



MHCN mental health carers

NSW Law Reform Commission

Level 3, Henry Deane Building
20 Lee Street
SYDNEY
NSW 2000 Australia

www.lawreform.justice.nsw.gov.au

5 June 2017

Re: Question Paper 4

Dear Sir/Madam

Mental Health Carers NSW is the peak body in NSW representing the interests of the carers of people with a mental illness. Our vision is for an inclusive community and connected carers; and our mission is to empower carers for mental health. We undertake systemic advocacy on behalf of mental health carers to improve their recognition and support in mental health and related social services.

Thank you for providing the opportunity to us to comment on the review of the Guardianship Act 1987 (NSW) in April 2016 and for this opportunity to comment on Question Paper 4 Safeguards and Procedures. We have noted the format of the questions detailed in this 'question papers' and have structured this paper to respond to the questions raised.

Our overall Observations and Recommendations

A register of guardians

A registration system for guardians and managers holds more benefits than disadvantages. There should be a national system but NSW should introduce one in the interim if necessary. It should be mandatory for all enduring arrangements and orders to be registered. Publicly available details on the existence of an enduring arrangement or order should be minimal such as only the person's name and address, and that an enduring arrangement or order has been registered but not the details of the enduring arrangement or order. There should be limits to access to any further details except by application to the registrar.

Establishment of a Public Advocate for NSW

There should be established in NSW the role of a Public Advocate, which undertakes systematic advocacy and can investigate complaints or allegations concerning a particular adult with impaired decision making capacity. The Public Guardian or a public advocate should be able to assist people



MHCN mental health carers

with a disability who are not under guardianship. The role of Public Advocate should be separate from the role of Public Guardian.



MHCN mental health carers

Question Paper number 4:

Questions	Our Position
2. Enduring guardianship	
Question 2.2: When enduring guardianship takes effect	
Should the <i>Guardianship Act 1987</i> (NSW) contain a procedure that must be followed before an enduring guardianship appointment can come into effect? If so, what should this process be?	The answer to this question is conditional on the introduction of some form of registration process, which is discussed below. If a registration process is in place, enduring guardians should then be required to notify a registrar if they believe the appointor has lost capacity and they intend to start using their powers. The registrar would then note this on the registration system.
Question 2.3: Reviewing an enduring guardian appointment	
Are the powers of the NSW Civil and Administrative Tribunal to review an enduring guardian appointment sufficient? If not, what should change?	There should be greater consistency between the powers the Tribunal has when reviewing a power of attorney and when reviewing an appointment of enduring guardian.
Question 2.4: Ending an enduring arrangement	

MCHN Mental Health Carers NSW Inc.

Funded by the NSW Mental Health Commission

Suite 501, Level 5, 80 William St, Woolloomooloo, NSW, 2011

Carer Connection Helpline: 1300 554 660 – Free Call

P: (02) 9332 0777

W: www.arafmi.org

E: admin@arafmi.org



MHCN mental health carers

<i>Questions</i>	<i>Our Position</i>
<p>What changes, if any, should be made to the <i>Guardianship Act 1987</i> (NSW) concerning:</p> <p>(a) The resignation of an enduring guardian, and</p> <p>(b) The revocation of an enduring guardianship arrangement?</p>	<p>The Guardianship Board or the Civil and Administrative Tribunal should have the power to investigate, revoke, or replace an alternative enduring guardian/attorney.</p>
<p>3. Guardianship orders and financial management orders</p>	
<p>Question 3.2: Time limits for orders</p>	
<p>(1) Are the time limits that apply to guardianship orders appropriate? If not, what should change?</p> <p>(2) Should time limits apply to financial management orders? If so, what should these time limits be?</p>	<p>The time limits that apply to guardianship orders and financial management orders by the Tribunals should be the same 30 days, 1 year, 3 years and 5 years, depending on the circumstances. The same time limits should apply to enduring guardianships and enduring powers of attorney.</p> <p>All orders should be reviewed every year unless there is agreement by all parties for a longer period of review.</p> <p>Reviews should consider fraud and appropriate decisions of the guardian or financial manager.</p>



