguable that parents should not need a guardianship order to deal with bureaucratic and administrative issues and Tribunal policy and authority supports this view. A guardian is a substitute decision-maker, not a carer or a supporter, and an order may be disproportionate to the need. However, it is true that some people require someone to make everyday decisions for them and that their need will not change. With no alternative model, and the existence of organisational policies that require guardianship, the legal authority that comes with guardianship would greatly assist parents of children with lifelong intellectual disability.
- 5.39 Incorporating supported or representative decision-making models into legislation would be one way of addressing this issue. Or, as one stakeholder suggests, the government could consider other legal mechanisms specifically tailored to enable parents to make decisions for their children in limited circumstances.<sup>56</sup>

#### *A streamlined process for appointing parents as guardians*

- 5.40 Applying to the Tribunal can be a lengthy process and emotionally draining for parents<sup>57</sup> and, as noted above, the Tribunal often will not appoint them as their child's guardian. Parent stakeholders say they would like a simpler process for being appointed as their child's guardian when they become adults.<sup>58</sup>
- 5.41 NSW could consider adopting a model that was proposed by the Victorian government in 2014. The proposal, which formed part of the *Guardianship and Administration Bill 2014* (Vic), would have allowed parents of people with profound decision-making incapacity to be appointed as their child's guardian or administrator without the need for a hearing. The then government recognised the difficulties parents face when they lose their legal status of decision-maker for their child when they turn 18.<sup>59</sup> The proposal was in response to the concerns of parents who could

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*Consent Policy* (2016) 5.

54. Our Voice Australia, *Preliminary Submission PGA38*, 3; N Brown, *Preliminary Submission PGA 43*, 2.
55. NSW Civil and Administrative Tribunal, Guardianship Division, *Information for Applicants: Appointment of a Financial Manager and/or Guardian*, Fact Sheet (2016) 1; NSW Department of Family and Community Services, *Preliminary Submission PGA54*, 3. See also *KTT* [2014] NSWCATGD 6.
56. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 4.
57. Our Voice Australia, *Preliminary Submission PGA38*, 3–4.
58. Confidential, *Preliminary Submission PGA06*; M and H Cochran, *Preliminary Submission PGA11*, 1; M Carter, *Preliminary Submission PGA37*; Our Voice Australia, *Preliminary Submission PGA38*, 5.
59. Second reading speech for the *Guardianship and Administration Bill 2014* (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 21 August 2014, 2941–2942 (R Clark, Attorney-General).



often not even get limited guardianship orders, even though third parties, such as care providers, required formal authority before they would engage with parents.

- 5.42 Under the proposed model, a parent of a child with decision-making incapacity could apply to the Victorian Civil and Administrative Tribunal (“Victorian Tribunal”) for a guardianship order or an administration order appointing them guardian as soon as the child turns 18.<sup>60</sup>
- 5.43 The parent would be required to show that they had been – and were still – making decisions on the person’s behalf on a regular basis before the person turned 18.<sup>61</sup> Medical evidence in support of their application must show the person does not have decision-making capacity because of a disability; their decision-making capacity is unlikely to improve; and their views cannot be ascertained.<sup>62</sup>
- 5.44 If satisfied of the above matters, the Victorian Tribunal could make an order without a hearing.<sup>63</sup>
- 5.45 A parent would not be eligible to use this process if they had ever lost custody, parental responsibility, or guardianship of their child.<sup>64</sup> The model also included additional safeguards, such as requiring the applicant to disclose whether they had been convicted of certain types of offences. If the Victorian Tribunal wasn’t satisfied with the documentation produced, or if it had other concerns, it would proceed to a hearing.
- 5.46 The Guardianship and Administration Bill lapsed when the Victorian government changed and so the proposal was never enacted.
- 5.47 There are downsides to guardianship applications without a Tribunal hearing. As they are “on the papers”, they arguably do not allow for effective interactions between the Tribunal and the parties. Removing the need for a hearing does not necessarily speed up the process. A hearing can allow for a quicker exchange of ideas and allows the subject person to hear and participate in the proceedings.

### *The National Disability Insurance Scheme*

- 5.48 The NDIS may strengthen the authority of informal decision-makers, including parents, by allowing them to be appointed as their child’s “plan nominee”.<sup>65</sup> A plan nominee helps the participant make decisions about their plan and how they want to use their funding, including decisions about accommodation.
- 5.49 A nominee will not be recognised as an authorised decision-maker for other purposes. However, the Commonwealth Government is considering the recommendations of the Australian Law Reform Commission (“ALRC”) to incorporate “supporters” and “representatives” with decision-making authority into the NDIS.<sup>66</sup> Under the ALRC model, a supporter or representative could help a

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60. Guardianship and Administration Bill 2014 (Vic) cl 35(1), (2).

61. Guardianship and Administration Bill 2014 (Vic) cl 36(b)(ii)(B).

62. Guardianship and Administration Bill 2014 (Vic) cl 36(b)(i).

63. Guardianship and Administration Bill 2014 (Vic) cl 41.

64. Guardianship and Administration Bill 2014 (Vic) cl 35(4).

65. *National Disability Insurance Scheme Act 2013* (Cth) s 86, s 88; *National Disability Insurance Scheme (Nominees) Rules 2013* (Cth) pt 3.

66. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Law*, Report 124 (2014) rec 5-2, rec 5-3.



person with significant decision-making impairment make decisions across areas such as social security, Medicare and eHealth. See Chapter 3 for more on the NDIS.

**Question 5.5: Process for appointing parents as guardians**

- (1) Should NSW introduce a streamlined method for parents of adult children with profound intellectual disability to become their guardian when they turn 18 without the need for a NSW Civil and Administrative Tribunal hearing?
- (2) What other mechanisms could be made available for parents to make decisions for an adult with profound decision-making incapacity?

## 6. Interstate appointments and orders

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### In brief

We look at how guardianship orders and appointments made outside NSW operate when a person moves to NSW and what recognition processes are available.

Interstate court or tribunal appointments.....	33
Power of review .....	35
Enduring guardianship appointments.....	36
When an enduring appointment “has effect” in NSW .....	37
Power of review.....	37
Should NSW introduce a system of registration? .....	37
Interstate tribunal appointments .....	38
Personal appointments.....	38

- 6.1 Sometimes guardians and people under guardianship move to NSW from elsewhere, either temporarily or permanently. Without a national guardianship framework, it is difficult for people to know whether and to what extent their powers can be exercised in NSW. Stakeholders tell us that appointed guardians who move to NSW from another state are often uncertain about the extent of their powers, and do not know what, if any, steps they need to take to ensure their appointment is valid.<sup>1</sup>
- 6.2 Whether an interstate appointment is recognised in NSW depends on the type of appointment and the powers it confers. The *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) recognises enduring appointments made in other states or territories<sup>2</sup> as well as orders made under a “corresponding law”.<sup>3</sup> However the rules on interstate orders and personal appointments operate differently, which can create confusion.
- 6.3 In this Chapter we consider the operation in NSW of:
- interstate court or tribunal appointments, and
  - interstate enduring guardianship appointments.
- 6.4 We also ask whether there is a way of achieving national consistency in this area.

### Interstate court or tribunal appointments

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- 6.5 Guardians or financial managers who have been appointed by a tribunal or court in another state or territory can apply to the NSW Civil and Administrative Tribunal

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1. NSW Ombudsman, *Preliminary Submission PGA41*, 6–7; Alzheimer’s Australia NSW, *Preliminary Submission PGA14*, 5.

2. *Guardianship Act 1987* (NSW) s 6O, s 48A, s 48B.

3. *Guardianship Act 1987* (NSW) s 48A, s 48B; *Guardianship Regulation 2016* (NSW) cl 16.

