



Mental Health Commission
of New South Wales

Review of the *Guardianship Act 1987 (NSW)*

***Submission to the NSW Law Reform Commission on
Question Paper Four: Safeguards and procedures by the
Mental Health Commission of New South Wales***

May 2017



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of New South Wales

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Question Paper Four: Safeguards and procedures
<http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Question-Papers/QP4.pdf>

The Mental Health Commission of NSW

The Mental Health Commission of New South Wales (NSW) is an independent statutory agency responsible for monitoring, reviewing and improving the mental health system and the mental health and wellbeing of the people of NSW. The Commission works with government and the community to achieve this goal.

In all its work, the Commission is guided by the lived experience of people with mental illness, and their families and carers. The Commission promotes policies and practices that recognise the autonomy of people who experience mental illness and support their recovery, emphasising their personal and social needs and preferences.

The Commission has provided submissions on the background paper and question papers one, two and three. The current submission builds on the arguments put forward in those papers.

Throughout this submission the term 'disability' is used broadly to encompass people who experience psychosocial disability.

Advocacy and investigative powers

Alongside the guardianship regime there needs to be a system of assistance, advocacy and monitoring. In NSW currently, some of these functions are provided by the Public Guardian and the NSW Ombudsman although there are limitations for both of these bodies. In particular, the Public Guardian can only provide assistance to those people who are under guardianship orders. This becomes particularly relevant if the Act is amended to promote supported decision making when, presumably, there will be fewer people with guardianship orders, but likely many people in need of assistance navigating supported decision making.

As noted throughout the Commission's submissions to this Review, societal attitudes in relation to disability have changed remarkably in the past 30 years and they are likely to continue to do so. Systemic advocacy is therefore essential to ensure that the guardianship regime changes alongside these societal shifts. Another important aspect of systemic advocacy is that it allows change to be brought about on a holistic level, rather than a case by case basis, leading to greater efficiency and better outcomes at a population level.

Given the vulnerability of the population under guardianship, there needs to be a robust system of monitoring and complaint handling. This should extend to investigation of allegations of abuse, neglect or exploitation by guardians, financial managers and other relevant representatives.

If establishing a body to carry out the above functions (either by creating a new Public Advocate or expanding the role of the Public Guardian), then it is important that the body also has the relevant powers to support that work, including own motion and complaint handling, the power to compel information and the power of search and entry. The need for such powers has to be seen in the context of the vulnerability of the relevant population, many of who will have limited capacity to raise complaints on their own behalf.

The functions of assistance, advocacy and monitoring are closely related, however, it is desirable that the powers to investigate allegations of abuse, neglect and exploitation are kept separate from the provision of guardianship. It may be that the Public Guardian is given increased powers to assist people who do not have guardianship orders, while a separate Public Advocate is created to monitor

the system. Both bodies could provide systemic advocacy. There would need to be robust information exchange provisions established between the two agencies and with the Ombudsman and other relevant agencies.

If the Public Guardian were to have both an investigation role and continue to provide guardianship then the potential for some conflict of interest would need to be carefully managed.