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Mr Alan Cameron AO
Chairperson
New South Wales Law Reform Commission
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12 May 2017

Dear Mr Cameron,

The NSW Civil and Administrative Tribunal ('the Tribunal') welcomes the opportunity to provide a response to the fifth question paper issued by the New South Wales Law Reform Commission in its review of the *Guardianship Act 1987* (NSW).

Question Paper 5 addresses the issue of 'Medical and dental treatment and restrictive practices'. As the Tribunal is an independent body which exercises a range of judicial or quasi-judicial functions under the *Civil and Administrative Tribunal Act 2013* (NSW) ('CAT Act') and the *Guardianship Act*, we do not propose to comment on matters of policy. Accordingly, we have sought to limit our comments, where relevant, to the operation of the current legislative scheme and potential implications for the functioning and resourcing of the Tribunal in relation to certain proposals for legislative reform.

The Tribunal has focused its comments on the discussion:

- concerning the definition of capacity (Question 2.1 at [2.1]-[2.7]);
- withholding or stopping life-sustaining treatment (Question 3.1 at [3.7]-[3.19]);
- whether the definition of medical and dental treatment under Part 5 of the *Guardianship Act* should include treatment by a registered health practitioner (Questions 3.3 at [3.25]-[3.27]);
- concerning special treatment, supported decision-making for medical and dental treatment and consent to sterilisation (Questions 4.1, 4.9, 4.10, 4.11, 4.12, at [4.5]-[4.12] and [4.39]-[4.58]);
- waiver of clinical trial consent provisions (Question 5.7 at [5.28]-[5.29]);
- concerning the relationship between the *Guardianship Act* and mental health legislation (Questions 6.1, 6.2, 6.3 at [6.1]-[6.17]);
- concerning the regulation of restrictive practices (Questions 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.7, 7.8 at [7.1]-[7.50]).

Question 2.1: "Incapable of giving consent"

(1) **Is the definition of a person "incapable of giving consent to the carrying out of medical or dental treatment" in s 33(2) of the Guardianship Act 1987 (NSW) appropriate? If not, what should the definition be?**

(2) **Should the definition used to determine if someone is capable of consenting to medical or dental treatment align with the definitions of capacity and incapacity found elsewhere in the Guardianship Act 1987 (NSW)? If so, how could we achieve this?**

Question Paper 5 raises for discussion (at [2.1]-[2.7]), whether the different definitions of capacity and incapacity in the *Guardianship Act* are confusing and whether one single definition should be adopted, or whether, in the context of medical and dental treatment, the term "incapable of giving consent" needs its own definition.

Whether or not the definition for incapacity in relation to medical and dental treatment should be changed is a matter of policy. However, it is important to note the context within which s 33(2) and Part 5 of the *Guardianship Act* operates which includes the *parens patriae* jurisdiction of the Supreme Court.

The provisions of the *Guardianship Act* dealing with incapability in ss 33(2) and 34 are consistent with Supreme Court authority in relation to the common law understanding of capacity including *Hunter and New England Area Health Service v A* [2009] NSWSC 761 and *Re JS* [2014] NSWSC 302. These authorities adopt formulations of the common law test outlined in a number of UK decisions including *Re MB* [1997] 2 FCR 514 (see, in particular, 553-554) and *In re T (Adult: Refusal of Treatment)* [1993] Fam 95.

As noted in a recent decision of the Tribunal (*UMG* [2015] NSWCATGD 54, [146]):

> The section 4 principles are a "statutory expression of the purposive character of the Court's inherent (parens patriae) protective jurisdiction" (*C v W* [2015] NSWSC 1774 at [90]). Given that Supreme Court's inherent protective jurisdiction and the statutory jurisdiction exercised by NCAT when exercising functions allocated to the Guardianship Division "are both seeking to serve the same end" (*FI v Public Guardian* [2008] NSWADT 263 at [49] (O'Connor K – DCJ (President)), it would be an unworkable situation for those proposing to undertake medical or dental treatment on adults in NSW if the provisions of Part 5 of the Guardianship Act required the application of a different test to the common law when assessing whether a person is incapable of consenting to such treatment.