(“Tribunal”) to have their status recognised.<sup>4</sup> The Tribunal must recognise the applicant’s status if it is satisfied they were appointed under a “corresponding law”.<sup>5</sup> There are nine state, territory and international laws declared to be corresponding laws.<sup>6</sup>

- 6.6 On recognition, the applicant is taken to be appointed under the *Guardianship Act* as a guardian or financial manager of the estate of the other person.<sup>7</sup> The applicant can only exercise functions authorised by their original appointment and only if those functions are authorised by the *Guardianship Act*.<sup>8</sup>
- 6.7 The effect of recognition, and when it is necessary, are not clear from the *Guardianship Act*. However, the following principles can be taken from the case law:
- recognition does not affect the validity of the original appointment in its state of origin<sup>9</sup>
  - recognition is not always necessary, particularly if an estate is not large or complex and the financial manager’s status is recognised by the relevant institutions in NSW<sup>10</sup>
  - recognition of an interstate financial management or administration order brings the manager or administrator under the supervision of the NSW Trustee and Guardian<sup>11</sup>
  - recognition confers a power to deal with property in NSW even if the financial manager or person under financial management lives interstate<sup>12</sup>
  - recognition allows a guardian or manager to commence or carry on proceedings in NSW for a person with incapacity<sup>13</sup>
  - the Tribunal has the power to confirm, review or revoke a recognition, however it cannot revoke or review the original order.<sup>14</sup>
- 6.8 In a 1999 case, the NSW Supreme Court considered what was meant by the words “taken to be an appointment under the [*Guardianship Act*]” in s 48B of the Act.<sup>15</sup> The Court interpreted the provision as requiring the Tribunal to recognise the applicant’s right to represent the person in NSW but not requiring the Tribunal to

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4. *Guardianship Act 1987* (NSW) s 48B(1).

5. *Guardianship Act 1987* (NSW) s 48B(2). A “corresponding law” is a law in force in another state, a territory, another country or part of another country that is declared by the regulations to be a corresponding law: *Guardianship Act 1987* (NSW) s 48A.

6. *Guardianship Regulation 2016* (NSW) cl 16.

7. *Guardianship Act 1987* (NSW) s 48B(3).

8. *Guardianship Act 1987* (NSW) s 48B(4).

9. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [54]–[58].

10. *TFI* [2014] NSWCATGD 14 [33].

11. *TFI* [2014] NSWCATGD 14 [31].

12. *HBQ* [2015] NSWCATGD 33 [14].

13. *FBT* [2014] NSWCATGD 27 [17]; *Uniform Civil Procedure Rules* (2005) r 7.14.

14. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [30].

15. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [26]–[27].

recognise the order itself.<sup>16</sup> The Court held that recognition gives the applicant the same powers as if they had been appointed in NSW.<sup>17</sup>

- 6.9 The Tribunal cannot decline to recognise an interstate appointment if the applicant meets the requirements in s 48B. However, it may immediately revoke the recognition if it satisfied it in the best interests of the protected person.<sup>18</sup>
- 6.10 However, recognition may not always be necessary and it can have disadvantages in some cases. A 2014 case illustrates this. An administrator appointed under an Australian Capital Territory (ACT) order applied to have the Tribunal's recognition of the order<sup>19</sup> revoked. The recognition had brought the administrator under the supervision of NSW Trustee and Guardian meaning she had to comply with requirements and pay fees. The estate in question was small, consisting only of an aged care pension. The Tribunal was satisfied there was no need for the continued recognition of the appointment. The applicant was complying with the requirements of the ACT order, and a bank and an aged care facility accepted the authority of the ACT order.<sup>20</sup> This raises the question of what the benefits of recognition are and when recognition will be required.

#### Question 6.1: Interstate court or tribunal appointments

- (1) Are the arrangements in relation to interstate appointments in the *Guardianship Act 1987* (NSW) operating well?
- (2) Should the legislation clarify what the effect of registration of interstate appointments is and when it is required?
- (3) Should the NSW Civil and Administrative Tribunal have the discretion not to recognise an appointment in certain circumstances?
- (4) What, if any, other changes should be made?

#### Power of review

- 6.11 The Tribunal has the power to review, vary or revoke its recognition of an interstate appointment as if it were an appointment under the *Guardianship Act*.<sup>21</sup> The Supreme Court has taken this to mean the Tribunal can revoke or confirm the recognition but not the interstate order itself.<sup>22</sup> For instance, revoking the recognition of an interstate administration order removes the administrator's powers over the estate assets held in NSW. However, the original appointment continues to have effect in its state of origin.<sup>23</sup>

16. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [26]–[27].

17. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [54].

18. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [27].

19. Equivalent of a financial management order.

20. *TFI* [2014] NSWCATGD 14 [33].

21. *Guardianship Act 1987* (NSW) s 48B(5).

22. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [55].

23. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [54]–[55].

- 6.12 It is unclear to what extent the Tribunal can vary a recognition order. There is no case law on this issue. Tribunals in other states can vary an interstate order upon recognition, for example by changing the administrator of an estate.<sup>24</sup>

**Question 6.2: Tribunal powers of review of interstate court or tribunal appointments**

Should the *Guardianship Act 1987* (NSW) clarify the powers of the NSW Civil and Administrative Tribunal to vary an interstate recognition order?

## Enduring guardianship appointments

- 6.13 The *Guardianship Act* recognises an enduring guardian appointed in another state or territory.<sup>25</sup> As with interstate orders, the appointment is only effective to the extent that the functions conferred on the guardian could have been conferred on an enduring guardian in NSW.<sup>26</sup> The appointment document must comply with the requirements of the state in which it was made.<sup>27</sup>
- 6.14 Interstate appointments, including enduring guardianships,<sup>28</sup> enduring powers of attorney,<sup>29</sup> advance personal plans,<sup>30</sup> and advance care directives<sup>31</sup> have effect in NSW to the extent that their powers match those of an enduring guardian under the *Guardianship Act*.<sup>32</sup>
- 6.15 When and in what circumstances an enduring appointment will be effective can be confusing. Issues which may cause uncertainty include:
- powers of attorney in some states include a power to make lifestyle and health care decisions, whereas in NSW an attorney only has the power to make financial decisions<sup>33</sup>
  - interstate enduring powers of attorney are also recognised under the *Powers of Attorney Act 2003* (NSW)<sup>34</sup> – and which recognition provisions apply depends on the powers conferred by the document, and
  - advance care directives do not have statutory force in NSW<sup>35</sup> so NSW hospitals or health practitioners may not recognise interstate advance care directives.

24. QPJ [2016] NSWCATGD 31 [10].

25. *Guardianship Act 1987* (NSW) s 6O.

26. *Guardianship Act 1987* (NSW) s 6O(1).

27. *Guardianship Act 1987* (NSW) s 6O(3).

28. Made under *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 1990* (WA).

29. Made under *Powers of Attorney Act 2006* (ACT); *Powers of Attorney Act* (NT); *Powers of Attorney Act 2014* (Vic); *Medical Treatment Act 1988* (Vic) to be superseded by 2018 by *Medical Treatment Planning and Decisions Act 2016* (Vic).

30. Made under *Advance Personal Planning Act* (NT).

31. Made under *Powers of Attorney Act 1998* (Qld) ch 3; *Advance Care Directives Act 2013* (SA).

32. *Guardianship Regulation 2016* (NSW) cl 8; *Guardianship Act 1987* (NSW) s 6O(1).

33. See, eg, NVP [2016] NSWCATGD 1, where the Tribunal held the Australian Capital Territory power of attorney was valid by applying both the *Powers of Attorney Act 2006* (ACT) and the *Guardianship Act 1987* (NSW): [8]–[14].

34. *Powers of Attorney Act 2003* (NSW) s 25.

### When an enduring appointment “has effect” in NSW

- 6.16 The *Guardianship Act* states that an enduring guardian appointed in another state or territory is recognised in NSW.<sup>36</sup> The document appointing an interstate enduring guardian will “have effect” in NSW as if it were a document appointing an enduring guardian in NSW. The recognition is effectively automatic and there is no ability to apply to the Tribunal to recognise an interstate enduring appointment.
- 6.17 It is unclear why an interstate guardian appointed under corresponding law can apply to the Tribunal to have their status recognised but an interstate enduring guardian cannot. This means that service providers such as hospitals may need to make an application for a guardianship order where there is uncertainty around the powers of an interstate appointment.<sup>37</sup> This is arguably an inefficient use of Tribunal resources, particularly if the Tribunal concludes a guardianship appointment is unnecessary.

### Power of review

- 6.18 The Tribunal has held that, as with interstate Tribunal appointments, it has no power to review interstate enduring guardians even where there is an allegation of abuse of powers.<sup>38</sup>
- 6.19 This leads to an anomalous situation where enduring guardians appointed in NSW are accountable for their actions, through the prospect of Tribunal revocation or review, while interstate appointed enduring guardians can operate unchecked in NSW. Their appointment can only be reviewed in the state of origin. This raises the risk of exploitation and abuse of vulnerable people.

### Should NSW introduce a system of registration?

- 6.20 A system of registration may solve some of the problems around recognition of both personal and tribunal appointments. If appropriately implemented, registration could reduce the number of Tribunal applications by service providers and clarify the powers of an interstate appointment without the need for a recognition process.
- 6.21 As we discuss in Question Paper 4, several stakeholders support a registration system for NSW appointments.<sup>39</sup> They say registration would give certainty to banks and third parties<sup>40</sup> and provide a means of scrutinising the actions of enduring guardians and attorneys.<sup>41</sup> This could extend to registration of interstate appointments, although there may be a need for the powers conferred by an appointment or order to be confirmed before registration.

