NEW SOUTH WALES BAR ASSOCIATION

SUBMISSION IN RELATION TO THE NSW LAW REFORM COMMISSION PAPER - REVIEW OF THE GUARDIANSHIP ACT 1987 DRAFT PROPOSALS

1. These submissions are made on behalf of the New South Wales Bar Association ("Bar Association"). They relate to the New South Wales Law Reform Commission Paper entitled *Review of the Guardianship Act 1987 Draft Proposals.* ("Draft Proposals")

2. The Bar Association has two main concerns in relation to the Draft Proposals:

   a) the change in emphasis from "best interests" to "expressed will and preferences"; and
   b) the expansion of the jurisdiction of the District Court to hear matters concerning mismanagement of protected funds.

"Best Interests" v "Expressed Will"

3. The present position under the *NSW Trustee and Guardian Act 2009* (NSW) is that management functions with respect to protected persons or patients must be exercised in accordance with the principles set out in s. 39 of that Act, namely:

   (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.

4. In *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245, Lindsay J, referred to the principles set out in s. 39 and observed at [11]:

   > *Those statements of principle are not an exhaustive statement of the objectives that should be advanced by decisions relating to administration of the estate of a protected person: RL v NSW Trustee and Guardian (2012) 84 NSWLR 263 at 285 [96]. The operation of the legislative regime relating to management of a protected estate in NSW is informed, and supplemented, by general law principles derived from the Court's inherent (parens patriae) jurisdiction, chief amongst which is the principle that, in administration of a protected estate, the paramount consideration is the welfare of the*

protected person: Holt v Protective Commissioner (1993) 31 NSWLR 227 at 238B-D and 241G-242A.

5. Similarly, in *Re Application for Partial Management Orders* [2014] NSWSC 1468 Lindsay J stated at [11]:

> *One needs to bear in mind, also, the importance attributed, by s 39 of the NSW Trustee and Guardian Act 2009, to the autonomy of a protected person and his or her family in management of a protected estate. Section 39 reflects the concern of the Court's protective jurisdiction to place at centre stage the best interests of a protected person, and to test all decisions against what may be of benefit to him or her: Holt v Protective Commissioner (1993) 31 NSWLR 227 at 238 and 241; RL v NSW Trustee and Guardian (2012) 84 NSWLR 263 at 285(96).*

6. The Draft Proposals suggest a subtle change in emphasis away from the 'best interests' of the protected person towards the 'expressed will' of the protected person. This is made clear in Proposal 1.11, which is in the following terms:

> The new Act should state that anyone exercising functions under it should approach the task of giving effect to a person's will and preferences wherever possible, as follows:
>
> (a) First, to be guided by the person's expressed will and preferences (including a valid advance care directive) wherever possible.
> (b) If these cannot be determined, to be guided by the person's likely will and preferences. These may be determined by the person's previously expressed will and preferences, and by consulting people who have a genuine and ongoing relationship with the person and who may be or have been aware of the person's will and preferences.
> (c) If these too cannot be determined, to make decisions that promote the person's personal and social wellbeing.
> (d) If giving effect to a person's will and preferences creates an unacceptable risk to the person (including the risk of criminal or civil liability), to make decisions that promote the person's personal and social wellbeing.
> (e) Regardless, a person's decision to refuse healthcare in an advance care directive must be respected if that refusal is clear and extends to the situation at hand.

7. These governing principles are a departure from the present position under s. 39 of the *NSW Trustee and Guardian Act 2009* and sit uncomfortably with the Court's *parens patriae* jurisdiction (which it is not proposed to limit – see Proposal 1.17). This is because the primary principle that governs the Court's *parens patriae* jurisdiction is that whatever is done or not done, the Court is guided by what is in the "best interests" of the protected person (although that can also include consideration of what a person would do if they had the requisite capacity). The strength of the jurisdiction is that the Court can do whatever is necessary and in the interests of the protected person – the common law jurisdiction is

virtually unlimited: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)*; (1992) 175 CLR 218; *X v Sydney Children* Hospital [2013] NSWCA 320 at [31]-[38]; *Application of a Local Health District; Re a Patient Fay* [2016] NSWSC 624 at [21]-[23].