We note, therefore, that if any steps are proposed to be taken to align the definition of capacity in Part 5 with other definitions in the *Guardianship Act*, careful regard should be had to the common law understanding of the capacity required to consent to treatment, so as to ensure a workable situation for those proposing to undertake medical or dental treatment on adults in NSW.

Question 3.1: Withholding or stopping life-sustaining treatment

(1) Should Part 5 of the Guardianship Act 1987 (NSW) state who, if anyone, can consent to withholding or stopping life-sustaining treatment for someone without decision-making capacity?
(2) If so, who should be able to consent and in what circumstances?

In the Tribunal's respectful view, it is necessary to clarify some aspects of the discussion in [3.7] to [3.19] of the Question Paper in relation to the withholding or stopping of life-sustaining treatment and to place the provisions of Part 5, and other provisions of the *Guardianship Act*, in context of the common law when it comes to decision-making in this area of a person's life.

In the end stages of a person's life, very difficult decisions may arise concerning whether or not to continue life-sustaining treatment. The withdrawal of treatment may be considered necessary where further treatment is either invasive or futile. The person's treating team might consider that palliative care is the most appropriate form of care for a person nearing the end of his or her life.

As a starting point, there is a common law presumption that an adult has capacity to consent or to refuse medical treatment unless and until that presumption is rebutted.[1]

There also exists a principle of futility of treatment that provides that:

- there is no general duty on a doctor to provide treatment that he or she considers to be futile; and
- consent is not required from the patient, a substitute decision-maker or an authorisation from the courts to withhold or withdraw treatment that is considered futile.[2]

Accordingly, applications are often made to the Court or to the Tribunal where there is dispute over the patient's capacity to consent or withhold consent, where a family member disagrees with a medical practitioner's assessment of futility or there is other conflict (for example, between family members) in relation to the end of life decision-making. The Supreme Court of NSW can also make decisions for adults in its *parens patriae* jurisdiction.[3]

The existence of an advance care directive or advance care plan that is disputed may also give rise to an application being made to the Tribunal or to the Court. The Tribunal has no jurisdiction to review or make declarations in relation to advance care directives but the content of an advanced care directive may be relevant to an assessment of the views of the person to whom the directive relates.

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[1] *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88 at [23].
[2] Willmott L, White B and Downie, J 'Withholding and withdrawal of "futile" life-sustaining treatment: Unilateral medical decision-making in Australia and New Zealand' (2013) 20 JLM 907 at 914.
[3] *Northridge v Central Sydney Area Health Service* (2000) 50 NSWLR 549 at [15]-[24].

Although the regime exists, under Part 5 of the *Guardianship Act,* for a person responsible to provide lawful substitute consent for the carrying out of certain medical or dental treatment (without needing to be appointed by the Tribunal as a guardian), this is directed to proactive medical interventions only. This was the view adopted by Judge O'Connor, the then President of the Administrative Decisions Tribunal in 2008 in the decision of *FI v Public Guardian* [2008] NSW ADT 263 at [40]. It was not, as is suggested in the Question Paper at [3.13], a decision of the Guardianship Tribunal and therefore not "yet another approach" taken by the Tribunal.

The *FI* decision confirms that a person responsible is not authorised to make decisions about the withdrawal, cessation or non-provision of life-sustaining treatment. Even in circumstances where a guardian is appointed under the *Guardianship Act* with a medical and dental consent function, but without a health care function, the guardian (as a person responsible under s 33A(4)(a) of the *Guardianship Act*) does not have the authority under the medical consent function alone to decide to withdraw life-sustaining treatment for the person under guardianship. The Tribunal exercising functions under Part 5 of the *Guardianship Act* is similarly limited to decision making about proactive medical procedures.

