Submission to NSW Law Reform Commission
Review of the Guardianship Act 1987 (NSW)
Question Papers 4, 5 and 6

1. Publication of FACS submission

1.1 The Department of Family and Community Services (FACS) thanks the NSW Law Reform Commission (the Commission) for the opportunity to respond to *Question Paper 4: Safeguards and procedures* (QP 4), *Question Paper 5: Medical and dental treatment and restrictive practices* (QP 5), and *Question Paper 6: Remaining Issues* (QP 6), which have been released by the Commission as part of the its review into the *Guardianship Act 1987* (Guardianship Act). FACS consents to the publication of this submission.

2. Context of FACS submission

2.1 FACS has responded to the questions in QP 4, QP 5, and QP 6 in the context of NSW's transition to the National Disability Insurance Scheme (NDIS), which will be fully operational from 1 July 2018.

2.2 The NDIS has changed the way supports for people with disability are funded and delivered across Australia, impacting on disability service related legislation, programs and systems, including the NSW guardianship regime. The NSW Law Reform Commission's review of the Guardianship Act provides a timely opportunity to ensure that NSW's guardianship regime aligns with human rights, the objects of the NDIS and other disability related reforms.

2.3 This submission is informed by human rights principles established in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), the *Disability Inclusion Act 2014* (NSW) (DIA), and the National Quality and Safeguards Framework (NDIS Q&S Framework), all of which are underpinned by the human rights principle of 'choice and control' and respect for the inherent dignity of people with disability as well as by the experiences of Ageing, Disability and Home Care (ADHC staff).

3. Summary of FACS position

3.1 The breadth of issues addressed in question papers 4, 5 and 6 is expansive. As a result, FACS' submission has been divided into three parts, with each question paper dealt with in a separate part of the submission:

- Part 1 – QP 4: Safeguards and procedures
- Part 2 – QP 5: Medical and dental treatment and restrictive practices
- Part 3 – QP 6: Remaining Issues.

3.2 FACS has not responded to every question posed in each question paper. Nonetheless, the submission responds to those questions that raise significant issues for its clients, staff, and operations. It also addresses broader legislative and policy reform issues, particularly those relating to the NDIS transition.

3.3 A high-level summary of FACS' position on topics raised in each question paper is outlined below:

Part 1 – Question Paper 4: Safeguards and procedures

Guardianship and financial management orders:	FACS has few concerns about how guardianship and financial management orders operate in NSW, but has made some recommendations for improvement (see pages 5 - 8).
A registration system:	FACS supports the introduction of a centralised, state-based registration system for guardianship and financial management orders, provided it complies with confidentiality and privacy principles (see pages 8 - 9).
Holding guardians and financial managers to account:	FACS supports the proposed strengthening of safeguards to hold guardians and financial managers to account for their actions (see pages 9 - 11).
Safeguards for supported decision-making:	FACS does not support the adoption of a single formal supported decision-making model in NSW, nor the associated amendment to the Guardianship Act to include a statement of duties and responsibilities for supporters (see page 11).
Advocacy and Investigative functions for the Public Guardian or Public Advocate:	FACS supports the proposal to empower the Public Guardian or Public Advocate with investigatory and/or advocacy functions, provided these functions are considered in the context of NDIS Q&S Framework, and relevant State and Commonwealth legislation and frameworks (see pages 11 - 13).
Procedures of the NSW Civil and Administrative Tribunal (Tribunal):	FACS considers there should be categories of matters for which the Tribunal can make decisions, without the need for a hearing. Also, a person before the Tribunal should have the option to be represented by legally represented, with the leave of the Tribunal (see pages14 - 15).

Part 2 – Question Paper 5: Medical and Dental Treatments and restrictive practices

Capacity to consent to medical and dental treatment:	FACS supports aligning the definitions of capacity across the Guardianship Act, provided the Act recognises that capacity can vary based on a range of factors, including the type of decision being made (see page 16).
Consent to medical and dental treatment:	FACS considers that provisions relating to patient objections and the 'person responsible' hierarchy are adequate, but has made suggestions about circumstances where consent requirements could be eased (see pages 17 - 19).

Relationship between the Guardianship Act and *Mental Health Act 2007* (Mental Health Act) and the *Mental Health (Forensic Provisions Act) 1900* (Forensic Provisions Act):	FACS considers that there are inconsistencies between the Guardianship Act and the Mental Health Act and Forensic Provisions Act. In the event of any inconsistency with the Guardianship Act, FACS' view is that the mental health legislation should prevail (see pages 19 - 21).
Restrictive Practices:	FACS is concerned to ensure a robust system for the regulation of restrictive practices, particularly as NSW transitions to the NDIS. At this stage, the structure of the Commonwealth's proposed regulatory framework as set out in the recently introduced National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 (NDIS Q&S Commission Bill), is still being developed. FACS supports the enactment of legislation that explicitly addresses the use of restrictive practices, including requirements for behaviour support plans, but is of the view that NSW should only enact legislation regarding restrictive practices or behaviour support in relation to matters that clearly fall outside the jurisdiction of the NDIS, and for which there are no other mechanisms already available. (see pages 21 - 24).

Part 3 – Question Paper 6: Remaining Issues

Objectives, principles and language:	FACS supports the inclusion of an objects clause and updated statement of general principles in the Guardianship Act to guide decision-making and bring the Act into line with contemporary human and disability rights principles. FACS is particularly supportive of reform that recognises the specific needs of Aboriginal and Torres Strait Islander (ATSI) people, as well as people from culturally and linguistically diverse (CALD) backgrounds (see pages 25 - 27).
Relationships with Commonwealth Laws:	FACS recognises the issues associated with Commonwealth and state-based nominee schemes and makes various recommendations to ensure an effective inter-relationship between both schemes (pages 27 - 28).
Adoption information directions:	FACS is of the view that these provisions do not require amendment (see page 29).
Age:	To ensure there is no regulatory gap between the child protection and guardianship system, FACS considers that the age threshold for guardianship orders should remain at 16 years of age, and that the age at which a person can be appointed a guardian should be maintained at 18 years of age. However, FACS does support various proposed changes to Tribunal processes and the Guardianship Act, which would allow young people to participate in proceedings (see

	pages 30 - 32).
Orders for guardianship and financial management:	FACS supports the introduction of single orders for guardianship and financial management orders in NSW (page 32).
Search and removal powers:	FACS considers that the search and removal provisions contained in sections 11 and 12 of the Guardianship Act need to be retained, as they are likely to provide an important safeguard for people with disabilities when the NDIS is in full scheme (see pages 32 - 33).
Handling personal information:	FACS suggests that consideration be given to inserting information access and disclosure provisions into the Guardianship Act to clarify a substitute decision-maker's right to access a person's personal, health and financial information (see pages 33 - 34).
Supreme Court powers:	FACS considers the range of powers vested in the Supreme Court, including powers to review Tribunal decisions to be appropriate, but notes one point of concern (see pages 34 - 35).

Part 1 – Question Paper 4: Safeguards and procedures

1. Context

1.1 QP 4 considers the safeguards and procedures that should exist within the NSW guardianship system in relation to financial managers and guardians. It also asks questions about safeguards that should be adopted if NSW introduces a formal system of supported decision-making.

1.2 In responding to QP 4, FACS has been guided by the principles outlined in Article 12(4) of the UNCRPD, in particular, that any laws, policies and practices that deal with a person's legal ability to make decisions must include appropriate and effective safeguards to prevent abuse.[1]

2. Guardianship orders and financial management orders

Question 3.1: What are your views on the process for applying for a guardianship or a financial management order?

2.1 FACS does not have any concerns with the current application process for guardianship and financial management orders. In FACS' experience, applications are easy to complete, and hearings are well-structured.

2.2 However, FACS recognises that the hearing process can be overwhelming for people with cognitive impairments. To help improve accessibility and inclusiveness of the hearing process, particularly where a person with cognitive impairment is the subject of an application, FACS recommends that consideration be given to:

- engaging specialists, such as speech pathologists to facilitate communication during the hearing;
- engaging independent officers to obtain the person's views about their wishes and preferences in a more casual setting, away from the Tribunal. This could occur in the presence of a Tribunal member, and/or with the officer reporting his/her findings back to the Tribunal. This approach is considered particularly important in cases where the person and/or family members express conflicting views about their needs;
- using video technologies to improve communication when the person calls into a hearing, as feedback from FACS staff suggests that audibility is routinely problematic.