35. In NSW, people can make a common law advance care directive, the validity of which can be recognised by the Supreme Court: see, eg, *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88 [97]–[98].

36. *Guardianship Act 1987* (NSW) s 6O.

37. See, eg, *NVP* [2016] NSWCATGD 1 [2].

38. *QBL* [2014] NSWCATGD 8 [15]–[16]; *NVT* [2015] NSWCATGD 37 [37]–[38].

39. See, eg, L Barry, *Preliminary Submission PGA02*, 4; Seniors Rights Service, *Preliminary Submission PGA07*, 25; Disability Council NSW, *Preliminary Submission PGA26*, 17; Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 2.

40. Seniors Rights Service, *Preliminary Submission PGA07*, 25.

41. L Barry, *Preliminary Submission PGA02*, 4; Disability Council of NSW, *Preliminary Submission PGA26*, 16–17.

## Interstate tribunal appointments

- 6.22 Other states allow Tribunal appointments to be registered. The *Victorian Guardianship and Administration Act 1986* (Vic) (“*Guardianship and Administration Act*”) allows the Victorian Civil and Administrative Tribunal to register a guardianship or administration order made under a corresponding law in another state or territory. After registration, the interstate order has the same force and effect as if it were an order made under the *Guardianship and Administration Act*.<sup>42</sup> In Queensland, an interstate order that is similar to an order that could have been made under the Queensland legislation can be registered. The order is then treated as if it were an order made by the Queensland Civil and Administrative Tribunal.<sup>43</sup>

## Personal appointments

- 6.23 Tasmania is alone in allowing personal appointments made in a different state to be registered. An interstate power of attorney can be registered provided the power is the same or substantially the same as an enduring power of attorney made in Tasmania.<sup>44</sup> However, this does not extend to enduring guardianship appointments.

### Question 6.3: Interstate enduring appointments

- (1) Should interstate enduring appointments be reviewable in NSW?
- (2) Should NSW introduce a system of registration for interstate appointments? If so, should there be a process for confirming the powers confirmed by the interstate instrument or order?

42. *Guardianship and Administration Act 1986* (Vic) s 63A, s 63E; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [27.31].

43. *Guardianship and Administration Act 2000* (Qld) s 166–171.

44. *Powers of Attorney Act* (Tas) s 43, s 47.



## 7. Orders for guardianship and financial management

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### In brief

This chapter considers:

- whether separate orders must be made for guardians and financial managers even if the same person holds both positions
- how enduring appointments should work with court or tribunal orders, and
- how disputes could be resolved between decision-makers appointed under one or more orders.

A single order? .....	39
Effect of orders on personal/enduring appointments.....	41
Resolving disputes between decision-makers .....	42

### A single order?

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- 7.1 In NSW, separate orders must be made for guardians and financial managers even if the same person is appointed as both a guardian and a financial manager.
- 7.2 In Question Paper 1, we considered the possibility of more closely aligning the preconditions for making guardianship and financial management orders.<sup>1</sup> In Question Paper 3, we noted the Legislative Council Standing Committee in 2010 recommended the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) apply the same criteria to appointing financial managers as it does to appointing guardians.<sup>2</sup> A related question is whether the Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”) should be able to make a single order that allocates certain powers and responsibilities to one or more people for personal and financial matters. The answer, to a certain extent, will depend on whether we propose aligning the two orders more closely. Some submissions to Question Paper 1 support the possibility of a single order.<sup>3</sup>
- 7.3 There are a number of instances of single orders elsewhere. For example, the Northern Territory permits the Northern Territory Civil and Administrative Tribunal (“NT Tribunal”) to make a guardianship order appointing one or more guardians specifying the personal matters and/or financial matters for which each guardian

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1. NSW Law Reform Commission, *Preconditions for Alternative Decision-making Arrangements*, Review of the Guardianship Act 1987 Question Paper 1 (2016) [4.15]–[4.19].

2. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [6.106]. See NSW Law Reform Commission, *The Role of Guardians and Financial Managers*, Review of the Guardianship Act 1987 Question Paper 3 (2016) [2.48].

3. Mental Health Coordinating Council, *Submission GA1, 7*; Aged and Community Services NSW and ACT, *Submission GA5, 6*.

has authority.<sup>4</sup> The legislation in England and Wales allows a court to appoint deputies to make specified decisions for a person's personal welfare and/or their property and affairs.<sup>5</sup> Likewise, in Ireland, a court may appoint a decision-making representative to make one or more decisions on behalf of a person for his or her personal welfare or property and affairs, or both.<sup>6</sup>

7.4 The benefits of a single order are greatest where the same person carries out financial and personal functions. However, there will always be cases where it is appropriate to divide responsibilities, for example, where the nature of the person's estate demands the appointment of someone with particular financial abilities, or where the statutory officers – the Public Guardian and the NSW Trustee and Guardian – must be appointed. In such cases it would matter little whether there were two separate orders or one order with responsibilities divided between two or more appointments.

7.5 The Victorian Law Reform Commission ("VLRC") decided to retain the existing legislative distinction between financial decision-making and personal decision-making on the grounds that "substitute decision making about financial and personal matters often requires significantly different skills".<sup>7</sup> The VLRC observed:

For example, different skills are often needed when making decisions about someone's financial affairs from those that are needed when making decisions about where that person will live or whether to authorise medical treatment for them.<sup>8</sup>

7.6 However, as we noted in Question Paper 1, at a functional level, particular decisions may involve both guardians and financial managers. For example, a decision about where a person lives may also require a decision about the financial arrangements necessary to implement that decision. Indeed, many decisions about living arrangements will have financial implications.<sup>9</sup>

7.7 We consider what could be done when the different decision makers disagree about a course of action that involves both personal and financial decisions at the end of this Chapter.<sup>10</sup>

#### **Question 7.1: A single order for guardianship and financial management**

- (1) Should there continue to be separate orders for guardianship and financial management?
- (2) What arrangements would be required if a single order were to cover both personal and financial decisions?

4. *Guardianship of Adults Act* (NT) s 14, s 16.

5. *Mental Capacity Act 2005* (UK) s 15, s 16.

6. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 38(2)(b).

7. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [5.46].

8. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [5.47].

9. NSW Law Reform Commission, *Preconditions for Alternative Decision-making Arrangements*, Review of the Guardianship Act 1987 Question Paper 1 (2016) [4.17].

10. [7.18]-[7.22], below.

## Effect of orders on enduring appointments

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- 7.8 Sometimes the Tribunal or the Supreme Court will appoint a guardian or financial manager to make some decisions for a person even though the person has already appointed their own enduring guardian or attorney. The law deals with guardianship orders and financial management orders differently.

### Guardianship orders

- 7.9 Under the *Guardianship Act*, a guardianship order (whether made by the Tribunal or the Supreme Court) suspends the authority of an enduring guardian “to exercise a function under the appointment” for the duration of the guardianship order.<sup>11</sup> Such a provision will often apply in cases of conflict between family members where not all of them have been appointed as enduring guardians.
- 7.10 This has the effect of suspending the appointment of an enduring guardian and all of his or her functions even when the guardianship order is for a limited purpose such as deciding who can have access to the person and under what conditions.<sup>12</sup>

### Financial management orders

- 7.11 The *Guardianship Act* does not expressly state the effect of an appointment of a financial manager on a person holding an enduring power of attorney.
- 7.12 The Supreme Court has held that a financial management order suspends the authority of a person appointed under an enduring power of attorney implicitly, by operation of a combination of provisions in the *Guardianship Act* and the *NSW Trustee and Guardian Act 2009* (NSW).<sup>13</sup>
- 7.13 One particular question is should the *Guardianship Act* set out what effect the appointment of a financial manager has on a holder of an enduring power of attorney and whether it should be similar to the provision about the effect of guardianship orders or an amended version of that provision.

### Allowing enduring orders a limited operation

- 7.14 An important question is whether it is appropriate for a Tribunal or Supreme Court order to suspend the whole operation of an enduring appointment, especially where the order might be limited to a particular decision or type of decision. For example, a guardianship order intended to deal with the question of allowing visits by a person’s family members could prevent decisions being made by an enduring guardian about health care or accommodation.
- 7.15 In some cases a guardianship order of limited duration would allow an enduring guardianship to resume relatively quickly. However, this might not necessarily be

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11. *Guardianship Act 1987* (NSW) s 6I.