However, a guardian appointed under Part 3 of the *Guardianship Act* with a health care function does have the authority to make decisions in connection with health care that include decisions to withdraw life-sustaining treatment (*FI v Public Guardian* [2008] NSW ADT 263 at [51]). A decision to withdraw life-sustaining treatment must be made in accordance with the best interests of the protected person in the circumstances (*FI v Public Guardian* [2008] NSW ADT 263 at [53]). This judgment must be informed by having regard to whatever is known about the likely wishes of the protected person in the situation, reasonable medical opinion as to what is appropriate and the views of the family (including best friends and the like) (*FI v Public Guardian* [2008] NSW ADT 263 at [53]).

The *FI* decision remains the leading authority in NSW in relation to this aspect of Part 5 of the *Guardianship Act*. Any proposal to enable person's responsible to consent to the withdrawal of life sustaining treatment would, it would seem, need to consider the basis for the decision in *FI* including the objects provisions of Part 5.

Question 3.3: Treatment by registered health practitioner

Should the definition of medical and dental treatment in Part 5 of the Guardianship Act 1987 (NSW) include treatment by a registered health practitioner?

Any proposal to expand the definition of "medical and dental treatment" to include treatment by a range of registered health practitioners would involve a significant policy and practice change and would warrant broad community consultation. If such changes were to be introduced then the Tribunal would expect that it would result in significant additional workload as additional treatments requiring substitute consent would be captured by Part 5. If a person responsible were not available, then, assuming the current decision-making regime under Part 5 was unchanged, substitute consent for the treatment would be sought directly from the Tribunal (*Guardianship Act*, s 36(1)(b)).

Question 4.1: Special treatment

We note that a number of questions are posed in relation to the issue of special medical treatment that are matters of policy and do not propose to address them. However, in order to assist the Commission, the manner in which the former Guardianship Tribunal and the Guardianship Division of the Tribunal has considered these provisions is set out in a number of reported decisions as outlined below:

Test under s 45(2) of the Guardianship Act

Section 45(2) provides that the Tribunal cannot consent to special medical treatment unless the treatment is necessary:

(a) to save the patient's life; or
(b) to prevent serious damage to the patient's health;

This test applies to special medical treatment as defined by paragraphs (a) and (c) of the definition of special medical treatment in s 33(1).

The special treatment to which the test contained in s 45(2) applies is:

- treatment intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out (s 33(a) of the definition of special treatment);
- treatment carried out for the purposes of terminating a pregnancy (cl 9(a) of the Guardianship Regulation 2016 (NSW) (the Regulation));
- treatment in the nature of a vasectomy or tubal occlusion (cl 9(b) of the Regulation);
- treatment that involves the use of an aversive stimulus, whether mechanical, chemical, physical or otherwise (cl 9(c) of the Regulation).

In *XTV* [2012] NSWGT (6 February 2012) the Tribunal considered an application for consent to an endometrial ablation for a 22-year-old woman with Down's syndrome and a severe intellectual disability. The Tribunal discusses the relevant legal principles [25]–[50] and the differences between the common law developed by the Family Court and the Supreme Court and the jurisdiction of the Guardianship Tribunal under Part 5 of the *Guardianship Act*. Unlike the common law, the test for consent to a sterilisation procedure under the *Guardianship Act* does not involve considerations of best interests. The test in s 45(3) has been described by the courts as "particularly stringent" when compared with the common law [44]. Consent was refused.

Other cases include:

PYR [2012] NSWGT 30 – application for consent to endometrial ablation combined with tubal obstruction under general anaesthetic – 21 year-old-woman – whether the proposed treatment was necessary to prevent serious damage to health – whether alternate treatments more appropriate - application dismissed

LDS [2012] NSWGT 9 – Application for consent to a hysterectomy with conservation of ovaries – 46-year-old woman – moderate intellectual disability – uterine fibrosis

causing heavy bleeding and pain – anaemia – consent granted.