8. It follows, therefore, that if a person's express will and preferences differ from what the Court determines is in their best interests, a situation may arise whereby the statutory framework would require a certain decision to be made, but a quite different decision might be appropriate in accordance with the Court's inherent jurisdiction. This tension is problematic in a legal sense because, where the Court's inherent jurisdiction has been preserved by statute (as is proposed here), the Court's statutory jurisdiction has generally been construed as operating along similar lines: *Re M and the Protected Estates Act 1983* [2003] NSWSC 344 at [7].

9. The proposed change in emphasis away from 'best interests' towards 'expressed will' may also have unintended, but important, practical consequences. A situation that commonly arises is where a protected person is faced with the inevitability of leaving their home and going into care. Practical experience teaches that it is common for people (whether with capacity or without) to express a strong desire to stay in their home, and not go into care at all. Sadly, this is frequently not viable when a person reaches a level of frailty or cognitive decline and to comply with that instruction could be detrimental to the person's health. The decision by an Enduring Guardian or a Guardian to exercise an accommodation power to enable a person to move from their home to a care facility may be a decision that the person going into care does not support, notwithstanding that it may be entirely the right one.

10. It is suggested in the Draft Proposals that the 'best interests' test "... is widely seen as paternalistic". That is no doubt correct. However, it is an unavoidable consequence of the Court's protective jurisdiction. *Parens patriae* literally translates to "parent of the nation". Problems with perceptions about autonomy and dignity of the individual are mitigated by a close examination of the current statutory framework. Consideration of a protected person's expressed will and preference remains critically important. Persons must take into account the protected person's welfare, their social welfare, protection of their assets, and consideration as to what they would have done if they had the requisite capacity. A decision maker can and must assess all of these things when coming to a decision. Section 39 (b) and (d) of the *NSW Trustee and Guardian Act 2009* respectively enshrine freedom of decision and the views of protected persons. It may be that some articulation of these elements could be the subject of law reform so that attorneys, guardians and managers can take into account all possible and relevant factors (including wishes expressed, with appropriate support).

11. At a broader level, and in the context of greater awareness of elder abuse, there is a concern that a change in emphasis from the 'best interests' to the 'expressed will' of the protected person may, inadvertently, provide reasons or justifications to misappropriate or mishandle a protected person's estate. By way of example:

a) A child and representative of a represented person could point to historical financial support from the represented person to justify personal gifts of money to either themselves or friends;
b) A representative may point to the existing will of a represented person to justify an *inter vivos* gift or disposition of personal or real property;
c) A representative may make personal gifts to him or herself that the represented person's estate cannot afford, on the basis that the represented person, when they had the requisite capacity, had made gifts or payments in the past.

12. In the above examples, the protected person's expressed wishes, or likely wishes, or purported likely wishes (evidence or accounts of which might conceivably be given by persons interested in the protected person's estate) could have significant negative ramifications for the protected person. One can easily foresee a scenario where a person who stands to benefit from a represented person's estate could provide an account of their earlier expressed wishes that is beneficial to that person. However, putting aside the possibility of 'elder abuse', the "best interests" approach itself, by requiring a contemporaneous consideration of the circumstances of the protected person, mitigates against the risk that a decision maker will lawfully make decisions that will be harmful or detrimental to that person. This is in contrast to an examination of a person's 'likely wishes', which by definition must have an historical element. A person's 'likely wishes' must be determined, at least in part, from their historical conduct. That past conduct may not accord with the reality of the person's current circumstances. Decisions made on the basis of expressed or past intentions that do not accord with the current reality have the potential to lead to negative outcomes.

Expansion of jurisdiction of the District Court

13. The Draft Proposal observes that, under the law as it presently stands, "…if someone wants to make a claim or take action against an appointed decision-maker for abuse or misuse of power or failure to perform their duties, they have to go to the Supreme Court". Proposal 10.1 seeks to provide a simpler and cheaper option by giving the District Court the jurisdiction to hear such matters. The proposal is as follows:

> **10.1 Causes of action**
> The new Act should provide that the District Court has jurisdiction in relation to any cause of action, or claim for equitable relief that is available against a supporter or representative in the Supreme Court for abuse or misuse of power or failure to perform duties, and has the power to order any remedy available in the Supreme Court.