12. *BCA* [2014] NSWCATGD 47 [33]; *KMC* [2014] NSWCATGD 43 [9].

13. *Guardianship Act 1987* (NSW) s 25E, s 25G, s 25H, s 25M; *NSW Trustee and Guardian Act 2009* (NSW) s 71(1); *C v W* [2015] NSWSC 1774 [12].

the case, as the *Guardianship Act* allows for a guardianship order that is limited to particular functions to be a continuing order.<sup>14</sup>

- 7.16 An alternative approach would be to provide that an enduring appointment continues to have effect except where a Tribunal or Supreme Court order is in direct conflict.
- 7.17 This is achieved, for example, in the Northern Territory where the NT Tribunal must not make a guardianship order that “confers on the guardian authority for a matter for which a relevant agent has authority” under an advance personal plan or enduring power of attorney.<sup>15</sup> The NT Tribunal may amend advance personal plans and enduring powers of attorney and can, thereby, avoid any conflict with a guardianship order.<sup>16</sup>

### Question 7.2: Effect of orders on enduring appointments

What arrangements should be made for the operation of enduring appointments when the NSW Civil and Administrative Tribunal or Supreme Court of NSW has also appointed a guardian or financial manager?

## Resolving disputes between decision-makers

- 7.18 Sometimes, when more than one decision-maker is appointed (whether under one or more orders), disputes may arise as to the appropriate course of action in a particular case. They may arise between joint financial managers, joint guardians, and between guardians and financial managers.
- 7.19 There is no legislative provision in NSW that addresses dispute resolution between substitute decision-makers outside of disputes related to proceedings in the Tribunal.<sup>17</sup> This raises two questions:
- whether there needs to be such a provision, and
  - which body or agency is best placed to conduct or facilitate any dispute resolution processes.
- 7.20 If the decisions of substitute decision-makers are inconsistent, the VLRC has recommended that they seek a resolution either informally or through mediation before seeking the Tribunal’s assistance.<sup>18</sup> Unless the parties agree otherwise, the decision of a guardian would be preferred to that of a financial manager.<sup>19</sup>
- 7.21 Under Queensland legislation, a dispute between competing substitute decision-makers is to be resolved through mediation by the Public Guardian. If the mediation

14. *Guardianship Act 1987* (NSW) s 16(1)–(2).

15. *Guardianship of Adults Act* (NT) s 18.

16. *Advance Personal Planning Act* (NT) s 61; *Powers of Attorney Act* (NT) s 15.

17. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1.

18. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 196(a).

19. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 196(c)(i).

does not resolve the dispute, the parties can apply to the Queensland Civil and Administrative Tribunal for directions.<sup>20</sup>

- 7.22 In the Northern Territory, although there is an obligation for multiple substitute decision-makers to make decisions unanimously, if there is a dispute that they cannot resolve by themselves, the NT Tribunal can make orders to facilitate the resolution of their differences.<sup>21</sup>

**Question 7.3: Resolving disputes between decision-makers**

- (1) How should disputes between decision-makers be resolved?
- (2) Who should conduct or facilitate any dispute resolution process?
- (3) What could justify preferring the decision of one substitute decision-maker over another?

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20. *Guardianship and Administration Act 2000* (Qld) s 41(1).

21. *Guardianship of Adults Act* (NT) s 22(2), s 33(2)(b).

## 8. Search and removal powers

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### In brief

We consider the circumstances when the NSW Civil and Administrative Tribunal can make an order empowering police or Tribunal officers to search premises and remove a person who is deemed to be at risk.

Order for search and removal by Tribunal.....	44
Application for order for search and removal from premises.....	45
Reasonable force .....	46

- 8.1 The *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) empowers an authorised person or police officer to enter a premises and remove a person in certain circumstances.
- 8.2 The search and removal powers can only be used if:
- a guardianship application in relation to the person has been made,<sup>1</sup> or
  - the person appears to be a person in need of a guardian and is being unlawfully detained or their wellbeing is at risk<sup>2</sup>
- 8.3 The provisions can only be used in respect of a person who is not already under guardianship. We discuss a guardian’s power to enforce a guardianship order in Chapter 9 and we discuss the Public Guardian’s advocacy and investigative powers in Question Paper 4.
- 8.4 In this chapter we seek your views as to the continued relevance of the search and removal provisions and whether the powers they confer or the circumstances in which they can be used need to be more clearly defined or circumscribed.

### Order for search and removal by Tribunal

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- 8.5 The Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”) may order the removal of a person from any premises if a guardianship application has been made in respect of the person.<sup>3</sup> The order empowers an authorised Tribunal officer or a member of the NSW Police Force to enter the premises, search the premises for the person and remove them.<sup>4</sup> The authorised officer may use all reasonable force for the purposes of entering, searching, and removing the person from the premises.<sup>5</sup>

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1. *Guardianship Act 1987* (NSW) s 11(1).
  2. *Guardianship Act 1987* (NSW) s 12(1).
  3. *Guardianship Act 1987* (NSW) s 11(1)(a).
  4. *Guardianship Act 1987* (NSW) s 11(1)(b).
  5. *Guardianship Act 1987* (NSW) s 11(2).



- 8.6 An authorised officer is a Tribunal employee<sup>6</sup> who is declared to be an authorised officer, or a Tribunal employee who belongs to a class of employees declared to be authorised officers.<sup>7</sup> The Minister of the Department of Community Services, Ageing, Disability and Home Care may declare any employee or any class of employees to be authorised officers.<sup>8</sup>
- 8.7 The Tribunal must be satisfied that it is appropriate in the circumstances of the case to make the order.<sup>9</sup>
- 8.8 The search and removal provisions in the *Guardianship Act* appear to be rarely used<sup>10</sup> and there is limited case authority on this point.<sup>11</sup>

### Application for order for search and removal from premises

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- 8.9 Section 12 empowers a Tribunal employee or a member of NSW Police to apply to an authorised officer – defined as a magistrate, children’s magistrate, registrar of the Local Court, or authorised employee of the Attorney-General’s Department<sup>12</sup> – for a search warrant. The employee or police officer must believe, on reasonable grounds, that there is a person in need of a guardian on the premises who:
- (a) is being unlawfully detained against his or her will, or
  - (b) is likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken.<sup>13</sup>
- 8.10 The authorised officer may issue a search warrant if he or she is satisfied there are reasonable grounds to do so.<sup>14</sup> The search warrant authorises the employee or police officer named in the warrant:
- (a) to enter any premises specified in the warrant,
  - (b) to search the premises for the person, and
  - (c) to remove the person from the premises.<sup>15</sup>
- 8.11 A member of NSW Police or a medical practitioner may accompany the employee executing the search warrant and take all reasonable steps to assist the employee in the exercise of their function.<sup>16</sup> The employee or police officer may use all reasonable force for the purposes of removing a person from the premises.<sup>17</sup>

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6. *Guardianship Act 1987* (NSW) s 3(1) definition of “employee”.

7. *Guardianship Act 1987* (NSW) s 3(1) definition of “authorised officer”.

8. *Guardianship Act 1987* (NSW) s 3(3).

9. *Guardianship Act 1987* (NSW) s 11(1)(a); *New South Wales Minister for Mental Health v Brauer* [2015] NSWSC 863 [53].

10. N O’Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [6.3.9].

11. See, eg, *JND* [2011] NSWGT 18.

12. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3.

13. *Guardianship Act 1987* (NSW) s 12(1).

14. *Guardianship Act 1987* (NSW) s 12(2).

15. *Guardianship Act 1987* (NSW) s 12(2).

16. *Guardianship Act 1987* (NSW) s 12(4).

17. *Guardianship Act 1987* (NSW) s 12(5).

- 8.12 If an authorised officer, employee, or member of the police force removes a person from any premises under s 11 or 12, they must immediately place the person in the care of the Secretary of the Department of Family and Community Services, Ageing, Disability and Home Care<sup>18</sup> or delegated person at a place approved by the Minister for Community Services or delegated person.<sup>19</sup> If a person has been removed from a premises under s 12, the Secretary must not keep the person in their care for more than three days unless the Secretary has made an application for a guardianship order in respect of the person within that time.<sup>20</sup>

### Reasonable force

- 8.13 There is no definition of “reasonable force” under the *Guardianship Act*, however it is lawful for a police officer exercising a function under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.<sup>21</sup>

#### Question 8.1: Search and removal powers

- (1) Is there a need for provisions in the *Guardianship Act 1987* (NSW) that empower police or NSW Civil and Administrative Tribunal employees to search premises and remove people deemed in need of protection?
- (2) What changes, if any, should be made to these provisions?

