NSW DISABILITY NETWORK FORUM

Review of the *Guardianship Act 1987:*

Response to Question Paper 3

31 January 2017

Contact the **NSW Disability Network Forum** through the NCOSS secretariat

[redacted]

About the NSW Disability Network Forum

The NSW Disability Network Forum comprises non-government, non-provider peak representative, advocacy and information groups whose primary purpose is to promote the interests of people with disability. The aim of the DNF is to build capacity so that the interests of people with disability are advanced through policy and systemic advocacy.

NSW Disability Network Forum Member Organisations:

- Being Mental Health and Wellbeing Consumer Advisory Group
- Blind Citizens NSW
- Deaf Australia NSW
- DeafBlind Association NSW
- Deafness Council (NSW)
- First Peoples Disability Network
- Information on Disability and Education Awareness Services (IDEAS) NSW
- Institute for Family Advocacy
- Intellectual Disability Rights Service
- Multicultural Disability Advocacy Association of NSW
- NSW Council for Intellectual Disability
- NSW Council of Social Service (NCOSS)
- NSW Disability Advocacy Network
- People with Disability Australia
- Physical Disability Council of NSW
- Positive Life NSW
- Side by Side Advocacy Incorporated
- Self Advocacy Sydney
- Synapse (Brain Injury Association NSW)

This submission was developed by NCOSS in consultation with the DNF members and approved by NCOSS Deputy CEO.

Introduction

The DNF welcomes the opportunity to respond to the third Question Paper of the review of the *Guardianship Act 1987 (NSW)* (*Guardianship Act*), dealing with the role of guardians and financial managers.

This Question Paper deals with the appointment of substitute decision-makers, the powers and functions they should be able to exercise, and the principles they should apply. As emphasised in our responses to previous Question Papers, the DNF strongly advocates that substitute decision-making be used only as a last resort, after the person has been provided with the maximum possible support to make decision

In relation to the questions dealing with appointments of guardians and financial managers, we emphasise the importance of the substitute decision-maker not having a conflict of interest with the person needing support and, where possible, having a compatible personality to assist in making decisions that align with the person's will and preferences.

We believe the powers and functions of guardians and financial managers should be set out in the *Guardianship Act*, but also specified in each order made by the Tribunal. This will ensure substitute decision-makers understand the nature of their powers and powers are exercised proportionately, in accordance with Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

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As highlighted in the DNF's response to previous Question Papers, this review coincides with a period where many people with disability will experience greater choice and control, and corresponding opportunities to broaden their life experience and expand their will and preferences. In this context, we believe that decision-makers should act in accordance with a person's will and preference while giving overriding consideration to their personal and social well-being. Personal and social well-being has been recommended by the Victorian Law Reform Commission as an appropriate overriding standard for substitute decision-makers.

This submission should be read in conjunction with the DNF's response to Question Paper 1.[1]

Question 2.1: Who can be an enduring guardian?

(1) Who should be eligible to be appointed as an enduring guardian?

(2) Who should be ineligible to be appointed as an enduring guardian?

While believing a person should be able to select an adult of their choice to be their enduring guardian, the DNF endorses the current exclusion in the *Guardianship Act* that a person's paid service provider should not be eligible to be their enduring guardian. Further, to avoid any potential conflict of interest, we believe an appointment should lapse if an enduring guardian becomes a person's paid service provider.

Question 2.2: Who can be a Tribunal-appointed guardian?

(1) What should the Tribunal consider when deciding whether to appoint a particular person as a guardian?

The DNF supports the current criteria in the *Guardianship Act* relating to the appointment of guardians the Tribunal must be satisfied that:

(a) the personality of the proposed guardian is generally compatible with that of the person under guardianship;

(b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship;

(c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order;

(d) the proposed guardian would be able to exercise their functions in accordance with the *Guardianship Act*.[2].

In particular, we emphasise the importance of the Tribunal ensuring the parties are compatible and have no conflict of interest.

(2) Who should be ineligible to act as a guardian?

The DNF believes that it is important for the revised *Guardianship Act* to outline classes of people who are excluded from acting as guardians, as a safeguard against conflict of interest. We recommend the

[1] DNF response to review of the *Guardianship Act 1987*: Question Paper 1.

[2]. *Guardianship Act 1987* (NSW) s 17(1).

exclusions for paid carers and health care professionals operating in Queensland and the Northern Territory.