2.3 Although these proposals will require additional resources from the Tribunal, FACS considers them to be important in ensuring improved access to, and the inclusion of, people with cognitive impairments in the process. This will also help to ensure that a person's will and preferences are independently considered, and that hearings are adapted to their needs, in accordance with contemporary human rights principles.

[1] Article 12(4), *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008.

Question 3.2: Are the time limits that apply to guardianship orders appropriate? Should time limits apply to financial management orders?

2.4 FACS supports the current time limits that apply to guardianship orders, but considers that time limits should be applied to financial management orders.

2.5 FACS recognises that capacity is a continuum, and that decision-making capacity can vary across time and with the subject that is being decided upon. FACS considers that the time limits on financial management orders need to be more flexible to better reflect the variability of decision-making capacity.

2.6 Applying time limits to financial management orders will ensure that similar safeguards and procedures operate for both guardianship and financial management orders. It is also consistent with the human rights principle of least restriction (see Article 12(4) of the UNCRPD).

Questions 3.4(1) and 3.4(3): What changes should be made to the process for reviewing guardianship orders and financial management orders?

2.7 FACS considers the current process for reviewing guardianship orders to be appropriate, but recommends that financial management orders should be subject to regular reviews, including end-of-term reviews.

2.8 FACS notes that some ADHC staff have expressed concerns about their inability to participate in review hearings which in their opinion has resulted in problems for some of their clients. FACS suggests that consideration be given to broadening the range of parties with standing to attend guardianship hearings to include staff from relevant disability services providers.

Comment: Need for regular reviews of financial management orders

Although financial management orders provide some safeguards for individuals with an intellectual disability, there is no focus or concerted effort to review them or provide the individual with support/guidance/training on how they can develop their money management skills independently or with support. Once a financial manager has been appointed, it is often quite difficult to have this decision re-considered. The onus remains on the person with a disability to prove they have developed the capacity to manage their finances independently (or with support) rather than the system having to prove they continue to not have the capacity to manage their finances (onus of proof remains on the person with a disability through a complex legal process).

Comment by FACS, Disability Operations

Case Study: Giving service providers standing to attend review hearings

A Leaving Care client with an intellectual disability, a history of trauma, and aggressive and violent behaviours towards others, was in prison when his guardianship order expired. The guardianship order included an order for accommodation and services. Under the order, he was in an interim placement funded by ADHC with support services in place.

When the man was released from prison, he had no other option but to return home to live with his mother, even though he had been aggressive towards her in the past.

The man also became his own consenter, and due to his lack of decision-making capacity, refused to participate in the NDIS without appreciating the consequences. The man no longer receives any support or funding and has started acting out towards his mother again.

Although ADHC was a service provider for the man, ADHC staff were not invited to his review hearing to put arguments before the Tribunal. ADHC considers that it the orders had been continued, the man would still be receiving the supports he requires.

Case study by FACS, Disability Operations

Question 3.5: What factors should the Tribunal consider when reviewing a guardianship order? Should they be set out in the Act?

2.9 In line with FACS' previous comments regarding capacity, we propose that when reviewing guardianship orders the Tribunal should consider whether a person's decision-making capacity has changed during the period of the order, as this will be relevant in determining the need for, and scope of any ongoing order. FACS supports the inclusion of this (and other) review factors in the Act.

Question 3.6: Should the Guardianship Act expressly allow the Tribunal to revoke a financial management order if the person no longer needs someone to manage their affairs?

2.10 FACS supports the proposal that the Guardianship Act include provision that the Tribunal may revoke a financial management order if the person no longer needs someone to manage their affairs, such as for the reasons described above.

Question 3.7: What procedures should apply if a guardian or a financial manager dies?

2.11 FACS does not have any concerns with the current arrangements for private guardians under the Act, but considers the arrangements for financial managers to be inadequate. FACS supports the NSW Legislative Standing Committee on Social Issues recommendation that the NSW Trustee and Guardian should assume management responsibility of a person's estate when their financial

manager dies, until a new manager is appointed by the relevant court or Tribunal.[2]

3. A registration system

Questions 4.1(2) and 4.1(1): Should NSW introduce a registration system? What are the potential benefits and disadvantages of a registration system?

3.1 FACS supports the introduction of a centralised registration system that allows for all guardianship and financial management orders in NSW to be registered and monitored. In FACS' view the benefits of a centralised registration system would:

- make it easier to locate, verify and validate the continuing existence of an order;
- provide a mechanism to hold guardians and financial managers to account, including safeguarding against unlawful or unauthorised decision-making, as orders and their conditions can be readily checked and reviewed;
- improve the timeliness of services (and service provision) by enabling service providers to quickly identify the decision-making supports that a person requires;
- reduce the number of guardianship/financial management information requests that government agencies receive, as there will be one 'centralised' source for this information;
- provide a potential additional notification or warning system to alert users when orders are due to expire.

3.2 If a centralised registration system is introduced in NSW, FACS recommends the establishment of appropriate safeguards to ensure the confidentiality and privacy of personal information contained on the system. The registration system must adhere to relevant confidentiality and privacy principles and legislation. Careful consideration will need to be given to factors such as:

- individuals and entities who will be authorised to access the system;
- information that they will be authorised to access;
- purposes for which they will be authorised to use the information they access, including protocols for sharing this information with third parties.

3.3 Although FACS supports a state-based registration system, we note the discussion regarding a national registration system, and acknowledge that a key benefit of a national system would be its capacity to help service providers track and better respond to the needs of clients who move inter-state. It has been FACS' experience that people under guardianship arrangements can be relatively transient, and under the current system it can be difficult to track and maintain continuity of service provision. A national registration system would help facilitate continuity across jurisdictions.

[2] NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 26.

Question 4.2: If NSW was to implement a registration system, what should be the key features of this system?

3.4 FACS submits that the system should be accessible to key stakeholders, including relevant NSW and Commonwealth government agencies and commissions of inquiry, disability services providers, health service providers, and relevant financial institutions.

3.5 Information that could be held on the system could include: copies of any orders (including the terms of the order, the conditions of the order, a guardian or financial manager's address, the expiry date of the order); additional contact information, including phone numbers and email addresses, and regular income and financial requirements.

A registration fee

3.6 FACS would not be opposed to the imposition of a reasonable fee for registering orders onto the system. However, options for waiving this fee should also be expressly provided for, in specified circumstances.

Search access to the register

3.7 Due to the privacy risks FACS considers that outside of the key stakeholders identified above, third parties should not have 'search' access to the register unless there is 'due cause' and they can satisfy relevant security protocols, prior to being provided with information. This would require an intermediary to be involved.

3.8 A function of a Public Advocate could include deciding who can access the register and the information they can access, if one is to be established in NSW.[3]

4. Holding guardians and financial managers to account

Question 5.1: Should the Guardianship Act and/or the *NSW Trustee and Guardian Act 2009* (Trustee and Guardian Act) include a statement of the duties and responsibilities of guardians and financial managers?

4.1 FACS' submission to QP 3 was that the current model of substitute decision-making in NSW works well, but could be improved by clarifying the roles of different parties.

4.2 The Guardianship Act could also be strengthened by providing greater clarity as to the extent of a decision-maker's authority.

4.3 FACS supports the inclusion of a statement of duties and responsibilities in the Guardianship Act and/or the Trustee and Guardian Act. The Victorian Law Reform Commission's (VLRC) recommendations on the duties and responsibilities of guardians and administrators[4] provides a useful guide, which could be considered.

4.4 FACS considers that a statement similar to that recommended by the VLRC, coupled with the probity measures advanced in our submission to QP 3, could help to improve the accountability of guardians and financial managers in NSW.

[3] See Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 275-280.
[4] Ibid, rec 228.

4.5 FACS also considers it appropriate for financial managers who have engaged in a 'significant breach' of their duties and responsibilities to be subject to a financial penalty and be removed from their role as a financial manager. Similarly, guardians who engage in comparable conduct should be removed from their role as guardian.

Question 5.2: What, if anything, should change about the Trustee and Guardian's supervisory role under the Trustee and Guardian Act?

4.6 FACS considers that the current system of oversight by the NSW Trustee and Guardian could be improved by amending the Trustee and Guardian Act to:

> allow the Tribunal to appoint a private financial manager without requiring oversight by the NSW Trustee where the Tribunal is satisfied that the relationship and other safeguards are such that oversight is considered unnecessary.[5]

4.7 See FACS submission to QP 3 re fees for supervision (at 4.29)).

Questions 5.3 and 5.5: Should private financial managers and guardians be required to submit regular reports on their activities?

