To: NSW Law Reform Commission

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NSW LAW REFORM COMMISSION
REVIEW OF GUARDIANSHIP ACT 2009 (NSW)

When the CRPD was formulated, its purpose was to restructure guardianship laws throughout the world. Instead of the paternalistic model of guardianship, the CRPD's model recognised that all people have the right to make decisions and choices about their own lives and that human rights abuses are facilitated and not prevented by guardianship. The paternalistic model not only stripped disabled persons of their legal capacity in all matters related to their finance and property but also deprived them of all their freedoms and any procedural safeguards preventing plenary guardianship.

When the United Nations ratified the Convention in 2008 and, Australia became a signatory shortly thereafter, clear warnings were given to all signatories that if the Principles and Guidelines of that document were not legally enforceable by statute, then the UNCRPD would simply become a meaningless paper victory.

Unfortunately, Australia ignored those warnings and adopted a policy of wilful blindness which allowed the Guardianship Act to be misused and abused by the very organisations that were mandated to protect society's most vulnerable. It has failed the disabled by not implementing -

a) legislation by statute of the Principles and Guidelines of the CRPD thus ensuring that the interplay between guardianship laws and international human rights law was taken seriously;
b) by not ensuring the availability and presence of dedicated and committed Counsel to provide representation to people with disabilities to hear disability rights cases involving violations of the CRPD; and
c) failed to provide supports in the form of alternative non-institutional guardians.

By not heeding those warnings, guardianship laws in NSW and, nationally, have served only to facilitate human rights abuses against disabled persons not only by The Guardianship Tribunal, Public Guardian and Public Trustee but also by other perpetrators who use the flawed operations of the Guardianship Tribunal to achieve their agendas.

I am completing this Questionnaire in great hope that the NSW Law Reform Commission will actually acknowledge how badly the current guardianship laws impact on people's lives and focus on law reforms that will positively impact on the emotional life and psychological well being of people with disabilities including their financial affairs. Law on the books is not law in practice because whilst the Act incorporates some principles to promote a person's autonomy, there is clear evidence that these principles are not incorporated in any of the practices of the Guardianship Tribunal, Public Guardian and Public Trustee.

Question Paper 1:

Q. 1.12 **Current preconditions for alternative decision-making arrangements in NSW**

A. 1.12 Cognitive impairment and other disabilities are the current preconditions for alternative decision-making arrangements in NSW and nationally. This is inherently wrong as it assumes that a person who may be capable of exercising autonomous decision making in one aspect of life is incapable of exercising such decision making in all aspects of life. The law must recognise that persons with disabilities are persons before the law, having legal personality and legal capacity in all aspects of life, on an equal basis with others.

I do not believe the Law Reform Commission should either attempt or suggest that the law can address or describe every aspect of capacity or level of disability, as a guideline for the Guardianship Tribunal and its cohorts. "Capacity " must not be a precondition or the driving force in making guardianship orders.

1.13 **Substitute decision making**

No Tribunal member is equipped or expert in evaluating disabilities, cognitive or otherwise in any case that comes before them. How can any panel member make or be expected to make a credible evaluation of such matters within such a short time frame of the hearing? More particularly, without the appropriate expertise, and without any intimate knowledge of the person, their culture and background, medical histories and their day to day behaviours, such an evaluation is not possible; nor is it appropriate that a Tribunal has the legal right to place a person under plenary guardianship simply because of their disability.

In my opinion, the NSW Law Reform Commission is asking the wrong questions in regard to "substitute decision making". Substitute decision making should not ever apply to anyone but, rather, the question should be – what supports can be offered to a disabled person to help them make decisions for themselves? Or, in the case of parents of a severely disabled child/adult, what supports and protections will be available to their child/person and themselves as carers to protect them if they are the subject of abuse, violence or neglect OR what services or supports are available to the disabled person, if and when the parents or informal caretakers die?

1.14 **UNCRP**

The UNCRPD has always maintained the right of the disabled person to live a life free from restrictions and with a freedom to enjoy their basic human rights. The UN model recognised that cognitive impairment ebbs and flows – yet our guardianship laws do not. Such omission gives the statutory bodies the freedom to ignore this important fact and use cognitive impairment or any other disability as a precondition on which to base a decision for plenary guardianship. As stated above, without legislation, the Principles and Guidelines of the UNCRPD serve only as lip service for the organisations which constantly abuse and breach the human rights of the disabled person who is unfortunate enough to come before the Tribunal and under the control of the Public Guardian and Public Trustee.