WAK [2010] NSWGT 25 – Application for consent to special medical treatment – hysterectomy – post-operative radiation treatment – capacity to give informed consent – chronic schizophrenia – most appropriate form of treatment to promote and maintain subject person's health and well-being – whether treatment necessary to save subject person's life or prevent serious damage to subject person's health – consent given.

UMG [2015] NSWCATGD 54 (11 December 2015) – Application for consent to total hysterectomy and bilateral oophorectomy – whether the person is 'incapable of giving consent to the carrying out of medical or dental treatment' – s 34(1)(b) of the Guardianship Act – whether the person 'is capable of understanding the nature and effect of the proposed treatment' – s 33(2)(a) of the Guardianship Act – presumption of capacity – Part 5 does not apply – application dismissed.

OBD [2016] NSWCATGD 58 – Application for consent to special medical treatment – endometrial ablation – 25-year-old woman – severe intellectual disability – whether the proposed treatment is "special medical treatment" – meaning of "permanently infertile" – whether the treatment is the most appropriate form of treatment to promote health and wellbeing – whether treatment is necessary to save patient's life or prevent serious damage to health – application dismissed

QMI [2016] NSWCATGD 59 – Application for consent to special medical treatment – abdominal hysterectomy – 20-year-old woman – severe intellectual disability – whether the treatment is the most appropriate form of treatment to promote health and wellbeing – whether treatment is necessary to prevent serious damage to health – alternative treatment has failed, or is not likely to be effective or suitable – consent given

NKI [2015] NSWCATGD 59 - Application for consent to special medical treatment – abdominal hysterectomy and bilateral salpingectomy – 26-year-old woman – severe intellectual disability – alternative treatment has failed, or is not likely to be effective or suitable – whether the treatment is the most appropriate form of treatment to promote and maintain health and wellbeing – whether treatment is necessary to prevent serious damage to health – consent given

UFH [2015] NSWCATGD 58 – application for consent to special medical treatment – laparoscopic hysterectomy and bilateral salpingectomy – 32-year-old woman – mild intellectual disability – whether the person is 'incapable of giving consent to the carrying out of medical or dental treatment' – section 34(1)(b) of the Guardianship Act 1987 (NSW) – whether the person 'is incapable of understanding the general nature and effect of the proposed treatment' – section 33(2)(a) of the Guardianship Act 1987 (NSW) – presumption of capacity – application dismissed
GUARDIANSHIP – review of guardianship order – previous finding of partial incapacity – no need for appointment of a guardian to make decisions – guardianship order not renewed

Test under s 45(3) of the Guardianship Act

Section 45(3) provides that the Tribunal may give consent to certain special treatment if it is satisfied that:

(c) the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient; and
(d) in so far as the National Health and Medical Research Council has prescribed guidelines that are relevant to the carrying out of that treatment – those guidelines have been or will be complied with as regards the patient.

Section 45(3) applies to special medical treatment defined in paragraph (b) of the definition of special medical treatment in s 33 and treatment prescribed in cl 10 of the Regulation for the purpose of the provision: s 45(3)(b).

The special treatment to which the test contained in s 45(3) applies is:

- a new treatment that has not yet gained the support of a substantial number of medical or dental practitioners specialising in the area of practice concerned (s 33(1)(b) of the definition of special treatment);
- involves the administration of one or more restricted substances for the purpose of affecting the central nervous system, but only if the dosage levels, combinations or the numbers of restricted substances used or the duration of the treatment are outside the accepted mode of treatment for such a patient (cl 10(a) of the Regulation);
- involves the use of androgen reducing medication for the purpose of behavioural control (cl 10(b) of the Regulation).