4.8 FACS supports the use of pro-forma reports for financial managers to ensure they keep accurate records and to safeguard against the misuse of funds.

4.9 However, we are of the view that reporting in itself, is unlikely to promote good decision-making. It would be preferable if resources were invested in training financial managers to exercise their functions properly, rather than on staff examining their reports.[6] Also, to facilitate better decision-making and record-keeping practices, FACS suggests that more emphasis be placed on building the NSW Trustee and Guardian's capacity to provide training and resources for guardians and financial managers, and carry out auditing and monitoring functions.

Question 5.6: Who should be able to apply to the Tribunal for directions on the exercise of a guardian's functions?

4.10 FACS acknowledges that broadening the range of people who may apply to the Tribunal for a direction could impose additional accountability requirements upon those exercising guardianship functions.

4.11 However, FACS notes that there is a real risk of this power being misused by third parties who oppose the views and/or decisions of the guardian, and could make the guardianship process more adversarial, resulting in unnecessary complexity and additional delays.

4.12 For these reasons, FACS considers the guardianship review process provides a sufficient safeguard for "any person with a genuine concern for the welfare of the person under guardianship"[7].

[5] Intellectual Disability Rights Service, *Preliminary Submission PGA07*, 24.
[6] Above no 3, [para 18.104], page 423.
[7] See ss. 25 and 25B, *Guardianship Act 1987* (NSW).

Question 5.9: Should NSW introduce new criminal offences to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager?

4.13 FACS does not consider it appropriate to include specific criminal offences committed by a guardian or financial manager in the Guardianship Act.

4.14 Rather, consideration should be given to the adequacy of protections for vulnerable people, as part of a broader review of offences against people with disabilities in the *Crimes Act 1900* (NSW), including the evidence required to establish such offences.

Question 5.10: Should NSW introduce new civil penalties for abuse, exploitation or neglect committed by a guardian or financial manager?

4.15 FACS suggests that consideration should be given to imposing a suitable financial penalty on those who are found to have engaged in abuse, exploitation or neglect while exercising their functions.

4.16 With respect to guardians, however, FACS queries whether fines are appropriate or effective. It may be preferable to consider how the system can support a person who has suffered injury or loss to make a civil claim through the courts.

5. Safeguards for supported decision-making

Question 6.1: If NSW introduces a formal supported decision-making model, what safeguards should this model include?

5.1 In FACS' view it is neither possible nor desirable to adopt a single, formal supported decision-making model in NSW. As put forward in our submission to QP 2, a range of different supported decision-making approaches may be required depending upon a person's needs, supports, and the nature of the decision being made.

5.2 Consequently, FACS does not support the inclusion of a statement of roles and responsibilities for supported decision-makers in the Guardianship Act.

5.3 In FACS' view the roles and responsibilities of a supported decision-maker differ considerably to those of a substitute decision-maker. In supported decision-making arrangements the assisted person continues to be the person authorised to make decisions, but with support from another person.

5.4 By contrast, a substitute decision-maker makes decisions on behalf of a person with impaired decision-making ability. Given the fundamental difference between the two roles, query whether a single statement of roles and responsibilities for supporters is appropriate.

6. Advocacy and investigative functions

Question 7.1: Should the Guardianship Act empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship?

6.1 FACS supports the proposal to empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship.

6.2 Currently, the Public Guardian does not have a general power to assist a person with impaired decision-making capacity. A person must have a guardianship order in place before they can receive the assistance of the Public Guardian.

6.3 FACS is particularly concerned about the lack of protections for people with cognitive impairment who are not under guardianship. A Public Guardian with authority to assist this cohort would provide important protections and could help safeguard against mistreatment. It may also help secure better outcomes for people with cognitive impairments.

6.4 FACS has observed many cases where a person with a disability has been left with very few decision-making supports after their guardianship application has been dismissed by the Tribunal. Those with no informal support systems may be placed at a heightened risk of mistreatment, abuse, and neglect by others and contact with the criminal justice system.

6.5 Empowering the Public Guardian or a public advocate to assist people with disabilities who are not under a guardianship order could provide an important safeguard in ensuring that individuals within this cohort receive the support services they need and do not "fall through the gaps".

Case study: Assisting people without a guardianship orders may help to ensure that they don't "fall through the gaps"

An 18-year-old man was on remand at the Forensic Hospital in Long Bay Prison, for allegedly stabbing a male carer in a disability service. While in custody, a guardianship application was lodged with the Tribunal to appoint a substitute decision-maker for him once he was released from custody.

The young man had a long history of abuse and had been in the foster care system and the care of the Minister for much of his life. He suffered from several mental health problems including depression (with self-harming behaviours and suicidal thinking), and various sexual disorders. He was also considered to be at a high risk of reoffending.

Although the young man had difficulty making decisions (periodically), and required intensive support services and supervision, the Tribunal dismissed the application on the basis that his psychiatric diagnoses were considered to be in remission, and were not considered to be a 'disability' for the purposes of the Guardianship Act. The Tribunal determined that there was no evidence that the young man lacked the ability to weigh up and make informed life decisions at that time (or in the reasonably foreseeable future).

Despite the Tribunal's decision, FACS staff continue to hold concerns for the young man and the decision-making supports he will require in future, given the difficulties he's previously had in managing his own affairs. They're also concerned that without the proper supports, he is at a real risk of "falling through the gaps".

Example by FACS, Community Justice Program

Question 7.8: Should NSW introduce new advocacy and investigative powers for the Public Guardian or a separate office of the "Public Advocate"? If so, what functions should be given to this office-holder?

6.6 FACS supports the introduction of new advocacy and investigative powers for the Public Guardian or Public Advocate. However, any additional powers vested in the Public Guardian or Public Advocate will need to be considered in the context of the NDIS Q&S Commission Bill and other relevant legislation and frameworks – both state and Commonwealth. Care will need to be taken to ensure that the functions of the Public Guardian or Public Advocate do not overlap with those of the NDIS Quality and Safeguards Commission, the National Disability Insurance Agency, or the Tribunal. Any new functions vested in the Public Guardian or Public Advocate should complement, rather than duplicate, new or existing agency functions proposed at all levels of Government.

Possible new functions of the Public Guardian or Public Advocate

6.7 FACS considers that the powers and functions of the Public Guardian or Public Advocate could include:

- powers to investigate:
  - complaints or allegations of abuse, exploitation or neglect of people with impaired decision-making (on complaint or own motion) (Question 7.4);
  - the need for or inappropriate use of guardianship (including financial management and powers of attorney) (Question 7.3);
  - in circumstances where a complaint or allegation is beyond the jurisdiction of another authority, such as the NSW Ombudsman.
- advocating for people who are highly vulnerable due to impaired decision-making capacity, an inability to communicate decisions, a lack of access to advocacy supports, and/or are at risk of abuse, exploitation or neglect;
- undertaking systemic advocacy and research on administrative, legislative and policy issues;
- providing advice and community education on issues, including abuse, exploitation and neglect, supported decision-making, future planning, and guardianship.

6.8 These functions could provide necessary safeguards for people with impaired decision-making capacity, including individuals who are either ineligible for the NDIS (for example people aged 65 years and over) or, those whose complaint or matter falls beyond the jurisdiction of the proposed NDIS Quality and Safeguarding Complaints Commissioner.

Question 7.9: Would you like to raise any other issues about the potential advocacy and investigative functions of the Public Guardian or a new Public Advocate?

6.9 FACS acknowledges that the establishment of a new Public Advocate will have cost implications for Government. These costs could be reduced by subsuming the Public Guardian function within the new Office of the Public Advocate, as is the case in Victoria, Queensland and South Australia.

7. Procedures of the Guardianship Division of the Tribunal

Question 8.3: When, if ever, would it be appropriate for the Guardianship Division to make a decision without holding a hearing?

7.1 According to the Tribunal's 2015-16 Annual Report, the Guardianship Division received 10,384 applications and finalised 10,273 applications that financial year.[8] Given the considerable number of applications that the Guardianship Division handles each year, consideration should be given to establishing a category of matters where the Tribunal is able to make a decision on the papers without the need for a hearing.

7.2 Consideration could be given to including a provision in the Guardianship Act similar to that in the Guardianship and Administration Bill 2014 (Vic) which sought to allow parents of people with profound decision-making incapacity to be appointed as their child's guardian or administrator without the need for a hearing.[9] FACS is concerned that there is currently no mechanism in place which allows parents of these young people to have formal authority to open a bank account or conduct other transactions on their behalf. As a result, FACS would support an amendment to the Act that could expedite the Tribunal's decisions in such circumstances.