Question 2.3: When should the Public Guardian be appointed?

(1) Should the Tribunal be able to appoint the Public Guardian as a guardian? If so, when should this occur?

(2) Should there be any limits to the Tribunal's ability to appoint the Public Guardian? If so, what should these limits be?

The DNF agrees that the Public Guardian should only be appointed as the last resort. Due to the fundamental importance of the decisions to be made by a guardian, it would be preferable if the person chosen within the Office of the Public Guardian has a level of compatibility with the subject person.

Question 2.4: Should community volunteers be able to act as guardians?

(1)What could be the benefits and disadvantages of a community guardianship program?

(2) Should NSW introduce a community guardianship program?

The DNF believes that a community guardianship program should be introduced in NSW. Such a program would draw concerned citizens into relationships with people in need of a decision-maker. This would have the dual benefits of increasing people's networks of support and reducing demand on the Public Guardian.

To ensure the scheme is successful, there should be rigorous recruitment, training, support and monitoring of volunteers. Resources would need to be made available to the organisations and agencies responsible for the scheme to ensure these safeguards are delivered and volunteers are effectively supported. Further, volunteers should be asked to provide a commitment to the person needing support for the duration of the order.

Question 2.5: Who can be a private manager?

(1) What should the Tribunal consider when deciding whether to appoint a particular person as a private manager?

(2) Should the *Guardianship Act* include detailed eligibility criteria for private managers or is the current "suitable person" test sufficient?

(3) Should the same eligibility criteria apply to private guardians and private managers? If so, what should these common criteria be?

The DNF believes private financial managers should meet the eligibility criteria required of guardians. They should also be able to demonstrate a level of financial competency commensurate with the finances being managed and/or the willingness to attain this level of competency. When managing small personal finances, a family member's personal touch and knowledge of a person's preferences might be preferred over a high level of financial acumen.

Accordingly, we recommend that when appointing a financial manager, the Tribunal should be satisfied that:

(a) the personality of the proposed financial manager is generally compatible with that of the person under the financial management order;

(b) there is no undue influence or conflict between the interests (particularly, the financial interests) of the proposed financial manager and those of the person under the financial management order; and

(c) the proposed financial manager is both willing and able to exercise the functions conferred or imposed by the proposed financial management order.

The DNF believes that the exclusions we proposed for guardians in Question 2.2 should also apply to financial managers.

Question 2.6: Should the NSW Trustee be appointed only as a last resort?

(1) Should the *Guardianship Act* state explicitly that the Tribunal can only appoint the NSW Trustee as a last resort?

(2) If so, how should this principle be expressed in the Act?

The DNF believes that the *Guardianship Act* should state explicitly that the NSW Trustee and Guardian should be appointed as the last resort. This would create consistency between guardianship and financial management and emphasise that preference should always be given to the least restrictive option available.

Question 2.7: Should the Act include a succession planning mechanism?

(1) Should the *Guardianship Act* allow relatives, friends and others to express their views on who should be a person's guardian or financial manager in the future?

(2) What could be the benefits and disadvantages of such a succession planning mechanism?

(3) When deciding who to appoint, should the Tribunal be required to give effect to the wishes expressed in a succession planning statement?

The DNF endorses the recommendation of the Victorian Law Reform Commission that succession planning should be available as an option. We believe that the Tribunal should be required to consider succession planning documents but not obligated to follow them. This approach gives primacy to the views of people in the subject person's life, but allows the Tribunal discretion to consider changed circumstances.

Question 3.1: What powers and functions should enduring guardians have?

(1) **Should the *Guardianship Act* contain a more detailed list of the powers and functions that an adult can grant to an enduring guardian? If so, what should be included on this list?**

The DNF believes that the *Guardianship Act* should contain a more detailed list of the powers and functions of enduring guardians. This approach would enable the parties to understand the nature of

the powers given by an enduring appointment, as well as any limits or conditions on the exercise of those powers.

Following the approach of the Victorian Law Reform Commission, we believe the *Guardianship Act* should provide that an appointer can authorise their enduring guardian to exercise power over 'personal matters', defined in the Act in a non-exhaustive list. The order should then specify which particular power an enduring guardian can exercise, ensuring restrictions on liberty are proportional in accordance with Article 12 of the UNCRPD.