ATN [2012] NSWGT 22 (16 October 2012) – Application for consent to special medical treatment – male – intellectual disability – Androcur and Depo-Provera – medication used to control sexually aggressive behaviour – consent granted – guardian conferred authority to continue consent to special medical treatment.

SKX [2010] NSWGT 19 (1 December 2010) – Application for consent to special medical treatment – administration of androgen reducing medication – Androcur – whether special medical treatment is the only or most appropriate way of treating subject person – whether special medical treatment is manifestly in the subject person's best interests – Tribunal not satisfied criteria was met – application dismissed.

DKD [2016] NSWCATGD 57 - application for consent to special medical treatment – Androcur (cyproterone acetate) – 32-year-old man – moderately severe intellectual disability – most appropriate form of treatment to promote and maintain subject person's health and well-being – consent given

It may also be of assistance to draw the Commission's attention to the National Project on Sterilisation Data Collection Practices undertaken by the Victorian Office of the Public Advocate (OPA Vic) in 2015 on behalf of the Australian Guardianship and Administration Council (AGAC). This project was conducted in response to a

request from the Federal Attorney-General's Department and all of the relevant project material is available online.[4]

One of the outcomes of the project is the ongoing collection of statistics and publication on the number of instances where state and territory tribunals have approved a sterilisation process.[5]

Question 4.9: Supported decision making for medical and dental treatment decisions

(1) Should NSW have a formal supported decision-making scheme for medical and dental treatment decisions?

(2) If so, what should the features of such a scheme be?

In relation to the proposal of the adoption of a formal supported decision-making model for medical and dental decisions, we refer the Commission to the Tribunal's response to Question Paper 2 concerning the proposal for the introduction of formal supported decision-making generally.[6]

As the Tribunal noted in that response, experience suggests that a formal appointment process would, almost of necessity, become legalistic and contentious. In addition, it would be likely to relate to a far greater proportion of people with disabilities than those in relation to whom applications are made under the current substituted decision-making regime contained within the *Guardianship Act*.

Given the relatively low number of appointments of substitute decision-makers compared with the high number of people accessing services and support, an inference may be drawn that informal supported decision-making arrangements are currently being used for the majority of people with cognitive disability in NSW. If this is the case, then it remains a significant question whether the likely consequences associated with the introduction of a formal appointment process, including significant workload and resourcing implications for the Tribunal, are justified if informal supported decision-making arrangements are operating effectively.

Should, however, a formal supported decision-making model be introduced, it should ensure that it operates with as little legal complexity as possible and in a manner that provides adequate safeguards for the supported person.

The Tribunal notes that any such legislation would need to outline clearly the circumstances in which a supporter could be appointed and by whom. Clear guidance would also need to be provided as to the criteria that must be satisfied before a Court or Tribunal could appoint a supporter for a person and whether or not

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[4] AGAC, *National Project on Sterilisation Data Collection Practices*, 2015. Available at: http://www.agac.org.au/agac-publications

[5] AGAC, *Australian Sterilisation Data Report*, 2016. Available at: http://www.agac.org.au/images/stories/agac-ster-data-rep-2016.pdf

[6] NSW Civil & Administrative Tribunal, *Submission 55 to the NSW Law Reform Commission – Review of the Guardianship Act 1987 (NSW)*, 2017. Available at: http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Submissions/GA55.pdf

it is proposed that such a scheme would include criterion in relation to the person's capacity to utilise a supporter effectively. Any such legislative scheme would also need to make clear the circumstances in which the appointment of a supporter or co-decision-maker could be reviewed and, in appropriate circumstances, be removed from that role.

Similarly, clear guidance would be required as to the appropriate legislative pathway should a supported person's cognition decline such that the person can no longer be truly supported in their decision-making. Particular reference should be made to the obligations of appointed supporters in these circumstances to ensure that supported decision-making does not become substituted decision-making by default.