Question 8.5 and 8.7: When should a person be allowed to be represented by a lawyer or a non-lawyer? And should the Guardianship Act or the *Civil and Administrative Tribunal Act (2013)* allow a person to be represented by a lawyer in Guardianship Division cases when the person's capacity is in question?

7.3 In FACS' view, a person should be allowed to have legal representation with leave of the Tribunal. However, FACS recognises that this may be an expensive option for some clients, and that a Public Advocate (if introduced in NSW), may be beneficial for people with limited resources.

Comment: Legal representation should be an option, but should not dominate proceedings

"Given that the Guardianship Tribunal is a legal Tribunal, having legal representation is of course appropriate. However, FACS Disability Operations is of the view that one of the strengths of the Tribunal is its informality and it has always been an environment where the client can speak and ask questions. FACS Disability Operations would not want to see an environment that did not allow this to happen, and where the legal people in the room dominated proceedings."

Comment by FACS, Disability Operations

The Tribunal

7.4 FACS supports provision being made in the Guardianship Act to allow a person to have legal representation, particularly in cases where they require such support to participate effectively in a hearing.

[8] NSW Civil and Administrative Tribunal, NCAT Annual Report 2015-2016 (2016).
[9] cl 41, Guardianship and Administration Bill 2014 (Vic) (lapsed).

7.5 By way of example, sections 152 and 154 of the Mental Health Act provide a person with a mental illness or intellectual or developmental disability with a right to representation. Specifically, section 152 states that a person's mental illness, mental condition, intellectual disability or developmental disability is not an impediment to them being represented by a lawyer before the Mental Health Review Tribunal (MHRT).

7.6 Section 154 specifies the circumstances in which a person before the Tribunal may (or must) be represented by a lawyer. Notably, section 154(4) states that a person under the age of 16 must be represented by a lawyer or, with approval from the Tribunal, another person of his or her choice, unless the Tribunal decides that it is in his or her best interests not to be represented.

7.7 Given the Guardianship and Mental Health Acts deal with similar circumstances and can involve the same clients, FACS considers that the rules allowing legal representation under the Mental Health Act should apply to people with similar incapacities under the Guardianship Act.

Part 2 – Question Paper 5: Medical and dental treatment and restrictive practices

1. Context

1.1 QP 5 addresses alternative decision-making arrangements that apply when someone is incapable of giving valid consent to their own medical and dental treatment. It also considers the use and regulation of restrictive practices in NSW.

1.2 In responding to QP 5, FACS has been guided by the decision-making principles in Article 12 of the UNCRPD, which states that "parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" [10] and "parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity".[11]

2. Capacity to consent to medical and dental treatment

Question 2.1(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?

2.1 FACS supports the alignment of the definitions of capacity found in the Guardianship Act with the definition of 'capable of giving consent' to medical or dental treatment in Part 5 of the Act.

2.2 However, FACS reiterates the comments made in its submission to QP 1 –that the Guardianship Act recognise that decision-making capacity can vary over time and can be influenced by a range of factors including a person's age, the deterioration of their underlying condition, and the supports available to them. Decision-making capacity can be episodic and can depend on the subject matter, nature and/or significance of the decision being made.

2.3 Any attempt to align the definitions of capacity across the Act should acknowledge the variability of capacity, and the type of decision to be made. In this regard, FACS considers that the Act should identify standard elements or 'conditions' for demonstrating decision-making capacity in the areas to which the Guardianship Act applies, including demonstrating consent to medical treatment; managing one's financial affairs (financial management); and 'managing his or her person' (guardianship).

3. Types of medical and dental treatment

Question 3.3 Should the definition of medical and dental treatment in Part 5 of the Guardianship Act include treatment by a registered health practitioner?

3.1 FACS supports the proposal that the Guardianship Act include treatment by a registered health practitioner in the definition of medical and dental treatment under Part 5.

[10] Above no 1, Art. 12(2).
[11] Ibid, Art. 12(3).

3.2 FACS is aware of instances where staff have been confused about whether health services provided by other health professionals (i.e. than a medical practitioner or dentist, as defined under the Act) are 'medical treatments' under the Act. Broadening the definition of medical and dental treatment to include registered health practitioners, as defined in the *Health Practitioner Regulation National Law (NSW)*, may help avoid this confusion.

4. Consent to medical and dental treatment

4.1 In FACS' experience, staff have primarily dealt with matters involving 'minor' medical and dental treatments, over those that are characterised as being 'major' or 'special' treatments under the Guardianship Act. FACS' comments therefore focus primarily on issues and considerations relating to 'minor' medical treatments.

Question 4.2(3) and 4.3(3): How should a patient's objections to medical treatment be taken into account?

4.2 FACS does not have any concerns with the provisions relating to patient objections under the Act[12], and considers that the Act provides appropriate mechanisms for managing these situations.

4.3 Where a person objects to a 'minor' or 'major' medical or dental treatment that is not urgent, the onus of explaining the treatment and the consequences of non-treatment should lie with their treating physicians/nurses in the first instance, and then their support persons or guardians. All reasonable efforts should be made to ensure that the person receives information in a manner and format that will enable them to make an informed decision about the proposed treatment.

4.4 For example, it has been suggested that when dealing with patients with impaired decision-making capacity (or whose decision-making capacity is in question), their treating nurses (or doctors) could use a 'workbook' to assess their decision-making capacity at a specific point in time and in relation to a specific medical or dental treatment, including where the patient objects to the treatment. The patient could be asked to respond to questions in the 'workbook' (leaflet), and depending on the level of capacity they demonstrate, would have their acceptance or objection of that treatment acknowledged. The 'workbook' (leaflet) could then be attached to the patient's medical file to ensure that his/her other treating practitioners (e.g. shift nurses) are apprised of their decision-making capacity and their consent or objection to a particular treatment.

4.5 Where a person/patient continues to object to treatment, in spite of others' best efforts to explain the nature of the treatment and the consequences of treatment/non treatment, FACS considers that the current arrangements subsections 46(3),(4) and 46A of the Act to be appropriate.

4.6 Also, FACS recognises that some people with moderate to profound intellectual disabilities, can be very fearful of medical and dental procedures and will resist (or object) to treatment, without understanding its nature or need for it.

4.7 FACS' experience in such cases is that carers, with the consent of the person's guardian, may use restrictive practices (i.e. medications), when less restrictive alternatives have failed to manage a patient's resistance to treatment.

[12] Above no 7, ss. 46(3),(4) and 46A.

4.8 While FACS is firmly of the view that restrictive practices should only be used as a last resort and in accordance with strict protocols and procedures, we recognise that they may be necessary when dealing with patient objections in those circumstances where their health is at risk.

Question 4.3(4): In what circumstances could minor treatment be carried out without consent?

4.9 FACS considers that section 37 of the Act appropriately identifies the circumstances where treatments may be carried out without consent. This includes situations where treatment is considered urgent, a 'person responsible' is unavailable or unwilling to make a decision about a person's treatment, or a person's treating doctor or dentist considers that a minor treatment is necessary to promote his/her health and well-being and s/he does not object.[13]

4.10 Some FACS staff have experienced difficulties obtaining consent from 'persons responsible', where they are elderly or live some distance from the person needing treatment. In such cases "it can be hard to get them to sign documents or even respond to requests".[14]

4.11 While staff should always endeavour to obtain written consent from a 'person responsible' before a person's treatment is carried out, in cases such as those outlined above, it may be appropriate for treatment to be carried out without consent if staff have kept detailed records of their unsuccessful attempts to contact the 'person responsible, and have acted in accordance with established protocols and requirements under the Act.

Comment: Obtaining sign-off from persons responsible can be difficult in practice

In ADHC operated accommodation support services there are some health care procedures that staff need to perform to maintain a person's health and wellbeing. According to ADHC policy a person's health plan is to be developed based on the recommendations of the person's treating doctor. The person and/or the 'person responsible' are also to be involved in the development of the plan and sign-off on the final plan.

In practice, it is sometimes very difficult to obtain sign-off on a person's final health plan. To ensure that support workers continue to fulfil their duty of care to the person and ensure that they receive the best possible health and wellbeing outcomes, there have been instances where a person's health plan has been implemented and some minor health care procedures administered, without sign-off from their person responsible.

Comment by FACS, ADHC (SDP)

[13] Ibid, ss. 37(1) – 37(3).
[14] Comment from FACS staff member in ADHC (SDP), 21 April 2017.

Question 4.6: Is the "person responsible" hierarchy appropriate and clear? Does the hierarchy operate effectively?