18. *Guardianship Act 1987* (NSW) s 13(1), (1B).

19. *Guardianship Act 1987* (NSW) s 13(1), (1A).

20. *Guardianship Act 1987* (NSW) s 13(2).

21. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 230.

## 9. Enforcing guardians' decisions

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### In brief

A guardianship order can authorise a guardian or another person named in the order to take specified actions to ensure that a person complies with their guardian's decisions. Questions arise about the limits that should be imposed on any powers given to guardians, the amount of force that can be used, and who can be authorised to act.

Current law.....	47
Application where the guardian has an accommodation function.....	48
Options for reform .....	49
Limits on any powers given to guardians.....	49
Amount of force permitted .....	49
Who can be authorised to act.....	49

### Current law

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- 9.1 The *Guardianship Act 1987* (NSW) ("*Guardianship Act*") seeks to ensure that a person under guardianship complies with any decision their guardian makes when acting as guardian. It allows a guardianship order to state that a specified person can take the actions specified in the order. The order can specify whether the person taking action can be the guardian, another person or specified class of person (for example a police officer or ambulance officer), or a person authorised by the guardian.<sup>1</sup>
- 9.2 This provision covers a broad range of decisions that might need to be enforced, from controlling and restraining a person, to physically removing the person from a particular place. It is part of a series of provisions that govern a guardian's control over a person and the effect of the guardian's decision-making.<sup>2</sup> These other provisions provide (subject to any limitations in the order) that the guardian has custody of the person to the exclusion of any other person and has all the functions of a guardian that a guardian has at law or in equity, and that the guardian's decisions and actions have effect as if they were the person's decisions and actions.<sup>3</sup>
- 9.3 This provision is aimed at assisting someone who has already been appointed as guardian and the power is, therefore, different to the powers discussed in Chapter 8 that allow for the search and removal of people who may be in need of protection before a guardianship order is made. This provision also does not deal with

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1. *Guardianship Act 1987* (NSW) s 21A(1).

2. *White v The Local Health Authority* [2015] NSWSC 417 [51].

3. *Guardianship Act 1987* (NSW) s 21, s 21C.

restrictive practices which we discuss in Question Paper 5 and which are about managing ongoing behaviours.<sup>4</sup>

- 9.4 A person taking the action to enforce a guardian's decision is not liable for anything done if:
- they reasonably believe that the guardianship order has empowered them to act
  - the action is in the best interest of the person under guardianship, and
  - the action is necessary or desirable in the circumstances.<sup>5</sup>
- 9.5 The provision was inserted in the *Guardianship Act* in 1997 and appears to be based on a very similar provision originally enacted in Victoria in 1986.<sup>6</sup> Other jurisdictions have similar provisions.<sup>7</sup> There are however some variations in detail.

### Application where the guardian has an accommodation function

- 9.6 The power has a particular use if a guardian has been given an accommodation function. An accommodation function authorises a guardian to decide where a person is to live and for the person to be taken there and kept safely there. In doing so, a guardian or someone acting under the guardian's direction, may use methods that involve touching but may not use force. However, there may be circumstances where greater authority or control may be required to ensure a person's care and safety. In those cases, the Guardianship Division of the NSW Civil and Administrative Tribunal ("Tribunal") may give the guardian a stronger form of accommodation function or power. It is suggested that this order must be explicit as to the extent of the function or power it gives.<sup>8</sup>
- 9.7 An example of the use of the power can be seen in a 2009 case. The Public Guardian had been given the authority to decide where a person should live and to take him to that place if necessary. The person absconded to live with his mother. NSW Police attempted to retrieve him but could not gain access to his mother's house. The guardianship order was varied to permit the Public Guardian to authorise the police to use reasonable force when retrieving the person and taking him to the approved accommodation. The Tribunal limited the variation to two weeks as it was satisfied that a short-term variation was "appropriate, necessary and in his best interests".<sup>9</sup>

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4. NSW Law Reform Commission, *Medical and Dental Treatment and Restrictive Practices*, Review of the Guardianship Act 1987 Question Paper 5 (2017) ch 7.

5. *Guardianship Act 1987* (NSW) s 21A(2).

6. *Guardianship and Administration Board Act 1986* (Vic) s 26.

7. See, eg, *Guardianship and Administration Act 1995* (Tas) s 28; *Guardianship and Administration Act 1986* (Vic) s 26; *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 38.

8. N O'Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [7.5.2].

9. *OHB* [2009] NSWGT 14 [17].

## Options for reform

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### Limits on any powers given to guardians

- 9.8 Similar provisions operate elsewhere to limit the powers that may be granted to guardians. Limits have also been proposed by various reviews. Examples of such limits include:
- a requirement that the tribunal review the order as soon as practicable (for example, within 42 days)<sup>10</sup>
  - a requirement that force should be used as a last resort,<sup>11</sup> and only to an extent that is proportionate in the circumstances<sup>12</sup>
  - a requirement that the tribunal must be satisfied that the health or safety of the person would be seriously at risk or that the action is necessary to protect the wellbeing of the person or others.<sup>13</sup>

### Amount of force permitted

- 9.9 A particular question arises about the amount of force that can be allowed. The NSW provision makes no express reference to this. The concept of reasonable force is imported in the Tribunal's order in the example at [9.7].
- 9.10 In South Australia, authorised people may be allowed to enter premises and use "only such force as is reasonably necessary" to take a person to an authorised place and carers may be allowed to "use such force as may be reasonably necessary for the purpose of ensuring the proper medical or dental treatment, day-to-day care and wellbeing of the person".<sup>14</sup>

### Who can be authorised to act

- 9.11 Another question relates to the extent to which people who are authorised to act or to assist an authorised person should be identified in the relevant provision. The *Guardianship Act* only refers to a guardianship order permitting "a specified person or a person of a specified class of persons", or "a person authorised by the guardian" to take the specified actions. In the example at [9.7], the Tribunal permitted the Public Guardian to authorise the police to use reasonable force. The Tribunal has also made orders authorising ambulance officers to take a person to an approved place.<sup>15</sup>

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10. *Guardianship and Administration Act 1986* (Vic) s 26(1A).

11. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [12.175]; NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 28, ch 10.

12. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [12.175].

13. *Guardianship and Administration Act 1993* (SA) s 32; NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 28, ch 10.

14. *Guardianship and Administration Act 1993* (SA) s 32(1)(c), s 32(4)(a).

15. *PT* [2009] VCAT 1187 [1].

- 9.12 In Alberta, Canada, the relevant Act expressly provides that an order may authorise the police “to assist the guardian or another person in doing anything necessary to give effect to the decision”.<sup>16</sup> In South Australia, police officers are also expressly identified as people who could be authorised to enter premises and remove people.<sup>17</sup> The Queensland Law Reform Commission has proposed expressly including in legislation police and ambulance officers as categories of people who could be authorised to assist.<sup>18</sup>
- 9.13 The NSW Legislative Council Standing Committee on Social Issues recommended including an express provision in the *Guardianship Act* authorising “members of the NSW Police to use all reasonable force where all other means have been exhausted and where the action is necessary to protect the wellbeing of the person or others”.<sup>19</sup>
- 9.14 It is not clear whether such an order would compel police or any other officers to act. It would, however, protect them from liability if they did act on behalf of a guardian.

### Question 9.1: Enforcing guardians' decisions

- (1) What provision (if any) should be made for a guardianship order to permit guardians to enforce their decisions?
- (2) What limits should be placed on any part of an order that permits such enforcement?
- (3) Should any such provision expressly mention groups of people who may be permitted to enforce a guardian's decision, such as, for example, police officers or ambulance officers?
- (4) What limits should be placed on the amount of force authorised to enforce any such decision?

16. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 38(2).

17. *Guardianship and Administration Act 1993* (SA) s 32.

18. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [20.221], rec 20-13 – 20-18.

19. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 28, ch 10.



## 10. Handling personal information

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### In brief

The *Guardianship Act 1987* (NSW) does not say when a guardian or financial manager can access a person's personal information. The Act makes it an offence to disclose information obtained except in certain circumstances, including that there is a lawful excuse. Other exceptions could include that the disclosure was to prevent serious risk to life, health or safety or was to report a criminal offence.