MHCN mental health carers

Questions	Our Position
Question 3.3: Limits to the scope of financial management orders	
Should the <i>Guardianship Act 1987</i> (NSW) require the NSW Civil and Administrative Tribunal to consider which parts of a person's estate should be managed?	Financial management orders should specify the extent of the order.
Question 3.4: When orders can be reviewed	
<p>(1) What changes, if any, should be made to the process for reviewing guardianship orders?</p> <p>(2) Should the NSW Civil and Administrative Tribunal be required to review financial management orders regularly?</p> <p>(3) What other changes, if any, should be made to the process for reviewing financial management orders?</p>	All orders (guardianship and financial) should be reviewed every year unless there is an agreement by all parties for a longer period of review.
Question 3.5: Reviewing a guardianship order	
<p>(1) What factors should the NSW Civil and Administrative Tribunal consider when reviewing a guardianship order?</p> <p>(2) Should these factors be set out in the <i>Guardianship Act 1987</i> (NSW)?</p>	<p>Any instances of fraud/suspected fraud and apparently inappropriate decisions. Additionally decisions that are not consistent with the consumer's desires and preferences unless they are unsafe.</p> <p>The Act should set out some guidelines without being too prescriptive.</p>



MHCN mental health carers

<i>Questions</i>	<i>Our Position</i>
Question 3.6: Grounds for revoking a financial management order	
(1) Should the <i>Guardianship Act 1987</i> (NSW) expressly allow the NSW Civil and Administrative Tribunal to revoke a financial management order if the person no longer needs someone to manage their affairs?	All appointments (Guardians and Financial Managers) can be replaced following a review.
4. A registration system	
Question 4.1: Benefits and disadvantages of a registration system	
<p>(1) What are the potential benefits and disadvantages of a registration system? Do the benefits outweigh the disadvantages?</p> <p>(2) Should NSW introduce a registration system?</p> <p>(3) Should NSW support a national registration system?</p> <p>If NSW was to implement a registration system, what should be the key features of this system?</p>	<ul style="list-style-type: none"> • A registration system for guardians and managers holds more benefits than disadvantages. • There should be a national system but NSW should introduce one in the interim if necessary. • It should be mandatory for all enduring arrangements and orders to be registered. • Publicly available details on the existence of an enduring arrangement or order should be minimal such as only the person's name and address, and that an enduring arrangement or order has been registered but not the details of the enduring arrangement or order. There should be limits to access to any further details except by application to the registrar.
5. Holding guardians and financial managers to account	



MHCN mental health carers

<i>Questions</i>	<i>Our Position</i>
Question 5.1: A statement of duties and responsibilities	
<p>(1) Should the <i>Guardianship Act 1987</i> (NSW) and/or the <i>NSW Trustee and Guardian Act 2009</i> (NSW) include a statement of the duties and responsibilities of guardians and financial managers?</p>	<ul style="list-style-type: none"> • The Act should contain a statement of duties and responsibilities of guardians and financial managers. • Those appointed should sign to say they will adhere to them. • There should be tighter oversight and restrictions on the powers and actions of financial managers. • Both guardians and financial managers should submit regular reports to the registrar or tribunal. Report can be minimal if little activity had taken place and be automated and online for ease of completion.
Question 5.2: The supervision of private managers	
<p>What, if anything, should change about the NSW Trustee and Guardian's supervisory role under the <i>NSW Trustee and Guardian Act 2009</i> (NSW)?</p>	<p>Family members or others with an interest in the affairs of the consumer should be able to request a review by the NSW Trustee and Guardian of an order or a review the appointment of an enduring guardian or the power of attorney.</p>
Question 5.3: Reporting requirements for private financial managers	
<p>Should the <i>NSW Trustee and Guardian Act 2009</i> (NSW) be amended to allow the NSW Trustee and Guardian to decide how often private managers should lodge accounts?</p>	<p>Yes</p>
Question 5.4: Removing private financial managers from their role	