4.12 FACS does not have any concerns about the 'person responsible' hierarchy, except to note that the hierarchy is only effective in so far as the persons in the hierarchy are available and willing to consent to a person's medical or dental treatment.

Question 4.8: Is the requirement that consent requests and consents must be in writing appropriate? If not, what arrangements should be in place?

4.13 FACS considers the requirement that requests and consents be in writing to be appropriate. However, as noted above, it can be difficult to meet this requirement when the 'person responsible' cannot be reached or is unable to provide written consent for any reason.

4.14 In such cases, it may be appropriate for a person's treatment to be carried out without written consent, provided clear and complete records are maintained of each attempt to contact the 'person responsible', and verbal consent has been obtained from him/her, in the first instance. However, support workers must obtain written consent from the 'person responsible' at the earliest opportunity.

Question 4.9: Should NSW have a formal supported decision-making scheme for medical and dental treatment decisions?

4.15 As stated earlier, FACS does not support the introduction of a formal supported decision-making scheme in NSW, either in relation to the broader guardianship scheme or in relation to medical and dental treatments.

5. The relationship between the Guardianship Act and mental health legislation

Question 6.1: Is there a clear relationship between the Guardianship Act and the Mental Health Act? What areas, if any, are unclear or inconsistent? How could any lack of clarity or inconsistency be resolved?

5.1 FACS agrees with the Commission's observations in QP 5 concerning potential conflicts and confusion between the decision-making regimes under the Guardianship Act and the Mental Health Act, when a person with a mental illness is also the subject of a guardianship order. In FACS' experience, even though provisions in both Acts expressly provide that the Mental Health Act should take precedence in specified circumstances[15], there is often a conflict that exists between both decision-making regimes. For example, where a person with a mental illness wants to self-discharge from a mental health facility and their 'person responsible' disagrees with this decision.

5.2 Staff in FACS' Criminal Justice Program, in particular have observed numerous cases where guardians should have been able to override a patient's decision to self-discharge from a mental health facility. In their view, this would have significantly reduced the risks that the patients posed to themselves and to the

[15] Above no 7, s. 34(2); s. 3C, *Mental Health Act 2007* (NSW).

community. It would have also ensured that patients' needs were met while in the mental health facility, as illustrated in the following example.

Case study: Patient who continues to self-discharge

A man in his 50s was diagnosed with chronic schizophrenia. He has an extensive history of drug abuse and several compounding health issues, including cancer. The man also has a long history of physical aggression towards others.

The man has been in and out of mental health facilities for most of his life, and is well known to mental health services. However, due to his aggressiveness towards staff and other patients when admitted, there is little tolerance for his behaviour.

The man needs long-term care in a mental health facility, but has decided to self-discharge despite the significant risks for himself and the community. An ability to override his decision to self-discharge would reduce these risks and ensure that he receives the care he desperately needs.

Case study by FACS, Community Justice Program

5.3 In FACS' view, and to the extent of any inconsistency, mental health law should prevail over guardianship law. However, FACS recognises the issues surrounding self-discharge from mental health facilities, and suggests that consideration be given to allowing guardians to override a person's decision to self-discharge in certain circumstances.

Question 6.2: Is there a clear relationship between the Guardianship Act and the Forensic Provisions Act? What areas, if any, are unclear or inconsistent? How could any lack of clarity or inconsistency be resolved?

5.4 FACS agrees that the relationship between the Guardianship Act and the Forensic Provisions Act is unclear.

5.5 In FACS' experience, the two regimes often conflict in relation to decisions concerning supported accommodation, restrictive practices (including authorisations), and the implementation of forensic orders. For example, when a person is conditionally released into the community on a forensic order, they are sometimes issued with conditions about where they can live – e.g. in a secured or restrictive living facility. Where the person is also under guardianship, their guardian's authority to make decisions relating to their accommodation may be limited by the conditions contained in the person's forensic order.

5.6 FACS' view is that the forensic provisions regime should take precedence when the two come into conflict. In FACS view it is preferable that the forensic provisions regime (and the MHRT) manage decisions concerning a person's accommodation while that person is under a forensic order. FACS considers that the guardianship regime is not the most appropriate regime for ensuring that a person complies with accommodation conditions under their forensic order.

Question 6.3: Is it appropriate that mental health laws prevail over guardianship laws in every situation? If not, in which areas should this priority be changed?

5.7 FACS acknowledges that the objectives of guardianship and mental health legislation are different, in that the former focuses on a person's best interests and welfare while the latter seeks to balance those considerations against the safety of the individual and the community.

5.8 In FACS view it is appropriate for mental health laws to prevail over guardianship laws when the two are in conflict. The MHRT is equipped and has appropriate safeguards to make decisions about various aspects of a person's life, including health-related decisions. Further, mental health legislation does not preclude the MHRT from taking the person's wishes into account during determinations.

6. Restrictive practices

6.1 In February 2017, the Commonwealth Department of Social Services published the NDIS Q&S Framework. The Framework outlines the arrangements and safeguards that will apply to NDIS participants and registered providers when the NDIS is full scheme and was developed in consultation with people with disability, carers, providers and peak bodies over a three-year period. FACS has been working closely with the NSW Department of Premier and Cabinet (DPC), the Commonwealth and various other agencies to implement the Framework.

6.2 On 31 May 2017 the NDIS Q&S Commission Bill was introduced into the Commonwealth Parliament. The Bill is crucial in implementing the Framework. It seeks to ensure that there are nationally consistent quality assurance mechanisms and safeguards for NDIS participants when the NDIS is fully implemented on 1 July 2018. Among other things, the Bill establishes the NDIS Quality and Safeguards Commission and the office of the NDIS Q&S Commissioner; registration and oversight systems for NDIS providers; compliance and enforcement powers and obligations; a framework for establishing national complaints and resolution systems; and various other administrative and regulatory amendments to ensure efficient and effective operation of the NDIS.

6.1 Clause 181H of the Bill provides the NDIS Q&S Commissioner's behaviour support functions.

6.2 The responses provided below have been informed by the Q&S Framework, the NDIS Q&S Commission Bill and explanatory memoranda

Question 7.1: What are the problems with the regulation of restrictive practices in NSW and what problems are likely to arise in future regulation?

6.3 In FACS view QP 5 accurately highlights the most significant issues concerning the current regulation of restrictive practices in NSW. These include:

- a lack of a consistent definition of what constitutes a restrictive practice;
- inconsistent approaches to regulating restrictive practices between government agencies;
- minimal regulation of restrictive practices in informal settings;

- inadequate requirements for consents and authorisations; and
- lack of an independent body to monitor the use of restrictive practices.

FACS also acknowledges that the use of restrictive practices may be in breach of Article 15 of the UNCRPD.

Future regulation of restrictive practices

6.4 FACS acknowledges that much of the challenge in managing a system of restrictive practices will depend on how the system is set up under the NDIS.

6.5 Subclauses 181H(a) and (b) of Bill state that the NDIS Q&S Commissioner will provide leadership in relation to behaviour support, and in the reduction and elimination of the use of restrictive practices by NDIS providers, including:

- building capability in behaviour supports by developing and implementing a competency framework for registered NDIS providers who are registered to provide behaviour support (181H(a)); and
- overseeing the use of behaviour support and restrictive practices, including by monitoring registered NDIS provider compliance with the conditions of registration relating to behaviour support plans (181H (d)).

6.6 The explanatory memorandum further explains that:

> Within the NDIS, a restrictive practice can only be used when it is part of a behaviour support plan developed by a registered behaviour support practitioner and authorised by the state or territory in which the participant resides. The Bill provides for the Commission to mandate that both the behaviour support practitioner developing the plan and the provider(s) implementing an authorised restrictive practice are registered with the Commission. Mandating these providers to be registered with the Commission will ensure that the competence of those involved in behaviour support are assessed against the Commission's competency framework and the NDIS Practice Standards. A civil penalty offence will apply if these categories of supports are delivered by an unregistered provider as well as the Commissioner's other compliance and enforcement powers. This does not preclude criminal or civil action that may be taken under State or Territory legislation[16]

6.7 While the NDIS Q&S Commission Bill clearly provides a regulatory framework for managing registered NDIS providers who are authorised to implement restrictive practices, the details of how these functions will operate in practice, and in relation to state mechanisms, are yet to be determined. It is also not yet known how restrictive practices will be regulated for those who do not fall within the NDIS.