Access to information.....	51
Disclosure of information.....	53

- 10.1 Sometimes guardians and financial managers need to know personal information about someone before they can make a decision on their behalf. Guardians and financial managers must also sometimes communicate a person's personal information to others when acting on their behalf. These situations give rise to questions both about access to personal information and about disclosure of that information once obtained. Personal information can include health records and financial information.
- 10.2 The *Guardianship Act 1987* (NSW) ("*Guardianship Act*") does not explicitly address questions of handling personal information apart from a provision that makes it an offence to disclose information obtained in connection with *the Guardianship Act* except in certain circumstances.<sup>1</sup> The general principles in s 4 also do not refer to privacy, despite it being a right according to art 22 of the *UN Convention on the Rights of Persons with Disabilities*.<sup>2</sup>
- 10.3 Some stakeholders have noted that it is important to clarify the guidelines and laws on information sharing especially as the National Disability Insurance Scheme is rolled out. There are already provisions that deal with privacy concerns around personal and health information, and a decision-maker may have to deal with a large number of them.<sup>3</sup>

### Access to information

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- 10.4 Issues about access to personal information arise in a number of scenarios. They arise for a guardian or financial manager appointed by the Guardianship Division of the NSW Civil and Administrative Tribunal, as well as for an enduring guardian or attorney and a "person responsible" for making decisions about medical and dental

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1. *Guardianship Act 1987* (NSW) s 101.  
2. *Guardianship Act 1987* (NSW) s 4; Mental Health Coordinating Council, *Preliminary Submission PGA08*, 3; *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 22.  
3. Mental Health Review Tribunal, *Preliminary Submission PGA21*, 2; Mental Health Coordinating Council, *Preliminary Submission PGA8*, 3.

treatment. They could also arise for others who may act as supporters or co-decision-makers if such arrangements are introduced in NSW.

- 10.5 A decision-maker's ability to access a person's personal information seems to depend on the law, practices and procedures that apply to the people and organisations from which a decision-maker is seeking the information, such as banks, Commonwealth agencies, doctors, dentists and hospitals.
- 10.6 For example, under the *Health Records and Information Privacy Act 2002* (NSW), a guardian can access and make requests to amend health information when acting as an "authorised person".<sup>4</sup> However, for personal information, under the *Privacy and Personal Information Act 1998* (NSW), there is no mention of guardians or even authorised representatives.<sup>5</sup>
- 10.7 In some jurisdictions the guardianship legislation itself entitles decision-makers to access information in certain circumstances. For example, in Queensland, a guardian or administrator has a "right to all the information the adult would have been entitled to if the adult had capacity and which is necessary to make an informed exercise of the power".<sup>6</sup> A person who holds the information must give it to the guardian or administrator upon request, unless the person has a reasonable excuse not to.<sup>7</sup> The guardian or administrator may apply to the Queensland tribunal for an order that a person give the information.<sup>8</sup> Guardians and attorneys with power for health matters can also obtain information from health providers.<sup>9</sup>
- 10.8 The Victorian Law Reform Commission ("VLRC") recommended that substitute decision-makers be specifically entitled to access personal information about an individual that is relevant to and necessary for carrying out their functions.<sup>10</sup> The VLRC recommended that information could be disclosed once the person or body holding the information is satisfied that the person is a substitute decision-maker and that the information is relevant to and necessary for carrying out their functions.<sup>11</sup>
- 10.9 In Alberta, Canada, legislation separately specifies the types of information and the conditions for gaining access that must be met for each of the various decision-makers and supporters. So, for example:
- a guardian or trustee is entitled to access, collect or obtain personal information (including financial information) that is relevant to his or her authority and the carrying out of his or her duties and responsibilities
  - a person who intends to apply for a guardianship order or a trusteeship order may have personal information (except financial information) disclosed to them if the holder of the information is satisfied that the information is relevant to and necessary for the application

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4. *Health Records and Information Privacy Act 2002* (NSW) s 8(1).

5. *Privacy and Personal Information Act 1998* (NSW) s 14.

6. *Guardianship and Administration Act 2000* (Qld) s 44(1).

7. *Guardianship and Administration Act 2000* (Qld) s 44(2).

8. *Guardianship and Administration Act 2000* (Qld) s 44(3).

9. *Guardianship and Administration Act 2000* (Qld) s 76.

10. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 191.

11. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 192.

- a co-decision-maker is entitled to access, collect or obtain personal information (except financial information) that is relevant to their authority and the carrying out of their duties and responsibilities
- a decision-making supporter may only access, collect or obtain (or help someone to access, collect or obtain) personal information (except financial information) that is relevant to the decision if the supported decision-making authorisation entitles them to do so.<sup>12</sup>

### Question 10.1: Access to personal information

In what circumstances should different decision-makers and supporters be able to access a person's personal, health or financial information?

## Disclosure of information

- 10.10 In NSW, a person is prohibited from disclosing any information obtained in connection with the administration or execution of the *Guardianship Act*. Exceptions to this prohibition include where the disclosure was:
- with any lawful excuse, including that it was with the consent of the person from whom the information was obtained
  - in connection with the administration or execution of the *Guardianship Act* or the *Civil and Administrative Tribunal Act 2013* (NSW) or the conduct of legal proceedings under these Acts.<sup>13</sup>
- 10.11 In other places, there are also provisions aimed at ensuring confidentiality of personal information.
- 10.12 In Queensland, for example, a guardian or administrator may not use confidential information gained through being a guardian or administrator or because of an opportunity given by being a guardian or administrator. However, confidential information may be used in certain prescribed circumstances, including that:
- its use was authorised by law or the person to whom the information relates
  - it was necessary for proceedings under the *Guardianship and Administration Act 2000* (Qld)
  - it was authorised by a court or tribunal in the interests of justice
  - it was necessary:
    - to prevent serious risk to life, health or safety
    - to seek legal or financial advice or counselling, advice or other treatment, or
    - to report a suspected offence.<sup>14</sup>

12. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 9, s 22, s 41, s 72.

13. *Guardianship Act 1987* (NSW) s 101. A similar provision is contained in *Mental Health Act 2007* (NSW) s 189.

10.13 In Alberta, all decision-makers and supporters are required to take reasonable care to ensure that the personal information they obtain is kept secure from unauthorised access, use or disclosure, and that they only use the information for the purpose of exercising their authority and carrying out their duties and responsibilities.<sup>15</sup>

10.14 Other jurisdictions, for example Victoria, do not have such a provision. The VLRC observed:

Although the equitable duty of confidence probably obliges substitute decision makers to maintain the confidentiality of any information about the represented person that they obtain by virtue of that relationship, the Commission is unaware of any circumstances in which a person has sought to invoke this general law duty.<sup>16</sup>

10.15 The VLRC recommended that a substitute decision-maker “should only collect personal information that is relevant to and necessary for carrying out their role under the Act” and also recommended that it be an offence for substitute decision-makers to breach confidentiality.<sup>17</sup>

#### **Question 10.2: Disclosure of personal information**

- (1) In what circumstances should various decision-makers and supporters be permitted to disclose a person’s personal, health or financial information?
- (2) In what circumstances should various decision-makers and supporters be prohibited from disclosing a person’s personal, health or financial information?

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14. *Guardianship and Administration Act 2000* (Qld) s 249, s 249A.

15. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 9, s 22, s 41, s 72.

16. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.43].

17. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 289, rec 290.

## 11. The Supreme Court

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### In brief

The Supreme Court of NSW has a range of powers to deal with people who may be in need of the Court's protection, including its inherent protective jurisdiction, and powers given by various Acts. The Court also has powers to review administrative decisions and to hear appeals against decisions of the NSW Civil and Administrative Tribunal.

Inherent protective jurisdiction .....	55
Use of the protective jurisdiction in practice .....	56
Interactions between the Supreme Court and the Tribunal .....	57
Guardianship orders .....	57
Financial management orders .....	58
Supervisions, review and appeals .....	58

- 11.1 The Supreme Court of NSW has a range of powers to deal with people who may be in need of the Court's protection, including its inherent protective jurisdiction, and powers given by various Acts including the *Guardianship Act 1987* (NSW) ("*Guardianship Act*") and the *NSW Trustee and Guardian Act 2009* (NSW). The Court also has powers to review administrative decisions made under the *Guardianship Act* and the *NSW Trustee and Guardian Act 2009* (NSW) ("*Trustee and Guardian Act*") and to hear appeals against some decisions of the Guardianship Division of the NSW Civil and Administrative Tribunal ("Tribunal").
- 11.2 This chapter seeks your views about whether these powers are appropriate.