MHCN mental health carers

<i>Questions</i>	<i>Our Position</i>
<p>(1) When should a private financial manager be removed from their role?</p> <p>(2) Should the <i>Guardianship Act 1987</i> (NSW) set out the circumstances in which a private financial manager can or must be removed from their role more clearly?</p>	<p>In addition to the obvious circumstances of incompetence, fraud and inappropriate decision making, a private financial manager should be able to be removed when it is clear that their decisions are unduly conservative and cautious, lacking in timeliness or are inconsistent with the consumer's desires and preferences expect where decisions on this basis may be unsafe.</p>
<p>Question 5.5: Reporting requirements of private guardians</p>	
<p>Should private guardians be required to submit regular reports on their activities? If so, to whom should they be required to report?</p>	<p>A yearly report can be minimal if little activity had taken place, be automated and online for ease of completion. Where there has been more activity by the guardian then a longer report may be necessary but could also be online and automated for speed and convenience.</p>
<p>Question 5.6: Directions to guardians</p>	
<p>Who should be able to apply to the NSW Civil and Administrative Tribunal for directions on the exercise of a guardian's functions?</p>	<p>We see advantages in allowing interested persons to apply to the NSW Civil and Administrative Tribunal for a decision giving direction to the appointed or enduring guardian.</p>
<p>Question 5.7: Removing private guardians from their role</p>	
<p>(1) When should a private guardian be removed from their role?</p>	<p>In addition to the obvious circumstances of incompetence, fraud and inappropriate decision making a private guardian should be able to be removed when it is clear that their decisions are unduly conservative and cautious, lacking in timeliness or are</p>

MCHN Mental Health Carers NSW Inc.

Funded by the NSW Mental Health Commission

Suite 501, Level 5, 80 William St, Woolloomooloo, NSW, 2011

Carer Connection Helpline: 1300 554 660 – Free Call

P: (02) 9332 0777

W: www.arafmi.org

E: admin@arafmi.org



MHCN mental health carers

<i>Questions</i>	<i>Our Position</i>
(2) Should the <i>Guardianship Act 1987</i> (NSW) set out these circumstances?	inconsistent with the consumer’s desires and preferences, except where decisions on this basis may be unsafe.
Question 5.9 9.10 and 9.11: Criminal offences, Civil penalties and compensation orders	
Should NSW introduce new criminal offences to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager? Should NSW introduce new civil penalties for abuse, exploitation or neglect committed by a guardian or financial manager? Should NSW legislation empower the NSW Civil and Administrative Tribunal to issue compensation orders against guardians and financial managers?	There seems wisdom in having these power within the Act.
7. Advocacy and investigative functions	
Question 7.1: Assisting people without guardianship orders	
Should the <i>Guardianship Act 1987</i> (NSW) empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship?	The Public Guardian or a public advocate should be able to assist people with a disability who are not under guardianship. Yes the <i>Guardianship Act 1987</i> (NSW) should be amended to empower the Public Guardian or a public advocate to undertake some forms of systemic advocacy. The role of Public Advocate should be separate from the role of Public Guardian.
Question 7.2: Potential new systemic advocacy functions	



MHCN mental health carers

<i>Questions</i>	<i>Our Position</i>
<p>What, if any, forms of systemic advocacy should the <i>Guardianship Act 1987</i> (NSW) empower the Public Guardian or a public advocate to undertake?</p>	<p>We suggest the following roles of the Public Guardian or a separate Public Advocate in relation to systematic advocacy. Namely:</p> <ul style="list-style-type: none"> • Recommending new programs, or improvements to existing programs, to meet the needs of people who need assistance with decision making and to encourage them to reach the greatest practicable degree of autonomy. • Promoting the provision of services and facilities. • Monitoring and reviewing services and facilities with particular attention to the implementation and operation of the NDIS. • Supporting and encouraging the development of programs and organisations that assist people with disability and those that need assistance with decision making. • Promoting the protection of people with impaired capacity from neglect, exploitation and abuse. • Speaking for and promoting the rights of people with disability or impaired capacity. • Supporting and promoting the interests of the carers of people with disability. • To investigate, report and make recommendations on any aspect of the NSW guardianship legislation, and programs to support people in need of assistance with decision making, that the relevant minister refers to them.
<p>Question 7.3: Investigating the need for a guardian</p>	
<p>Should the <i>Guardianship Act 1987</i> (NSW) empower the Public Guardian or a public advocate to investigate the need for a guardian?</p>	<p>Yes. The Public Guardian in NSW or a Public Advocate should have the power to investigate any complaint or allegation that a person, who appears to the Public Guardian to have a decision-making disability, is in need of a guardian.</p>