6.8 In FACS' view NSW should only enact legislation regarding restrictive practices or behaviour support in relation to matters that clearly fall outside the jurisdiction of the NDIS, and for which there are no other mechanisms already available.

6.9 FACS understands that the NDIS Q&S Commission Bill will be supported by rules which will provide more details about behaviour supports and restrictive practices, including definitions, guiding principles and how the regulatory framework will operate in practice. FACS will continue to work with DPC, the

[16] Explanatory Memoranda, National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017, [para 324], page 57.

Commonwealth and other stakeholders on progressing implementing the Bill, NDIS Q&S Framework, and rules when they are developed.

Question 7.2: Should NSW pass legislation that explicitly deals with the use of restrictive practices? If so, should that legislation sit within the Guardianship Act or somewhere else?

6.10 See comments in relation to 6.6

Question 7.5: In what circumstances, if any, should restrictive practices be permitted?

6.11 Restrictive practices should only be used in clearly defined and limited circumstances, in strict compliance with relevant policies and protocols and only to prevent foreseeable self-harm or harm to others. Failure to use a restrictive practice in a situation where harm to others is foreseeable could potentially result in a criminal charge being brought against the person. FACS considers that restrictive practices may, in exceptional circumstances, be essential for ensuring the safety a person who is subject to such practices.

6.12 The use of these practices may also be used to ensure that a person receives the appropriate care and medical treatment (see medical and dental).

Question 7.7: What safeguards should be in place to ensure the appropriate use of restrictive practices in NSW?

6.13 FACS notes the VLRC's recommendation regarding the features that should be included in a mechanism for ensuring the appropriate use of restrictive practices:

- describes how the decision about a restriction upon liberty will be made if the person concerned is objecting but lacks capacity to make the decision;
- describes how this decision should be made if the person does not have the capacity to make it but appears compliant;
- describes the facilities in which the procedure can be used;
- includes principles to guide how and when this procedure should be used;
- includes principles to guide how decisions should be made collaboratively; and
- describes the situations in which the decision must be referred to the Tribunal[17].

Question 7.8: Should the law include specific requirements about the use of behaviour support plans?

6.14 In FACS view, any scheme for regulating restrictive practices should include the development of policies and guidance materials aimed at reducing and eliminating the use of restrictive practices in behaviour support.

[17] Above no 3, [para 15.135], page 339.

6.15 Education, training and advice should also be provided, along with monitoring of compliance by regulated providers and collecting, analysing and disseminating data and other information about their use.

Research on the development and evaluation of behaviour support practices and their effectiveness in reducing the use of restrictive practices is also essential.

Part 3 – Question Paper 6: Remaining Issues

1. Context

1.1 QP 6 covers topics that are not covered by question papers 1–5 either because they cut across the topics covered in these papers or because they do not fit into the topics addressed in these papers. It considers topics such as, the objects, principles and language of the Act; accommodating people from CALD backgrounds and ATSI peoples under the Act; issues relating to children and young people; and various other issues.

1.2 In responding to QP 6, FACS has been guided by the objects of the UNCRPD, the DIA, and Article 12 of the UN Convention on the Rights of the Child which recognises children's rights to be heard in legal processes.

2. Objectives, principles and language

Questions 2.1 and 2.2: What, if anything, should be included in a list of statutory objects or general principles to guide the interpretation of the guardianship law?

2.1 As stated in our submission to QP 1, FACS supports reform to the Guardianship Act that will bring it into line with:

- the disability rights objects and principles set out in the DIA;
- the 'choice and control' framework of the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act); and
- the NDIS Q&S Framework, which is underpinned by the human rights principle of 'choice and control'.

2.2 An objects clause can play an important role in guiding decision-making under the Guardianship Act, and under the other Acts and schemes that interact with the guardianship system. An objects clause can also help to guide action on compliance with the Act, particularly in relation to the interpretation and application of the provisions of the Guardianship Act.

2.3 FACS supports the inclusion of an objects clause that is similar to that contained in section 3 of the DIA. This section provides that:

> *The objects of [the Disability Inclusion Act] are as follows:*
>
> *(a) to acknowledge that people with disability have the same human rights as other members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights,*
>
> *(b) to promote the independence and social and economic inclusion of people with disability,*
>
> *(c) to enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports and services,*
>
> *(d) to provide safeguards in relation to the delivery of supports and services for people with disability,*

(e) to support, to the extent reasonably practicable, the purposes and principles of the United Nations Convention on the Rights of Persons with Disabilities,

(f) to provide for responsibilities of the State during and following the transition to the National Disability Insurance Scheme.

2.4 As stated in our submission to QP 3, FACS supports the inclusion of an updated statement of general principles in the Guardianship Act, similar to that provided in section 4 of the DIA. A statement of general principles could help guide decision-making under the Act and bring the Act into line with contemporary human rights and disability rights principles.

2.5 Consideration should be given to including some of the DIA principles into an updated list of guardianship decision-making principles, if one is developed.

Question 2.3: How should multicultural communities be accommodated in guardianship law?

2.6 FACS supports the VLRC's view that "[laws need to be] sufficiently flexible to preserve and uphold the diverse cultural values and practices of people with impaired decision-making ability".[18] We strongly recommend that the NSW guardianship laws include provision to accommodate people from CALD communities.

2.7 In particular, FACS supports the Guardianship Act being amended to include a list of principles to guide decision-making relating to particular groups, similar to section 5(3) of the DIA which states:

(3) Supports and services provided to people with disability from culturally and linguistically diverse backgrounds are to be provided in a way that:

(a) recognises that cultural, language and other differences may create barriers to providing the supports and services, and
(b) addresses those barriers and the needs of those people with disability, and
(c) is informed by consultation with their communities.

2.8 In FACS' view the section 5(3) DIA principles appropriately recognise the needs of people from CALD communities, and the more communal sense of decision-making that can exist in some CALD communities. FACS notes that these principles were developed in consultation the disability, including representative multicultural organisations.

2.9 FACS recommends that consideration should be given to amending the Guardianship Act to better reflect different cultural norms.

Question 2.4: How should ATSI be accommodated in guardianship law?

2.10 In FACS' view the current guardianship could better accommodate ATSI peoples and strongly recommends that the Act be amended to include a provision, similar to section 5(2) of the DIA, which deals specifically with the cultural needs of ATSI people. Section 5(2) provides:

[18] Above no 3, [para 6.83], page 90.

(2) *Supports and services provided to Aboriginal and Torres Strait Islander people with disability are to be provided in a way that:*

(a) recognises that Aboriginal and Torres Strait Islander people have a right to respect and acknowledgment as the first peoples of Australia and for their unique history, culture and kinship relationships and connection to their traditional land and waters, and

(b) recognises that many Aboriginal and Torres Strait Islander people with disability may face multiple disadvantage, and

(c) addresses that disadvantage and the needs of Aboriginal and Torres Strait Islander people with disability, and

(d) is informed by working in partnership with Aboriginal and Torres Strait Islander people with disability to enhance their lives.

2.11 In drafting these principles, FACS consulted broadly across the State and disability sector, including consulting with peak bodies, such as the Aboriginal Child, Family and Community Care State Secretariat (AbSec).

2.12 FACS also supports broadening the definition of "close friend or relative" under section 3E of the Act to better reflect Aboriginal concepts of kinship and family. In this regard, section 71(2) of the Mental Health Act may be instructive. It states the following:

In this section:

close friend or relative of a patient means a friend or relative of the patient who maintains both a close personal relationship with the patient through frequent personal contact and a personal interest in the patient's welfare and who does not provide support to the patient wholly or substantially on a commercial basis.

relative of a patient who is an Aboriginal person or a Torres Strait Islander includes a person who is part of the extended family or kin of the patient according to the indigenous kinship system of the patient's culture.

2.13 Further, as proposed in our response to Question 2.3 (above), FACS supports the inclusion of a provision that recognises the communal concepts of decision-making in some ATSI communities.

3. Relationship with Commonwealth Laws

Question 3.1: What should be done to ensure an effective interrelationship between Commonwealth nominee or representative provisions and state based arrangements for managing a person's financial and personal affairs?

3.1 FACS recognises that having different nominees or representatives under Commonwealth and state schemes can be highly confusing for individuals who are appointed as a guardian as well as the person for whom they are appointed. One of the key difficulties in applying the Commonwealth decision-making model to the NDIS is determining how NDIS supporters and representatives interact with NSW appointed guardians and financial managers.

3.2 FACS recommends that protocols be developed for the NDIA (and other relevant Commonwealth agencies) to work collaboratively with the NSW Office

of Public Guardian and NSW Trustee and Guardian and in a manner that is consistent with NSW guardianship orders.