The NSW Law Reform Commission has acknowledged and states in its Easy English Paper "….*every person is different and so is every situation*". How then can fairness or justice be provided to a disabled person, their families, carers etc. when each of the above entities adopt a tick the box, cookie cutter mentality of -

1.	***disabled, at any level***	**–**	***put them under plenary guardianship***
2.	***family conflict***	-	***put them under plenary guardianship***
3.	***family home***	-	***sell it no matter what, and put them in a facility***
4.	***lifestyle***	-	***give them the minimum to live on – they don't need much***
5.	***health needs***	-	***not important - keep the money in the Public Trustee's coffers***
6.	***family views, concerns***	-	***they are just an irritant – ignore them – we are in control***
7.	***preferences and wishes***	-	***pay lip service and ignore – we know best - we are in control***
8.	***communication***	-	***not important, don't reply to calls, correspondence etc. instead, send message back at 3pm on Friday when we leave the office for extended rostered days off – eventually they will give up and leave us alone.***
9.	***access arrangements***	-	***too bad if the protected person is too ill to go out, does not wish to see a particular person , prefers to stay home on that day or has information that the protected person is being abused – this is the schedule stick to it – not our role to investigate abuse or what is best for the protected person***
10.	***complaints, reviews,NCAT***	-	***who cares, we nearly always win anyway and we charge the estate for our legal fees; we can say what we want and our views are rarely challenged and we know how to slip in or remove file notes just in case someone checks – no one can punish us. We have the funds and a legal team to fight – they do not.***

1.15 **What decision making model should NSW adopt? Leaving this question open for now.**

My early response is that NSW (and nationally) should adopt the UNCRPD model and incorporate all rights under the Convention into domestic law. **Remove substitute decision making in its entirety.** Compulsory mediations conducted by independent, professional and expertly trained mediators (which would be available to all disabled persons if a Public Advocacy Centre was already established) should be the first step before any application is made to the Tribunal.

If the NSW Law Reform Commission does not outline a **detailed and viable framework** for supported decision making in the exercise of legal capacity, there is no doubt in my mind that the Tribunal, Public Guardian & Public Trustee will retain (by stealth) the draconian substitute decision-making practices they employ and continue to violate and deny a person's basic human rights.

I would urge the Law Reform Commission to engage in a conference or other effective mechanism specifically for individual stakeholders (disabled persons, their families, carers, personal private advocates etc.) so that they can have a meaningful participation in the development and implementation of legislation and policies regarding guardianship laws. It is these stakeholders who are at the coalface of guardianship orders and who have lived experiences of the devastating effect those orders have on their own lives and, in particular, the protected person.

These individuals do not have any vested interest in such participation other than to seek law reforms that will actually assist and protect the people they care for. Statutory bodies, service providers and organisations have other agendas including the retention of the status quo, empire building and protecting their pay packets.

Very few individuals have knowledge of this Inquiry or if they do, are unable or unwilling to put pen to paper because of their frustration, anger and despair and deep sense of futility of dealing with a system that beats them down on every level. Inquiries of this type should have wide media coverage and be promoted in the general public arena in order to obtain a more balanced number of

submissions from persons under guardianship who have lived under the "prisoner/jailer" regime of the NSW Guardianship Act.

Further, I believe that stakeholders would adopt a more positive approach to these Inquiries if a private conference or meeting specifically convened for these stakeholders. This would go a long way towards getting the policies right – target them instead of the bureaucrats who generally have no idea of what it means to be disabled, a family carer, supporter or concerned friend and have not experienced the soul destroying effect on the lives of those subject to the restrictions and human rights breaches of guardianship orders. Never has the saying "walk a mile in my shoes " been more appropriate than in the case of a person under plenary guardianship. No one would believe what is happening under guardianship laws unless it was actually happening to them.

1.16 Chapter 2 **What must happen before alternative decision making arrangements can be made in NSW?**

As outlined above, I do not believe that substitute decision making should form any part of guardianship law reform – it should be entirely removed from the Act.

Whilst it is not clear to me what , "Alternative Decision Making" means from the NSW Law Reform Commission's perspective but, presumably, it means providing a support mechanism to the disabled person in need of support at different times, of different types and at different levels. However, without a clear articulation of what those intended supports are and how they will be delivered, it is very difficult to form a considered assessment and opinion as to it value, practicality and viability.

The Guardianship Tribunal should only become involved when exhaustive enquiries have proven that the disabled person has **no support network whatsoever and is need of urgent support, and only then, as a case of** a**bsolute last resort, should a support decision maker be appointed but only on a temporary and trial basis.**

I do not believe that guardianship laws should control the freedoms of any person . Rather, supports should be made available when required and offered on a renewable or removable basis, as and when the disabled person/family/carers etc. choose. The supports should only be activated as a response system to a request for supports. The archaic and far reaching paternalism system of yesteryear which, regretfully, is still utilised in the current guardianship regime, has no place nor should it be tolerated in today's civil society. The entire system needs to be restructured.