MHCN mental health carers

Questions	Our Position
Question 7.4: Investigating suspected abuse, exploitation or neglect	
Should the <i>Guardianship Act 1987</i> (NSW) empower the Public Guardian or a public advocate to investigate suspected cases of abuse, exploitation or neglect?	Yes. The Public Guardian or a Public Advocate should have the power to investigate any complaint or allegation that a person, who appears to the Public Guardian to have a decision-making disability, is being exploited, neglected or abused.
Question 7.5: Investigations upon complaint or “own motion”	
If the Public Guardian or a public advocate is empowered to conduct investigations, should they be able to investigate on their own motion or only if they receive a complaint?	The Public Guardian or Public Advocate should be able to investigate on its own motion and should not be restricted to those instances where they receive a complaint. There should be simple and easy mechanisms for individuals to raise one-off issues related to individuals or systemic issues with the Public Guardian or Advocate.
Question 7.6: Powers to compel information during investigations	
<p>What powers, if any, should the Public Guardian or a public advocate have to compel someone to provide information during an investigation?</p> <p>What powers of search and entry, if any, should the Public Guardian or a public advocate have when conducting an investigation?</p>	The Public Guardian and/or the Public advocate should have reserve powers related to the provision of information and for search and entry necessary for these bodies to conduct their investigative responsibilities. These should be reserve powers only and used sparingly and, it is anticipated, rarely.
Question 7.8: A new Public Advocate office	
Should NSW establish a separate office of the “Public Advocate”? If so, what functions should be given to this office-holder?	Yes, there should be established in NSW the role of a Public Advocate, which undertakes systematic advocacy and can investigate complaints or allegations concerning a particular adult with impaired capacity. This office should, ideally, be

MCHN Mental Health Carers NSW Inc.

Funded by the NSW Mental Health Commission

Suite 501, Level 5, 80 William St, Woolloomooloo, NSW, 2011

Carer Connection Helpline: 1300 554 660 – Free Call

P: (02) 9332 0777

W: www.arafmi.org

E: admin@arafmi.org



MHCN mental health carers

Questions	Our Position
	<p>separate from but complimentary to the Public Guardian. However, we recognise that the introduction of a separate office of the Public Advocate may have political and resource implications. Should the decision be made not to establish a separate office of the Public Advocate then the powers and functions recommended above should be introduced into the role of the Public Guardian.</p>
<p>Question 8.7: Representation of a client with impaired capacity</p>	
<p>Should the <i>Guardianship Act 1987</i> (NSW) or the <i>Civil and Administrative Tribunal Act 2013</i> (NSW) allow a person to be represented by a lawyer in Guardianship Division cases when the person's capacity is in question?</p>	

Questions	Our Position
<p>8. Procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal</p>	
<p>Question 8.1: Composition of the Guardianship Division and Appeal Panels</p> <p>(1) Are the current rules on the composition of Guardianship Division and Appeal Panels appropriate?</p> <p>(2) If not, what would you change?</p>	<p>We have no specific recommendations to make on the composition of the Guardianship Division or the Appeals Panels. However we note the concerns of some stakeholders on the skills and knowledge of the panel members and would support reforms that ensure that Division and Panel members have the background and skills they need.</p>
<p>Question 8.2: Parties to guardianship and financial management cases</p>	
<p>(1) Are the rules on who can be a party to guardianship and financial management cases appropriate?</p> <p>(2) If not, who should be a party to these cases?</p>	<p>We are not aware of any changes that are needed to the current practices on who can be a party to hearings.</p>