14. For the following reasons, it is preferable for the Supreme Court to retain exclusive jurisdiction in relation to the matters referred to in Proposal 10.1:

a) The Supreme Court of NSW has exclusive probate jurisdiction. Increasingly, the probate and protective jurisdictions are intermingled or administered concurrently.

The probate and protective lists are managed by one judge. Statutory will applications for example (s 18 of the *Succession Act 2006* (NSW)) involve an exercise of both probate and protective jurisdictions. Practically, questions of capacity in cases involving whether a power of attorney was validly made or whether an attorney has misappropriated funds bleed into questions about capacity and will making.

b) It is not uncommon, in a testamentary capacity or knowledge and approval suit, for alternative relief to be sought against an attorney for an account, breach of trust, or a declaration that the deceased person did not have the power to execute a power of attorney and seeking compensation from the attorney to the estate of the deceased person (this situation often arises because a suite of documents, including powers of attorney, wills and enduring guardianships, are often prepared as part of one "estate planning" retainer, and if a will is challenged, so too the power of attorney).

c) The District Court will not have available to it recourse to the Court's parens patriae jurisdiction which is exercised exclusively through the Supreme Court as a prerogative power. Whilst the circumstances in which the Supreme Court needs to have recourse to the jurisdiction is not common, it does give the Court broad and flexible powers to mould relief to best suit the circumstances of a protected person. A common factual scenario is as follows: Proceedings are commenced by a protected person's child (A) against the partner (B) of a person whose capacity to manage her own affairs was disputed (C). A sought a declaration that a power of attorney executed by C to B was invalid due to a lack of capacity. She also sought orders that B repay money to A that B said C had gifted her. The proceedings settled between the parties. Such settlements require the approval of the court as the protective jurisdiction is not a consent jurisdiction, and one of the parties did not have capacity. The Court appointed two joint third party financial managers by consent, and also appointed a Protected Estate Committee (an office not recognised by statute) comprising B and the third party financial managers, with particular powers in relation to A's affairs. Particularly, the parties agreed that B, who lived with C, would not be appointed as Guardian under the legislation because the parties did not wish for B to be involved in any accommodation decisions (B was living with C).

By way of further example, In *IR v AR* [2015] NSWSC 1187, the Court appointed the Public Guardian as a Protected Estate Committee (a historical common law office) to supplement a Guardianship Order to enable the Public Guardian to authorise arrangements for the protected person's travel overseas (which arrangements could not be facilitated in conformity with the provisions of the *Guardianship Act 1987* (NSW)) and to bring parties who might disrupt the arrangements within the Supreme Court's contempt jurisdiction. A Protected Estate Committee was also appointed in *JMK v RDC and PTO v WDO* [2013] NSW1362.

These examples demonstrate the sort of relief (appointment of a financial manager as a resolution to proceedings commenced against an attorney, or appointment of a

person in a common law office under the inherent jurisdiction) that the District Court cannot grant.

d) District Court Proceedings are not necessarily cheaper, simpler or faster than Supreme Court proceedings. There is no particular reason why that should be so. Proceedings conducted discretely by parties, with identified issues, can and are readily accommodated by the Supreme Court. The Supreme Court is able to hear urgent applications. It can grant a broad range of relief including having recourse to the Court's inherent jurisdiction. It is in a position to consider and grant ancillary relief and hear associated applications, including consideration of remuneration of a financial manager (*Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245). The current law also allows for a manager to seek the direction of the Supreme Court of NSW: AC v OC (a minor) [2014] NSWSC 53 [67] – [68]. To the extent that a protected person's estate includes interests in a trust (or in some circumstances, consideration is given as to whether a trust is a preferable way of managing a protected person's property), The Supreme Court can give advice to, or make orders relating to, trust property.

16 February 2018