Related to these issues is that of the likely need for training and education for the members of those health professions who may be involved in providing evidence in hearings in which a person's capacity to be supported is under consideration, as distinct from the current legislative tests that many health professions are much more familiar with concerning substituted decision-making. Similarly, training and education would need to be provided for appointed supporters in their role as supporters as opposed to substitute decision-makers.

Question 5.7: Waiver of clinical trial consent provisions

Are there circumstances in which the individual consent requirements for clinical trials should be waived?

A trial of drugs or techniques falls with the definition of a "clinical trial" within Division 4A of the *Guardianship Act* if it is a trial of drugs or techniques that necessarily involves the carrying out of new medical (or dental) treatment that has not yet gained the support of a substantial number of medical practitioners (or dentists) specialising in the area of practice concerned (*Shehabi v Attorney General* (NSW) [2016] NSWCATAP 137 at [99]).

Any proposal to waive individual consent requirements for the trial of drugs or techniques that fall within this definition would involve a significant policy and practice change and would demand broad community consultation.

In addition, any proposal that would also have the effect of removing from the operation of Part 5 of the *Guardianship Act* medical treatment in the course of a randomised controlled trial that does not fall within the meaning of "clinical trial" in Division 4A, even if that medical treatment would otherwise fall within the definition of major or minor medical treatment, would involve a significant policy change and would demand broad community consultation.

Question 6: Relationship between the *Guardianship Act, Mental Health Act*, and *Forensic Provisions Act*

The complexity of the interaction between the *Guardianship Act*, the *Mental Health Act 2007* (NSW) and *Mental Health (Forensic Provisions) Act 1990* (NSW) in terms of medical treatment as a result of s 34(2) of the *Guardianship Act*, and more broadly in relation to other lifestyle issues as a result of s 3C of the *Guardianship Act*, is set out at [6.1]-[6.17].

The Tribunal notes the observation made in a number of submissions as to the difficulties faced by clinicians in determining the treatments covered by the respective pieces of legislation and which consent regime applies.

A publicly available resource that sets out the applicable consent regime by reference to patient category and the proposed treatment is available online at the Mental Health Review Tribunal website.[7]

We also note the submission made by the Mental Health Review Tribunal that this "review of the *Guardianship Act* could be widened to consider more broadly whether amendments should be made to allow the MHRT to be the decision-maker for all medical decisions in circumstances where a person is detained in a mental health facility".[8]

Whilst this proposal is a policy matter and given its significance, would warrant broad community consultation, we note that careful consideration would need to be given to ensuring consistency between any proposed decision-making regime under the *Mental Health Act* and the decision-making regime set out in Part 5 of the *Guardianship Act*. Without such consistency, the question may be asked why the medical treatment of a person with a mental illness is treated differently and subject to a separate scheme compared to individuals with other types of cognitive incapacity in relation to their general medical treatment.

We also note the reference in the Question Paper to the particular concerns that arise resulting from the different regimes that apply under the *Guardianship Act* and the *Mental Health Act* in relation to the termination of a pregnancy (at [6.14]-[6.17]). The submission made by the Mental Health Review Tribunal highlights some of these concerns:[9]

> Another area of overlap and inconsistency relates to definitions in the two Acts. For example, in the Guardianship Act, a termination of pregnancy is defined (in cl. 9 of the Regs) as special medical treatment, and so requiring the authorisation of the Guardianship Division. However, a termination is considered to be "surgery" under the Mental Health Act. This means that, for involuntary patients *(which does not include assessable persons or detained persons) consent may be given by the Secretary of the Ministry of Health, if the patient's designated carer agrees with it, the patient is unable to give informed consent and it is "desirable, having regard to the interests of the patient" (* s 100(3)). The MHRT considers that the Guardianship Act definition should be adopted, which means that only the MHRT could make such decisions,

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[7] Mental Health Review Tribunal, *Medical Consent Regimes*. Available at: http://www.mhrt.nsw.gov.au/assets/files/mhrt/pdf/MHRT%20medical_consent_regimes_table.pdf