### Inherent protective jurisdiction

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- 11.3 The Court has the power to make decisions in the best interests of people in need of the Court's protection.<sup>1</sup> This is in addition to any powers the Court may have under the *Guardianship Act*. This power, referred to as the Court's inherent protective (or *parens patriae*) jurisdiction exists in the background of all guardianship matters.
- 11.4 The inherent jurisdiction remains unaffected by subsequent statutes, unless expressly overridden.<sup>2</sup> Notwithstanding, the *Guardianship Act* expressly states that the following provisions do not limit the Court's jurisdiction "with respect to the guardianship of persons":<sup>3</sup>

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1. Derived from *New South Wales Act 1823* (Imp), the Third Charter of Justice, and the *Australian Courts Act 1828* (Imp) preserved and reinforced by *Supreme Court Act 1970* (NSW) s 22, s 23: *A v A* [2015] NSWSC 1778 [43].

2. *Re WM* (1903) 3 SR (NSW) 552. See also *Northridge v Central Sydney Area Health Service* [2000] NSWSC 1241; 50 NSWLR 549 [15]-[19]; *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 [12].

3. *Guardianship Act 1987* (NSW) s 8, s 31, s 31G.

- Part 3 which relates to the Tribunal making guardianship orders
  - Part 4 which relates to the Tribunal giving directions to guardians, and
  - Part 4A which relates to the Tribunal giving directions about adoption information actions for people with disability.
- 11.5 These express statements are limited to only three parts of the *Guardianship Act* and only apply to the Court’s jurisdiction “with respect to the guardianship of persons”. Other places have more comprehensive provisions that expressly preserve the relevant Supreme Court’s inherent jurisdiction. For example, in Queensland, the *Guardianship and Administration Act 2000* (Qld) states that the whole of the Act “does not affect the court’s inherent jurisdiction, including its *parens patriae* jurisdiction”.<sup>4</sup>
- 11.6 It has been stated that the Supreme Court’s protective jurisdiction “is directed to administration of the affairs of a person in need of protection, without strife in the simplest and least expensive way”.<sup>5</sup> Accordingly, the Court in exercising its protective jurisdiction is not bound by the technical rules of evidence, although it must have due regard to considerations of good practice and procedural fairness.<sup>6</sup>
- 11.7 The Court submits that “nothing should be done to limit the [Court’s] inherent, protective jurisdiction”.<sup>7</sup>
- 11.8 In their respective reviews of their states’ guardianship laws, the Victorian Law Reform Commission and the Queensland Law Reform Commission made no recommendations concerning their Supreme Courts’ inherent protective jurisdiction. No preliminary submissions have suggested removing or changing it.

### Use of the protective jurisdiction in practice

- 11.9 The Court’s inherent protective jurisdiction is not usually invoked in the ordinary run of cases. The provisions and procedures in the *Guardianship Act* and related statutes are generally sufficient to deal with the management of a person’s affairs and property. For example, the Victorian Supreme Court has observed that the fact that the inherent jurisdiction exists “provides no logical justification for bypassing” the Victorian equivalents of the *Guardianship Act* and doubted “if it should play any current role in the day to day administration of guardianship matters”.<sup>8</sup>
- 11.10 The inherent jurisdiction continues to play a useful role, for example, in covering situations that the *Guardianship Act* does not adequately deal with, such as revoking or undoing the effect of existing orders.<sup>9</sup> It may also provide orders in circumstances where protection is urgently needed but there are no other forums available to provide it.<sup>10</sup>

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4. *Guardianship and Administration Act 2000* (Qld) s 240.

5. *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 [5]; *M v M* [2013] NSWSC 1495 [50](f).

6. *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 [7]–[14].

7. Supreme Court of NSW, *Preliminary Submission PGA15* [7].

8. *Gardner; re BWV* [2003] VSC 173 [99]–[100].

9. *Re L* [2014] NSWSC 1106 [66]–[69], [88]; *W v H* [2014] NSWSC 1696 [49]; *Dunning v NSW Trustee and Guardian* [2015] NSWSC 2095.

10. See, eg, *Re Elizabeth* [2007] NSWSC 729 [17].



- 11.11 One question that arises is how the inherent jurisdiction might interact with statutory general principles. The Court has held that the general principles in the *Guardianship Act* and the *Trustee and Guardian Act* are a “statutory expression of the purposive character of the Court’s inherent (*parens patriae*) protective jurisdiction”.<sup>11</sup> The paramount consideration under the *Guardianship Act* is that cases should be decided according to a person’s welfare and interests. This is taken to be the same as a person’s interests that the Court takes into account when exercising its protective jurisdiction. What, therefore, might be the consequence of any change to the principles, for example, by replacing the requirement that paramount consideration be given to a person’s “welfare and interests” with a requirement that paramount consideration be given to a person’s “will and preferences”?<sup>12</sup>
- 11.12 We expect that changing the general principles will not present a problem. The Court in its inherent jurisdiction will take into account the statutory regime and will only depart from it in exceptional circumstances. For example, in its children’s jurisdiction the Court has noted that it would be highly inappropriate to challenge decisions of a specialist tribunal under the guise of invoking its protective jurisdiction, and observed that:
- it would only be in the most extraordinary circumstances that this Court should be asked, in the exercise of its *parens patriae* jurisdiction, to set aside or to affect the decision of a Magistrate in the Children’s Court.<sup>13</sup>
- 11.13 Such an approach would ameliorate any concerns about inappropriate resort to the Court to undermine Tribunal decisions made under any amended general principles.

**Question 11.1: Supreme Court’s inherent protective jurisdiction**

What, if anything, should legislation say about the relationship between the Supreme Court of NSW’s inherent protective jurisdiction and the operation of guardianship law?

**Interactions between the Supreme Court and the Tribunal**

- 11.14 The *Guardianship Act* sets out what happens in those cases when the Court is asked to use its power to make an order appointing a guardian or financial manager and the Tribunal is already hearing the matter or has already made an order.

**Guardianship orders**

- 11.15 The Tribunal may not make a guardianship order in the case of a person who is subject to an order made by the Court in its inherent jurisdiction, unless the Court consents to the making of the order.<sup>14</sup>

11. *C v W* [2015] NSWSC 1774 [90].

12. NSW Law Reform Commission, *Preconditions for Alternative Decision-Making Arrangements*, Review of the Guardianship Act 1987 Question Paper 1 (2016) [4.7]–[4.14]; NSW Law Reform Commission, *Decision-Making Models*, Review of the Guardianship Act 1987 Question Paper 2 (2016) [2.9].

13. *Re Victoria* [2002] NSWSC 647 [31].

- 11.16 In cases where a relevant Court order is in place, the practice of the Tribunal would appear to be to hear the evidence, make its order and then seek the consent of the Court for the order to take effect.<sup>15</sup>
- 11.17 The *Guardianship Act* expressly states that making an order under the *Guardianship Act* will terminate an order of the Court,<sup>16</sup> although a guardianship order under the *Guardianship Act* will cease to have effect for as long as a subsequent Court order appointing a guardian is in place.<sup>17</sup>

### Financial management orders

- 11.18 The *Guardianship Act* states that the Tribunal does not have jurisdiction to make a financial management order if “the question of the person’s capability to manage his or her own affairs is before the Supreme Court”.<sup>18</sup>
- 11.19 The Court has held that there must be a real question in issue in Court proceedings for the Tribunal’s jurisdiction to be excluded, observing that it “would be a strange result indeed if the mere filing of a document in this Court alleging an incapacity to manage affairs, when there was no real issue in dispute in that respect, could deprive the Tribunal of jurisdiction”.<sup>19</sup>
- 11.20 The Tribunal may “with the concurrence of the Supreme Court”, refer a proceeding relating to a person’s capability to manage his or her own affairs to the Court.<sup>20</sup> The Court recognises that when the Tribunal does refer a proceeding to the Court, the Tribunal is an expert tribunal set up to appoint financial managers and that:

It will be of assistance to this Court to have the views of the Tribunal even if the Tribunal takes the view that the matter should be forwarded or transferred to the Supreme Court.<sup>21</sup>

#### **Question 11.2: Interactions between the Supreme Court and the Tribunal**

- (1) Are the provisions that deal with the interaction between the Supreme Court of NSW and the NSW Civil and Administrative Tribunal adequate?
- (2) What changes, if any, should be made to these provisions?

### Supervision, review and appeals

- 11.21 The Court also has various supervisory, review and appellate jurisdictions under a number of legislative provisions.

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14. *Guardianship Act 1987* (NSW) s 15(1)(b).  
 15. *CVP* [2011] NSWGT 19 [14]–[20].  
 16. *Guardianship Act 1987* (NSW) s 22.  
 17. *Guardianship Act 1987* (NSW) s 23(b).  
 18. *Guardianship Act 1987* (NSW) s 25K(1).  
 19. *Bovaird v Bovaird* [2007] NSWSC 146 [15].  
 20. *Guardianship Act 1987* (NSW) s 25L.  
 21. *Bovaird v Bovaird* [2007] NSWSC 146 [16].