3.3 To address concerns about potential duplication, FACS considers that the starting point should be that where a representative is required, the NDIS Act should encourage the appointment of existing state appointees as NDIS representatives.

3.4 In our view it would be beneficial if all Commonwealth schemes that allow someone to help a person with a disability to make a decision (such as *Social Security (Administration) Act 1999* (Cth), and *Age Care Act 1997* (Cth)) contained provisions that require consideration to be given to whether there is a guardian or person already formally appointed under state law. We recommend that uniform national guidelines should be developed on the factors that agencies should consider when determining who should be a representative/nominee.

3.5 FACS supports an information exchange scheme being established to enable relevant state and Commonwealth agencies to make informed and consistent decisions about appointments[19]. This will help facilitate collaboration between relevant Commonwealth agencies and the NSW guardianship system.

3.6 FACS supports the establishment of a state based registration system (see FACS submission to QP 4 above) as this will assist the NDIA and other Commonwealth agencies to know what arrangements exist in NSW for managing a person's financial and personal affairs.

3.7 FACS is particularly concerned that the current interaction between Commonwealth and state laws may cause confusion for people with a disability and their guardians who have obligations under both. FACS recommends that clear and accessible guidelines be produced to explain how the Guardianship Act interacts with the NDIS legislation and other Commonwealth support schemes.

3.8 In FACS' view a new Public Advocate could assist people with a disability and their representatives to access information and appropriate assistance under Commonwealth/state schemes and provide necessary safeguards.

3.9 Consideration should be given to amending the Guardianship Act to clarify the status of NSW nominee arrangements, for example, by including a provision to the effect that 'the functions conferred on a guardian and/or financial manager will allow them to act as a nominee or representative under relevant Commonwealth schemes'.

3.10 Alternatively, the Guardianship Act could be amended and the power to make orders appointing a NSW appointed decision-maker as a NDIS representative conferred, under Commonwealth/State cross vesting arrangements.

3.11 It would also be appropriate for all applicable state and Commonwealth legal frameworks to include the capacity to intervene to prevent the abuse and undue influence of a person requiring decision making support. There should also be a uniform obligation to report concerns about the misconduct of a nominee, guardian or financial manager supported by an appropriate investigative body (such as a Public Advocate who is empowered to resolve complaints).

[19] NSW Law Reform Commission *Review of the Guardianship Act 1987, Remaining Issues – Question Paper 6,* page 17.

4. Adoption information directions

Question 4.1: What changes, if any, should be made to the part of the Guardianship Act that relates to adoption information directions?

4.1 FACS is of the view that the adoption information provisions contained in Guardianship Act do not require amendment. FACS considers that provisions appropriately recognise the objects of the *Adoption Act 2000* (NSW) (as set out in section 7 of that Act), and individuals affected by such requests.

5. Age

Question 5.1: What should the age threshold for guardianship orders in the Guardianship Act be?

5.1 A young person aged 16 to 18 years could be subject to either a guardianship order or a child protection care order[20]. In FACS' view, this 'age overlap' between the child protection and the guardianship systems is beneficial as it:

- ensures there is no regulatory gap between the two systems for 17 year olds; and
- it allows for a smooth transition for a young person with a disability from out-of-home care to guardianship arrangements.

5.2 In FACS view there are sufficient provisions in the *Children and Young Persons (Care and Protection) Act 1998* [21] (Care Act) and Guardianship Act [22] to ensure that the Children's Court and the Tribunal do not make inconsistent orders.

5.3 Accordingly, FACS does not support the proposal to increase the age threshold for a guardianship order to 18 years. As the case study below illustrates, there are circumstances where it will be in the best interests of a young person for guardianship arrangements to be made before the age of 18.

Case Study: Guardianship order being made for 17 years old young woman with an intellectual disability

A 17 year old young woman with a mild/moderate intellectual disability and suspected personality disorder had significant domestic issues with her mother (also with a diagnosed personality disorder and learning delays). There were multiple reports of physical and verbal aggression from both sides and the young woman decided that she did not want to return home nor did her mother want to have her there. The young woman had only minimal interaction with the child protection system prior to this.

Ageing Disability and Home Care supported the young woman to move into a refuge. At this time her mother was still her legal decision-maker and had access to her daughter's disability support pension that she was using for her own bills etc.

[20] A person up to the age of 18 who is in need of care and protection may be placed on a care order under the Care Act. It is also possible to appoint a guardian for a young person aged 16 or over under the Guardianship Act.

[21] By s. 79A(5) Care Act, the court can not make a guardianship order that is inconsistent with order made by the Tribunal or Supreme Court.

[22] s.15(1)(c) Guardianship Act , cannot make a guardianship order in respect of a young persons who is subject to a Court order, with out the Court's consent.

An application was made to the Guardianship Tribunal for a substitute decision-maker and financial trustee. In this case there was no father present, nor appropriate other family members willing to support the young woman. A public guardian was appointed for 12 months and a financial guardian was also appointed a. This was a great support for the young woman as she was unable at that point, cognitively and emotionally to make well considered decisions. These orders were reviewed the following year and her Financial Trustee was maintained. However her Public Guardian was removed as she had demonstrated during the 12 months, her ability to make increasingly sound decisions for herself.

Case study by FACS, Disability Operations

5.4 So that there is no regulatory gap between the child protection and guardianship system for 16 and 17 year olds, FACS recommends that the age threshold for guardianship orders remain at 16 years old.

Question 5.2: Should the Tribunal have the power to make financial management orders for children and young people?

5.5 In FACS view the Tribunal should have the power to make financial management orders for young people over the age of 16 years.

5.6 For children under the age of 16 years, financial decisions should rest with their parent or legally appointed guardian. However, FACS recognises that there may be exceptional or special circumstances where it may be appropriate for Tribunal to exercise the power to make financial management orders for children under the age of 16 years.

Question 5.3: Under what circumstances, if any, should the Tribunal be able to appoint 16- and 17-year-olds as guardians?

5.7 As a general principle FACS does not support 16 and 17 year olds being appointed as guardians. All states and territories require the guardian to be at least 18 years of age[23].

5.8 The age restriction appears to be appropriate given the significance of decision-making responsibilities that guardians assume on behalf of their ward. Factors such as the potential guardian's maturity, sense of responsibility and rights of an adult "citizen" are important preconditions to assuming a role as a guardian and effectively exercising guardianship functions.

[23] s.44(1) *Guardianship and Administration Act* (WA) states that: "A guardian (including a joint guardian) shall be an individual of or over the age of 18 years"; s141 of the *Guardianship and Administration Act 2000* (Qld) says "The tribunal may appoint a person as guardian or administrator for a matter only if a person who is at least 18 years ; s.23 (1) of the *Guardianship and Administration Act 1986* (Vic) states that: "The Tribunal may appoint as a plenary guardian or limited guardian any person who has attained the age of 18 years"; s. 21(1) of the *Guardianship and Administration Act 1995* (Tas) states that "The Board may appoint as a full guardian or limited guardian any person who is of or over the age of 18 years"; s. 15(1) of the *Guardianship of Adults Act 2016*(NT) states that "An individual is eligible for appointment as a guardian for an adult under section 13 if: (a) the individual: (i) is at least 18 years of age".

Question 5.4: Should young people have standing in the Tribunal?

5.9 FACS supports the amendment to the Guardianship Act to allow a young person aged 16 years or above to participate directly in proceedings. FACS also supports young people who are primary carers being allowed to make an application to the Tribunal.

5.10 However, we recognise that no one model of a child's participation in court or tribunal proceedings is appropriate to all circumstances. Ultimately, the needs of children differ to such an extent that there can be no single 'representation' or 'participation' model, appropriate for all young people (16 -18 year olds). For example, the involvement of an articulate young person who is a primary carer may not be appropriate for a young person with an intellectual disability.

5.11 If a 16 year old initiates proceedings and the Tribunal is of the view that the young person does not understand the nature and possible consequences of the proceedings or is not capable of appropriately participating in the proceedings, FACS suggests that the Tribunal require the appointment of a 'next friend' or legal representative.

5.12 We also recommend that clear procedures and protocols be developed to clarify the current uncertainty as to the standards for representation and involvement of young people in Tribunal proceedings. In determining the scope of their representation and involvement, a young person's willingness to participate and ability to communicate should be guiding factors.

Question 5.5: Should NSW introduce a streamlined method for parents of adult children with profound intellectual disability to become their guardian when they turn 18 without the need for a Tribunal hearing?