[8] Mental Health Review Tribunal, *Preliminary Submission PGA 21 to the NSW Law Reform Commission – Review of the Guardianship Act 1987 (NSW)*, 4. Available at: http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Preliminary-submissions/PGA21.pdf

[9] Mental Health Review Tribunal, *Preliminary Submission PGA 21 to the NSW Law Reform Commission – Review of the Guardianship Act 1987 (NSW)*, 4. Available at: http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Preliminary-submissions/PGA21.pdf

following a hearing. Such a legislative amendment would bring the Mental Health Act in better alignment with the Guardianship Act.

The Question Paper also highlights (at [6.15]) the different tests applied under the different statutory regimes and the more stringent requirements for consent to a termination of pregnancy under the *Guardianship Act* compared to the regime under the *Mental Health Act*.

In addition to those decisions referenced in the Question Paper about the interaction of these legislative regimes more generally, we note a recent decision (*HRM* [2016] NSWCATGD 30) in which the Tribunal considered that orders may be made pursuant to the *Guardianship Act* in respect of a "forensic patient" under the *Mental Health (Forensic Provisions) Act 1990* (see also *Attorney General of NSW v HRM* [2016] NSWSC 1189).[10]

Question 7: Restrictive practices

A number of important issues are raised in the Question Paper concerning the use of restrictive practices in NSW (at [7.1]-[7.50]) and the Tribunal makes the following general comments.

As is noted in the Question Paper, the regulation of restrictive practices in NSW will undergo significant practical reform as a result of:

- the introduction of the National Disability Insurance Scheme (NDIS)
- the resulting transfer in NSW of all government disability services to the non-government sector by July 2018, and
- uncertainty about the content of the Bill that will bring into effect important aspects of the NDIS Quality and Safeguarding Framework.[11]

The legislative response at a federal level, if any, to the Australian Law Reform Commission's (ALRC) Inquiry on 'Protecting the Rights of Older Australians from Abuse' (announced on 24 February 2016) may also have an impact on the regulation of the use of restrictive practices in aged care facilities in NSW. We note in this regard the proposal (at 11-7) of the ALRC Discussion Paper on the chapter concerning the use and regulation of restrictive practices[12] that the *Aged Care Act 1997* (Cth) should regulate the use of restrictive practices in residential aged care.

Any proposed legislative reform of the *Guardianship Act* in relation to restrictive practices should therefore have careful regard to these broader reforms to ensure consistency. It would seem to be a very unsatisfactory position for people with cognitive disability to have applied to them a different legislative regime depending on whether they live in a group home funded by the NDIS and subject to the NDIS Quality and Safeguarding Framework and (as yet unseen) legislation governing the use of restrictive practices, whilst residents of aged care facilities that are governed

[10] See also FJD [2016] NSWCATGD 23.
[11] Department of Social Services, *NDIS Quality and Safeguarding Framework*, 2016. Available at: https://www.dss.gov.au/sites/default/files/documents/04_2017/ndis_quality_and_safeguarding_framework_final.pdf.
[12] Australian Law Reform Commission, *Elder Abuse Discussion Paper 83*, ch 11. Available at: https://www.alrc.gov.au/publications/restrictive-practices.

by the *Aged Care Act* are potentially subject to a different legislative regime in relation to the use of restrictive practices.

The Tribunal also observes that in proposing any legislative changes to the *Guardianship Act*, careful regard should be had to consistency in relation to the type of practice that will fall within the definition of a restrictive practice that requires the appointment of a guardian. As has been noted in the Question Paper, the *Guardianship Act* does not include a definition of restrictive practices and the Tribunal derives its approach to restrictive practices from the common law. The term has been regarded as generally involving the physical, mechanical or chemical restraint of a person or limiting a person's freedom of movement or access to objects. A guardian may be appointed with a restrictive practices function if the restrictive practice might be considered unlawful without consent and the person is not able to provide informed consent on his or her own behalf.[13] The Tribunal has developed a publicly available information sheet on guardianship and restrictive practices.[14]

The NDIS Quality and Safeguarding Framework does not include a definition of restrictive practices and it is unclear whether its associated legislation will do so.