- 11.22 The *Guardianship Act* provides that the Court “may review the appointment (or purported appointment) of an enduring guardian and may make such orders as it thinks appropriate in respect of the appointment”.<sup>22</sup>
- 11.23 Under the *Trustee and Guardian Act*, the Court can make orders about the management of protected estates or give directions to the NSW Trustee and Guardian.<sup>23</sup> These are seen as supplements to the Court’s inherent jurisdiction.<sup>24</sup>
- 11.24 Tribunal decisions are subject to rights of appeal to either an appeal panel or the Court (the one appeal route precluding the other and vice versa).<sup>25</sup>
- 11.25 As statutory bodies, the Tribunal and the NSW Trustee may also be subject to judicial review proceedings in the Court.<sup>26</sup>
- 11.26 Part 57 of the *Uniform Civil Procedure Rules 2005* (NSW) sets out the powers and procedures of the Court in relation to:
- applications for a declaration that a person is incapable of managing his or her affairs and for an order that the person’s estate be subject to management under the Act<sup>27</sup>
  - special orders in relation to orders by the Mental Health Review Tribunal that a person’s estate be subject to management of the NSW Trustee<sup>28</sup>
  - applications for review of the appointment of an enduring guardian<sup>29</sup>
  - applications by a person to revoke any declaration that they are incapable of managing their affairs.<sup>30</sup>

### Question 11.3: Supervision, review and appeals

Are there any issues that should be raised about the Supreme Court of NSW’s supervisory, review and appellate jurisdictions?

22. *Guardianship Act 1987* (NSW) s 6L.

23. *NSW Trustee and Guardian Act 2009* (NSW) s 65.

24. *W v H* [2014] NSWSC 1696 [52].

25. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 pt 6, formerly under *Guardianship Act 1987* (NSW) s 67. See *EB v Guardianship Tribunal* [2011] NSWSC 767 [181]; *P v D1* [2011] NSWSC 257 [53].

26. *Ability One Financial Management Pty Limited v JB* [2014] NSWSC 245 [110].

27. *NSW Trustee and Guardian Act 2009* (NSW) s 41. See *Re AAA* [2016] NSWSC 805 [28].

28. *NSW Trustee and Guardian Act 2009* (NSW) s 52.

29. *Guardianship Act 1987* (NSW) s 6L.

30. *NSW Trustee and Guardian Act 2009* (NSW) s 86.

## Appendix A

### Preliminary submissions

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<b>PGA01</b>	Maxwell Watts and Mareea Watts (15 February 2016)
<b>PGA02</b>	Lise Barry (23 February 2016)
<b>PGA03</b>	Dr John Carter (9 March 2016)
<b>PGA04</b>	Lina Sultana (10 March 2016)
<b>PGA05</b>	NSW Disability Network Forum (18 March 2016)
<b>PGA06</b>	[Confidential] (18 March 2016)
<b>PGA07</b>	Seniors Rights Service (18 March 2016)
<b>PGA08</b>	Mental Health Coordinating Council (18 March 2016)
<b>PGA09</b>	Bridgette Pace (19 March 2016)
<b>PGA10</b>	Council on the Ageing NSW (19 March 2016)
<b>PGA11</b>	Michael Cochran and Hilda Cochran (20 March 2016)
<b>PGA12</b>	Kellie Jefferson (20 March 2016)
<b>PGA13</b>	Legal Aid NSW (21 March 2016)
<b>PGA14</b>	Alzheimer's Australia NSW (21 March 2016)
<b>PGA15</b>	Supreme Court of NSW (21 March 2016)
<b>PGA16</b>	Medical Insurance Group Australia (MIGA) (21 March 2016)
<b>PGA17</b>	Carers NSW (21 March 2016)
<b>PGA18</b>	NSW Council for Intellectual Disability (21 March 2016)
<b>PGA19</b>	NSW Council for Civil Liberties (21 March 2016)
<b>PGA20</b>	Avant Mutual Group Limited (21 March 2016)
<b>PGA21</b>	Mental Health Review Tribunal (21 March 2016)
<b>PGA22</b>	BEING (21 March 2016)
<b>PGA23</b>	People with Disability Australia (21 March 2016)
<b>PGA24</b>	National Disability Services (21 March 2016)
<b>PGA25</b>	Peter Deane (21 March 2016)
<b>PGA26</b>	Disability Council NSW (21 March 2016)
<b>PGA27</b>	Jan Barham (21 March 2016)
<b>PGA28</b>	Department of Rehabilitation Medicine St Vincent's Hospital (21 March 2016)
<b>PGA29</b>	Vanessa Browne (21 March 2016)
<b>PGA30</b>	June Walker (21 March 2016)
<b>PGA31</b>	Bernhard Ripperger and Laura Joseph (28 March 2016)
<b>PGA32</b>	NSW Young Lawyers (29 March 2016)
<b>PGA33</b>	[Confidential] (29 March 2016)
<b>PGA34</b>	John Friedman (30 March 2016)
<b>PGA35</b>	Institute of Legal Executives (31 March 2016)
<b>PGA36</b>	[Confidential] (31 March 2016)
<b>PGA37</b>	Mary Lou Carter (1 April 2016)
<b>PGA38</b>	Our Voice Australia (1 April 2016)
<b>PGA39</b>	NSW Mental Health Commission (1 April 2016)

- PGA40** The South Eastern Sydney Local Health District Human Research Ethics Committee (1 April 2016)
- PGA41** NSW Ombudsman Office (1 April 2016)
- PGA42** Nell Brown (3 April 2016)
- PGA43** Law Society of NSW (4 April 2016)
- PGA44** Intellectual Disability Rights Service (4 April 2016)
- PGA45** Craig Ward (1 April 2016)
- PGA46** [Confidential] (30 March 2016)
- PGA47** Australian Centre for Health Law Research (4 April 2016)
- PGA48** [Confidential] (4 April 2016)
- PGA49** NSW Health Commission (4 April 2016)
- PGA50** NSW Trustee and Guardian (7 April 2016)
- PGA51** Michael Murray (6 April 2016)
- PGA52** Australian Lawyers Alliance (8 April 2016)
- PGA53** Mental Health Carers Arafmi NSW Inc (18 April 2016)
- PGA54** NSW Family and Community Services (27 April 2016)

## Appendix B

### Submissions

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- GA1** Mental Health Coordinating Council (24 September 2016)
- GA2** Royal Australasian College of Physicians (13 October 2016)
- GA3** Justice Health and Forensic Mental Health Network (12 October 2016)
- GA4** Seniors Rights Service (14 October 2016)
- GA5** Aged and Community Services NSW and ACT (13 October 2016)
- GA6** NSW Disability Network Forum (13 October 2016)
- GA7** NSW Council for Intellectual Disability (16 October 2016)
- GA8** Bridgette Pace (17 October 2016)
- GA9** Combined Pensioners and Superannuants Association of NSW Inc (17 October 2016)
- GA10** Mental Health Carers NSW (17 October 2016)
- GA11** Alzheimer's Australia NSW (17 October 2016)
- GA12** Carers NSW (17 October 2016)
- GA13** NSW Council of Social Service (17 October 2016)
- GA14** Cognitive Decline Partnership Centre (17 October 2016)
- GA15** Schizophrenia Fellowship of NSW (17 October 2016)
- GA16** Intellectual Disability Rights Service (17 October 2016)
- GA17** Physical Disability Council of New South Wales (18 October 2016)
- GA18** Legal Aid NSW (18 October 2016)
- GA19** NSW Civil and Administration Tribunal - Guardianship Division (18 October 2016)
- GA20** People with Disability Australia (22 October 2016)
- GA21** Synapse (24 October 2016)
- GA22** Stephanie Travers (24 October 2016)
- GA23** Capacity Australia (25 October 2016)
- GA24** Royal Australian and New Zealand College of Psychiatrists (26 October 2016)
- GA25** Mental Health Commission of NSW (27 October 2016)
- GA26** Medical Insurance Group Australia (27 October 2016)
- GA27** The Law Society of NSW Young Lawyers Civil Litigation Committee (28 October 2016)
- GA28** NSW Trustee and Guardian (28 October 2016)
- GA29** The Law Society of NSW (8 November 2016)
- GA30** Mid North Coast Community Legal Centre (31 October 2016)
- GA31** NSW Family and Community Services (9 November 2016)
- GA32** Multicultural NSW (29 November 2016)





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ISBN 978-1-922254-23-8