NCAT
NSW Civil &
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New South Wales Law Reform Commission
GPO Box 31
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Dear Commissioner,

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

Question Paper 1 addresses the issue of 'Preconditions for alternative decision-making arrangements'. The Tribunal has sought to assist the Commission by commenting, where relevant, on the operation of the current legislative scheme as well as providing references to reported decisions that may have relevance to the questions raised in the Question Paper. As the Tribunal is an independent body which exercises a range of quasi-judicial functions under the *Civil and Administrative Tribunal Act 2013* (NSW) and the *Guardianship Act*, we do not propose to comment on matters of policy.

The Tribunal has focused its comments on:

- the discussion concerning the acknowledgment of variations in a person's capacity (at [3.32]-[3.45]);
- the discussion concerning "other preconditions" that must be satisfied before a guardianship order may be made (at [4.1]-[4.6]).

Acknowledging variations in capacity

The Question Paper raises for discussion the ability of the current legislative regime to take into account that a person's decision-making capacity can vary over time and may depend on the type and nature of the decision to be made. The following questions are posed:

Q 3.4 (1) Should the law acknowledge that decision-making capacity can vary over time and depend on the subject matter of the decision?
(2) How should such acknowledgments be made?
(3) If the definition of decision-making capacity were to include such an acknowledgment, how should it be expressed?
(4) If capacity assessment principles were to include such an acknowledgment, how should it be expressed?

The Question Paper notes that some submissions to the Commission have emphasised that an individual's capacity can fluctuate. Criticism has been made of a

"bright line" approach which does not reflect "the lived experience of people experiencing cognitive decline associated with dementia" [3.35]. Criticisms are also made of an approach which assumes that people either do, or do not have, decision-making capacity [3.35].

The Tribunal acknowledges these observations. The reported cases listed below provide examples of the application of the current legislative regime where there is evidence that the person's decision-making capacity has, or is likely to, change over time. It is also noted that the end of term and requested review processes set out in the *Guardianship Act,* enables review of these matters to occur.[1]

These cases include:

- a matter in which evidence was provided as to significant improvements in a person's mental health and insight between the time of making the application for a guardianship order and the hearing of that application, resulting in no order being made by the Tribunal (*UIO* [2016] NSWCATGD 5);

- a matter in which the Tribunal determined not to make a financial management order in respect of a person with fluctuating decision-making capacity. The Tribunal concluded that other methods of managing the person's affairs namely the making of an enduring power of attorney, which could be activated during periods where the person's mental health deteriorates, was "a less intrusive and reasonably satisfactory option in the current circumstances" (*DQC* [2016] NSWCATGD 10);

- a matter in which the Tribunal reviewed a financial management order at the application of the person who was the subject of the order and believed that he had regained the capacity to manage his own affairs. In revoking the financial management order, the Tribunal noted:

  > "The evidence was unanimous from all those involved in the hearing that Mr BPC has regained his capacity to manage his affairs. He has had a successful trial of managing his pension for more than a year, and has participated in a program to develop budgeting skills. He has demonstrated an ability to save, and has goals for the future, including obtaining employment. He is very compliant with treatment, no longer misuses drugs and alcohol, is in a long term stable relationship, and is well engaged with support services. He has outlined a plan for managing his savings, and the NSW Trustee and Guardian, his support workers, and his partner have expressed confidence in his capacity to adhere to this plan" (*BPC* [2015] NSWCATGD 34);

- a matter involving an 18-year old woman with complex mental health issues and a traumatic background who, up until she turned 18 had been under the care of the relevant Minister pursuant to a court order. The Tribunal made a financial management order but made it reviewable in 12 months time having regard to the person's age and the likelihood that "she will have opportunities to continuously develop her living skills". Given the person's age and "her

[1] See *Guardianship Act 1987* (NSW), Part 3, Div 4 (in relation to guardianship orders) and Part 3A, Div 2 (in relation to financial management orders).

> strongly held wish to be given the opportunity to manage her financial affairs", the Tribunal also recommended that "the NSW Trustee and Guardian, at a time and in circumstances it considers appropriate, pursuant to s 71(2) of the *NSW Trustee and Guardian Act 2009* (NSW), give consideration to authorising Ms TFC to manage so much of her financial affairs as the NSW Trustee and Guardian considers appropriate" (*TFC* [2015] NSWCATGD 49).

For further examples, see:

DAZ [2008] NSWGT 3 (29 January 2008)
EXW [2007] NSWGT 3 (31 January 2007)
OMF [2008] NSWGT 5 (1 February 2008)

Other preconditions – the person must be "in need" of an order

The Question Paper (at [4.3]) notes that in NSW, "the Tribunal must be satisfied that the person 'is in need of a guardian' before it can make a guardianship order". The Question Paper then goes on to observe (at [4.4]) that in other jurisdictions, legislation "similarly requires that the person must be in need of the relevant order". The paper (at [4.6]) then refers to a number of jurisdictions that do not expressly impose a precondition that there be a need for an order. Rather, "they require consideration of whether the person's needs could be met by other means that are less restrictive of the person's freedom of decision and action, or their rights and personal autonomy".

To the extent that it is suggested that the *Guardianship Act* requires the Tribunal to be satisfied that a person "is in need" of a guardianship order before the power to make such order can be exercised, we point out that the reference in s 14(1) to "a person in need of a guardian" is in fact a reference to the definition in s 3(1) of the Act, that is, "a person who, because of a disability, is totally or partially incapable of managing his or her person" (s 3(1)). The term 'a person who has a disability' is also defined (see s 3(2)).

The earlier part of the Question Paper considers these statutory definitions when dealing with the issue of decision-making capacity. While satisfaction of these matters is a precondition to the exercise of the power to make a guardianship order, the *Guardianship Act* does not impose an additional requirement that there be a "need" for a guardian before that power can be exercised. Rather the *Guardianship Act* requires that in considering whether or not to exercise the power to make a guardianship order, the Tribunal must have regard to the matters listed in s 14(2), any other relevant matters and the principles set out in s 4 (*IF v IG & Ors* [2004] NSWADTAP 3, [26]-[28]; *BZE v NSW Public Guardian* [2015] NSWCATAP 64, [22]-[23]).

The *Guardianship Act* directs that one of the matters that the Tribunal must have regard to when considering whether to make a guardianship order, is whether it is practicable for services to be provided to the person without the making of an order (s 14(2)(d)) as well as the principle that a person's freedom of decision-making and freedom of action should be restricted as little as possible (s 4(b)). This is consistent with the description provided (at [4.6]) of those jurisdictions that do not expressly require that a need for a guardianship order be established before a guardianship order is made.

We raise this issue simply to ensure that there is clarity that the question posed at 4.1(1) — "Should there be a precondition before an order is made that the Tribunal be satisfied that the person is "in need" of an order?" — takes into account that the *Guardianship Act* does not currently require the Tribunal to be satisfied that a person "needs" a guardianship order before the power to make such order can be exercised.

Future comments on capacity

We also note that the current Question Paper relates specifically to the question of decision-making capacity in reference to the *Guardianship Act*. The Tribunal may have additional comments when the Commission considers other legislative regimes such as the *Powers of Attorney Act 2003* (NSW).

Yours sincerely,

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NSW Civil and Administrative Tribunal