Any uncertainty on the part of service providers in NSW (whether providing services to people who receive funding from the NDIS or who live in an aged care facility) about the definition of a restrictive practice and whether there is a need to seek the appointment of a guardian has the potential to impact on the rights and protections for those people who may be subject to the use of restrictive practices.

We also note that the NDIS Quality and Safeguarding Framework (at 72) discusses proposals around the authorisation of the use of restrictive practices and indicates that behavior management plans will continue to need to be authorised through the relevant state or territory system for authorisation.

In NSW, the current system for the authorisation of behavior management plans that include the proposed use of a restrictive practice is contained within Ageing, Disability and Home Care's (ADHC) Behaviour Support Policy. However, once NSW ceases to provide disability services, it is unclear what system will govern the authorisation of behaviour support plans. For example, will an equivalent of the internal Restricted Practice Authorisation mechanism provided for in ADHC's Behaviour Support: Policy and Practice Manual (at 3.2.1) continue to be applied?

Further, as noted (at 3.2.1(b)) of the same document, authorisation by way of the internal Restricted Practice Authorisation mechanism ensures that:

> "documented support plans or strategies which contain the use of a Restricted Practice:
>
> (1) Can be clinically justified;
> (2) Are authorised within the context of ADHC work practice requirements;

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[13] See, for example, BDQ [2016] NSWCATGD 45 and HAO [2010] NSWGT 15.

[14] NSW Civil & Administrative Tribunal – Guardianship Division, *Restrictive Practices and Guardianship*. Available at: http://www.ncat.nsw.gov.au/Documents/gd_factsheet_restrictive_practices_and_guardianship.pdf

(3) Include provision for appropriate consent; and
(4) Can be safely implemented and monitored."

As can be seen from that document, (at 3.2.1), the issue of consent is a separate distinct requirement from the other authorisation requirements for a restricted practice.

Under the *Guardianship Act*, the role of the Guardianship Division of the Tribunal is to consider whether or not a person is able to provide their own informed consent to the use of a proposed restrictive practice and, if not, whether a substitute decision-maker should be appointed to make that decision. If an order is made, the Tribunal usually includes a condition to the effect that a guardian may only consent to a restrictive practice if positive approaches are also being used to address the person's behaviour and needs.[15] A guardian may also be appointed with a services function if this is necessary for the guardian to engage on the person's behalf with the health care and other professionals who are responsible for the development of the person's behaviour support plan.

Therefore, although the Tribunal may appoint a guardian with the function of restrictive practices and/or services, it does not perform the role that ADHC currently performs in terms of "authorising" a behavior support plan. It is unclear from the NDIS Quality and Safeguarding Framework who, in NSW, will be responsible for this role after July 2018.

As has previously noted, it is currently unclear the extent to which the Bill that will bring into effect the NDIS Quality and Safeguarding Framework will regulate the use of restrictive practices. On the current publicly available information, it is likely that as a result of the reforms at a national level, there will be significant workload and resource implications for the Tribunal. Any recommendations in relation to this should include recommendations in relation to appropriate resourcing.

For the sake of completeness, we also note the comment in the Question Paper (at [7.42]) that states that it is the 'Tribunal's practice in urgent situations to make a "short order" without a hearing authorising the use of restrictive practices'. This statement is incorrect. The Tribunal is required to hold a hearing in all proceedings that involve the exercise of a substantive Division function (CAT Act, cl 6(1) Sch 6).

Yours sincerely,

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Division Head – Guardianship Division
NSW Civil and Administrative Tribunal

[15] See, for example, BDQ [2016] NSWCATGD 45 and HAO [2010] NSWGT 15.