1.16 Chapter 3 **The question of "capacity" which is central to the current NSW law.**

The term "**capacity**" of itself should not have any significance nor the basis upon which alternative decision making arrangements are made. As outlined above, it is a fluid condition and all available avenues should be canvassed for provision of suitable levels of support which reduces risks and assists the disabled person to meet their needs.

The current laws allows a very broad range of causal factors and a very high degree of subjective interpretation of "capacity", "impairment" or decision making ability" which largely results in the person being placed under plenary guardianship. The onus is then on the protected person to PROVE otherwise. This is inconsistent with Article 12 of the UNCRPD and allows the Guardianship Tribunal, Public Guardian and Public Trustee to strip persons of their freedoms, natural justice and basic human rights.

It should not be the role of the Tribunal or anyone else for that matter to make decisions on the quantitative and qualitative manner in which disabled persons lives their lives. **The medical model of "condition" and "illness" which relies on personal interpretations and assumptions of disability, by Guardianship Tribunals and its cohorts, in the legislation, should be totally removed. It should be replaced by the social model of disability as used by the UNCRPD which essentially states that everyone is to be treated equally under the law and has the right to freedom from discrimination on the grounds of disability.**

Further, and of great importance, is the fact that a family member who is the key care has no legal standing with regard to the protected person. This must change and legal status must be implemented in law reforms. Powers of Attorneys are almost always set aside by Guardianship Tribunals so some form of legal recognition of the family carer is required. **Article 19 of the UNCRPD is consistently**

abused by the Tribunal and its cohorts obliging the protected person because of "capacity" diminished or otherwise to be removed from the home and placed into an institution when it is unwarranted and against the protected person's wishes and the wishes of the family/carers etc.

This is just a cash grab by the Public Trustee to sell the person's home, receive a handsome commission and charge exorbitant fees for doing very little, and poorly at that.

Unless an independent People's Advocacy Centre, with full legal authority and investigative powers is established then the disabled person, their families, carers etc. will continue to have NOWHERE to go to lodge a complaint and receive the help and advice they need to remove them from an unsatisfactory situation. All the good will and law reform in the world will not help unless there is an organisation they can to turn to for help that is not a toothless tiger, a cohort of the guardianship regime or any other organisation UNLESS it has the legal and juridical authority to right those wrongs - **please do not recommend or direct us** to NCAT, TARS the Complaints Unit , Ombudsman or the Supreme Court in a futile attempt to do so!!

1.16 Chapter 4 **What <u>other</u> preconditions must be satisfied before an order can be made or arrangements entered into force?**

None – see responses above.

1.16 Chapter 5 **What factors, considerations, principles or guidelines should a Court or Tribunal take into account when deciding whether to make a particular order?**

The UNCRPD provides an excellent blueprint for the authorities to follow. Unfortunately, the way the guardianship laws are written and the largess given to the Tribunal and its cohorts, none of the Principles and Guidelines of that instrument are actually adhered to by these government bodies and, in fact, have become meaningless – despite the lip service given to those Principles and Guidelines and conveniently quoted by these entities to justify their Reasons for Decisions.

From the outset, red flags were raised by the UN and concerned others involved with legislative reform, that if Australia did not incorporate by statute, those Principles and Guidelines, then human rights abuses and violations against disabled people would occur. Unfortunately, they were right.

In summary, unless a Court or Tribunal is mandated to adopt Article 12 of the UNCRPD, and the legislators remove the existing guardianship laws which are incompatible with that Article as clarified by the UN Committee in its 2014 General Comment, Australia will continue to compound the abuses against disabled persons rather than negate it.

Guardianship Tribunals do not respect the meaning of "last resort" ; instead they use it as a default position to place almost everyone with any disability, who comes before it, under plenary guardianship. "Australia's "interpretive" declarations of Articles 12, 17 and 18 of the Convention are just another example of a Government that is toying with people's lives and does not wish to right the wrongs of current guardianship laws and protect its most marginalised and vulnerable citizens.

Australia should adopt the UNCRPD in its <u>entirety</u> and restore the right to natural justice and human rights of our society's most vulnerable. All the groundwork has <u>already been done by</u> the worlds most prominent human rights advocates and highly experienced and respected legal minds – why try and reinvent the wheel?

Incorporation of the UNCRPD into the law reforms and attendant legislation have been a long time coming and they should be implemented NOW.

One of the most important things the Australian Law Reform Commission and legislators can do, apart from incorporating into law the Articles of the UNCRPD, is also making sure that legal penalty and punishment is included in the Guardianship Laws against those, including all public servants, who abuse and breach those those laws.