5.13 FACS supports the establishment of a streamlined process for appointing parents as guardians under the Guardianship Act, without the need for a hearing where there are no factual or legal issues in dispute.

5.14 The model proposed by the Victorian Government in the Guardianship and Administration Bill 2014 (and described in [5.41] to [5.45] of QP6) for a young adult with profound intellectual disability, could be considered.

5.15 Under this model, an administrative order could be made by Tribunal appointing the parents as guardians when their child turns 18 years of age. In our view the application should be supported by:

- medical evidence showing that the young person does not have decision-making capacity and their views can not be ascertained;
- a statement establishing that the parents have been the on-going substitute decision-maker for their adult child.

5.16 FACS supports the inclusion of safeguards into this model such as: the requirement to disclose any criminal convictions; parents being ineligible if they have lost custody, parental responsibility or guardianship of their children.

5.17 If Tribunal has concerns, or is not satisfied with the documentation provided, the application could be listed for hearing.

5.18 Consideration should also be given to enabling an administrative order to be made that recognises such parents as authorised decision-makers under the NDIS scheme. This may assist in facilitating uniform recognition of parents in

their decision-making roles under state guardianship laws and Commonwealth regimes (see FACS submission to question 3.1).

6. Orders for guardianship and financial management

Question 7.1: Should there continue to be separate orders for guardianship and financial management?

6.1 As stated in our submission to QP 4, FACS view is that guardianship and financial management orders should always reflect the best interests of the person under guardianship or whose finances are under management.

6.2 FACS considers that the Tribunal should be able to make single orders for guardianship and financial management orders when a person's guardian and financial manager are the same person. We also agree with the proposal that the Tribunal be allowed to make single orders that allocate certain powers and responsibilities to more than one person for financial and personal matters.

6.3 As noted in QP 6, the benefits of a single order are greatest where the same person carries out financial and personal functions[24] and could result in decisions being made more quickly. Where it is appropriate to divide functions, the Tribunal should be able to continue to make separate orders, or if the orders are more closely aligned, to make a single order for more than one person.

6.4 For these reasons, FACS supports the introduction of single orders, particularly where the Tribunal is of the view that the same person has the requisite skills and capacity to carry out guardianship and financial decision making functions.

6.5 FACS notes its previous comments on separating the roles of guardians and financial managers in its submission to QP 3.

Question 7.3: How should disputes between decision-makers be resolved?

6.6 In FACS' view there should be a clear and transparent process for resolving disputes between decision-makers. FACS acknowledges the various positions described in QP 6 and agrees that disputes should be resolved through mediation in the first instance. Where a dispute is not resolved and/or the dispute is complex, it should be progressed to the Tribunal.

6.7 Consideration could be given to developing resources (with clear instructions and processes) for decision-makers on ways to effectively, and independently, manage disputes before engaging a third-party regulator or mediator.

7. Search and removal powers

Question 8.1: Is there a need for provisions in the Guardianship Act that empower police or NCAT employees to search premises and remove people deemed in need of protection?

7.1 FACS supports the retention of sections 11 and 12 of the Guardianship Act, which empower police and Tribunal employees to search premises and remove a person 'in need of protection'.

[24] Above no 19, [para 7.4], page 40 .

7.2 While acknowledging that such provisions are rarely used, FACS is of the view that they provide important protections for people with disability, particularly as they exercise greater choice over their accommodation under the NDIS.

7.3 Under Part 4 of the *Boarding Houses Act 2012* (NSW) (Boarding Houses Act), the Minister for Family and Community Services is responsible for ensuring that assisted boarding houses[25] comply with specified accommodation and service standards.

7.4 The Act also empowers authorised officers to enter an assisted boarding house without consent or warrant where there are concerns, but this power only extends to assisted boarding houses. It does not apply to people with disability living in other forms of accommodation e.g. the family home or non-regulated premises where they may be at risk.

Case study: Need for search and removal powers

For example, in 2011 FACS made applications to the Guardianship Tribunal to remove 31 residents from two boarding houses in Orange and Dubbo under section 11 of the Guardianship Act. At the time, it was alleged that residents in these facilities had been subject to physical abuse, false imprisonment, over medication and a range of inhumane treatments. The section 11 removal orders were issued and the residents were successfully removed from both facilities.

8. Handling personal information

Question 10.1: In what circumstances should different decision-makers and supporters be able to access a person's personal, health or financial information?

8.1 FACS considers that access to personal, health and financial information by decision-makers and other supporters needs to be improved.

8.2 While there is an argument for harmonising legislation that recognises the right of decision-makers to access information from government and corporate bodies, options on how to resolve this need to be carefully weighed. Requirements that apply to the access to, and disclosure of personal information should be addressed together so that issues which are conceptually linked are addressed in a consistent way.

8.3 In responding to requests for access to personal information, government and business must consider the application of privacy and confidentiality laws. The issue is further complicated by:

- inconsistencies between Commonwealth and state privacy legislation and statutory confidentiality provisions
- inconsistent language in various statutes regarding substitute decision-makers for example, Part 1 of the Health Records and Information Privacy Act, Part 4 of the Privacy Code of Practice (General) 2003, and Part 5 of the Guardianship Act on medical and dental treatment;
- current limitations on the coverage of service providers and non-government organisation (NGO) substitute decision makers under privacy legislation and the increased role of NGOs under the NDIS.

[25] boarding houses accommodating 'people with additional needs'

8.4 Consideration could be given to inserting information access and disclosure provisions into guardianship legislation. Doing so would cut through some of the inconsistencies and limitations identified above, particularly for private guardians and persons responsible who have limited recognition under information management regimes.

8.5 It would also fit with provisions such as section 25 of the *Privacy and Personal Information Protection Act 1998* which recognise exceptions and allow for non-compliance with privacy principles.

8.6 In FACS' view the preferred approach is to amend the Guardianship Act to include information access and disclosure provisions.

8.7 With respect to the circumstances in which decision-makers and supporters are able to access a person's personal, health or financial information, FACS considers the Victorian approach to be useful, namely, that substitute decision makers be entitled to access personal information that is "relevant to and necessary for carrying out their functions".

8.8 Information would only be released once the person or body holding the information is satisfied:

- that the person is the substitute decision maker; and
- the information is relevant to and necessary for carrying out the functions of the substitute decision maker.[26]

8.9 For example, if a person has decision-making functions regarding financial matters then they should be able to access relevant personal financial information about the person.

8.10 Similarly, FACS considers that guardians should have a duty to respect the confidentiality and privacy of the person's personal information. Consideration should be given to adopting an approach whereby guardians have a duty to keep a person's personal information secure from unauthorised access, use and disclosure, and are only permitted to use and disclose the personal information for the purpose of exercising their authority and carrying out their duties and responsibilities. [27]

9. Supreme Court

Question 11.1: What, if anything, should legislation say about the relationship between the Supreme Court of NSW's inherent protective jurisdiction and the operation of guardianship law?

9.1 In FACS view the current case law adequately addresses the relationship between the Supreme Court of NSW's inherent protective jurisdiction and the operation of guardianship law. Accordingly, FACS does not consider that any amendments are needed on this matter.

Question 11.2: Are the provisions that deal with the interaction between the Supreme Court of NSW and the NSW Civil and Administrative Tribunal adequate?

[26] Above no.3, rec 192.
[27] Above no 3, rec 289 - 290.

9.2 FACS Community Justice Program (CJP) has expressed concern about a lack of clarity between guardianship orders made by Tribunal and extended detention / supervision orders made in the Supreme Court.

9.3 In FACS' view the intersection of the supervisory powers and responsibilities of Tribunal and the Supreme Court is unclear.

9.4 FACS suggests that consideration be given to resolving this uncertainty in the legislation, as it will help relieve pressure on organisations that are required to support an individual who is subject to conditions under an extended detention or supervision order.

> *In a recent case, a Supreme Court judge determined that an extended supervision order was not required because the guardianship order was sufficient to fulfil this function. What the court failed to consider was that guardianship orders are issued in the "best interests" of the person under guardianship, and did not consider factors such as community safety. Guardians also have wide discretion to make decisions under a guardianship order, while extended supervision orders are more rigid. Also, because a supervision order was not issued, there was a real risk that the person would lose many of the supports they needed to help manage their issues and risks to themselves and the community.*
>
> **Example by FACS, Community Justice Program**

Question 11.3: Are there any issues that should be raised about the Supreme Court of NSW's supervisory, review and appellate jurisdictions?

9.5 FACS has not identified any issues.