MHCN mental health carers

<p>Question 8.3: The requirement for a hearing</p>	
<p>When, if ever, would it be appropriate for the Guardianship Division to make a decision without holding a hearing?</p>	<p>We have heard of cases of abuse where a person with limited or impaired decision making capacity is induced to agree to a decision that may not be their preference or in their best interest but appear to be giving their consent feely. For these reasons we are of the view that decisions made without a hearing should be the exception and only occur where there is no possibility of coercion, abuse or other undesirable pressure on the person of concern to express a particular view to the tribunals outside of a hearing.</p>
<p>Question 8.4: Notice requirements</p>	
<p>(1) Are the current rules around who should receive notice of guardianship and financial management applications and reviews adequate? If not, what should change? (2) If people who are not parties become entitled to notice, who should be responsible for notifying them?</p>	<p>We are aware of cases of abuse where the family member instigating the abuse has succeeded in becoming the substitute decision maker without the knowledge of other members of the family. In other circumstances partners of long term same sex, and other non-marital, relationships may be excluded from proceedings. For these reasons we believe it is essential that as many persons who may have a legitimate relationship with the person of concern have the opportunity to put their arguments to the tribunal. Privacy concerns, while important, should also be considered alongside the risk of appointing an inappropriate guardian or manager and where the decisions of the tribunal are in the public domain. The responsibility for notification rests with the tribunal.</p>
<p>Question 8.5: When a person can be represented</p>	
<p>When should a person be allowed to be represented by a lawyer or a non-lawyer?</p>	<p>The NSW Mental Health Review Tribunal allows persons to be represented by a lawyer or non-lawyer, subject to the agreement of the tribunal. Our view is that this allows the person before the tribunal, and their carers, to experience a more positive approach to the decisions of the tribunal. Some persons who have been before the MHRT have afterward expressed their view that they did not fully understand what was happening and would have preferred to have been represented or supported. For this reasons we believe that a person before the Guardianship Tribunal or Panels</p>



MHCN mental health carers

	should have the right to be represented although this should be optional and the Tribunal should continue to foster an informal an atmosphere for hearings.
Question 8.6: Separate representatives	
How should separate representation be funded?	The Tribunal should be able to order that the costs of representation provided by Legal Aid NSW be paid from the person's estate.
Question 8.7: Representation of a client with impaired capacity	
Should the Guardianship Act 1987 (NSW) or the Civil and Administrative Tribunal Act 2013 (NSW) allow a person to be represented by a lawyer in Guardianship Division cases when the person's capacity is in question?	It seems reasonable that where the capacity of a person involved in a Guardianship Division action is in question, which would be in a large percentage of cases, the person should be able to have a legal representative. The conduct of the Mental Health Review Tribunal may provide some model for this question.
Question 8.8: Timeframes for finalising Guardianship Division cases	
What, if any, changes to the legislation are required to support the timely finalisation of Guardianship Division cases?	Resource issues should not influence the consideration of appropriate amendments to the Act. The Act should be amended to require cases to be completed within a certain time period – say 21 days irrespective of the increase costs to government. Provisions could be inserted into the Act if it is thought that this period is insufficient in specific cases should all the parties agree. In these cases application could be made, either by the tribunal or a party to the case. Provisions should also be built into the Act to prevent any unreasonable delay in the commencement of a case.
Question 8.9: Appealing a Guardianship Division decision	
(1) Is the current process for appealing a Guardianship Division case appropriate and effective?	We are not aware of any difficulties with the current appeals process.
(2) If not, what could be done to improve this process?	
Question 8.10: Privacy and confidentiality	
What, if anything, should be changed in the law to protect the privacy of people involved in Guardianship Division cases?	We are not aware of any changes that are needed to protect the privacy of persons involved in Guardianship cases.
Question 8.11: Access to documents	

MCHN Mental Health Carers NSW Inc.

Funded by the NSW Mental Health Commission

Suite 501, Level 5, 80 William St, Woolloomooloo, NSW, 2011

Carer Connection Helpline: 1300 554 660 – Free Call

P: (02) 9332 0777

W: www.arafmi.org

E: admin@arafmi.org



MHCN mental health carers

- (1) Who should be allowed to access documents from Guardianship Division cases?
- (2) At what stage of a case should access be allowed?

We are not aware of any changes to the current arrangements for access to documents held by the Tribunal.

MCHN Mental Health Carers NSW Inc.

Funded by the NSW Mental Health Commission

Suite 501, Level 5, 80 William St, Woolloomooloo, NSW, 2011

Carer Connection Helpline: 1300 554 660 – Free Call

P: (02) 9332 0777

W: www.arafmi.org

E: admin@arafmi.org



MHCN mental health carers

Many thanks for considering our response to your discussion papers on this important review of the Guardianship Act 1987. We would welcome the opportunity to further discuss our views with you should the opportunity arise. Our contact details are provided below.

Yours Sincerely

Jonathan Harms,

CEO, Mental Health Carers NSW