Expanding the list of personal matters would help a person understand which powers they would want their enduring guardian to exercise, and not to exercise, in the event they lack capacity in the future.

The DNF endorses the following non-exhaustive list of 'personal matters' identified by the Victorian Law Reform Commission as potential powers of enduring guardians:

(a) where and with whom the person lives;

(b) with whom the person associates;

(c) whether the person works and, if so, the kind and place of work and the employer;

(d) decisions about health care, including refusal of life‐sustaining medical treatment if the conditions for refusal of medical treatment are fulfilled, and consent to forensic examinations;

(e) what education or training the person undertakes and the place where this occurs;

(f) daily living issues, including, for example, diet and dress; and

(g) any legal matters not relating to the person's financial or property matters.

(2) Should the *Guardianship Act* contain a list of the powers and functions that an adult cannot grant to an enduring guardian? If so, what should be included on this list?

The DNF endorses the Victorian Law Reform Commission's list of non-exhaustive list of functions which enduring guardians should not be able to exercise. This list includes powers relating to:

(a) making or revoking the person's Will;

(b) making or revoking an appointments or advance directives;

(c) voting on the person's behalf in a Commonwealth, state or local election or referendum;

(d) entering into or dissolution of a marriage or sexual relationship;

(e) decisions about the care and wellbeing of any children of the person, including a decision in relation to adoption;

(f) a decision to detain or compulsorily treat the person for reasons other than the personal and social wellbeing of the person;

(g) consenting to an unlawful act; and

Question 3.2: Should the Tribunal be able to make plenary orders?

(1) What are the benefits and disadvantages of allowing the Tribunal to make plenary orders?

(2) Should the *Guardianship Act*:

(a) continue to enable the Tribunal to make plenary orders

(b) require the Tribunal to specify a guardian's powers and functions in each guardianship order, or

(c) include some other arrangement for granting powers?

The DNF believes the Tribunal should not be allowed to make plenary orders as Article12 of the UNCRPD mandates that restrictions on a person's liberty must be as limited as possible. We endorse the approach recommended by the Victorian Law Reform Commission whereby the *Guardianship Act* contains a non-exhaustive list of functions and guardians are granted powers from the list, which are appropriate to the circumstances. Making the list non-exhaustive would ensure that the Tribunal has discretion to respond to exceptional circumstances appropriately.

Questions 3.3and 3.4: What powers and functions should tribunal-appointed guardians have and be excluded from exercising?

The DNF believes that the *Guardianship Act* should adopt a consistent approach to the functions of guardians and enduring guardians. A such, we recommend that the non exhaustive list of functions and exclusions specified in relation to the appointment of enduring guardians at Question 3.1 should be applied to Tribunal appointed guardians.

Question 3.6: Should the roles of guardians and financial managers remain separate?

(1) What are the benefits and disadvantages of keeping the roles of guardians and financial managers separate?

(2) What are the benefits and disadvantages of combining the roles of guardians and financial managers?

(3) Should the roles of tribunal-appointed guardians and financial managers remain separate?

The DNF believes that the roles of Tribunal appointed guardians and financial managers should remain separate. Although personal and financial decisions are often interlinked, we agree with the observations of the Victorian Law Reform Commission that the skills required for each role are

significantly different. These different skills mean that the subject person is best served if the roles remain separate.

The DNF believes that the role of guardian and financial manager can be filled by the same person provided that the person meets the criteria for each role.

Question 4.1: What decision-making principles should guardians and financial managers observe?

What principles should guardians and financial managers observe when they make decisions on behalf of another person?

The DNF believes that in addition to current principles in the *Guardianship Act*, decision-makers should be required to:

- provide the person with support to make, or participate in, decisions that affect them;
- consider the importance of maintaining (or creating) support networks and supportive relationships;
- consider the person's right to be a valued member of society;
- recognise the importance of maintaining the person's Aboriginal or Torres Strait Islander cultural and linguistic environment, values, traditions and customs (where relevant);
- recognise the importance of maintaining the person's cultural and linguistic environment, values, traditions and customs (where relevant);
- exercise their powers in a way that is appropriate to the person's characteristics and needs;
- consider the importance of promoting the person's happiness, enjoyment of life and wellbeing; and
- consider the ability of the person to maintain their preferred living environment and lifestyle.

We endorse the view of the Victorian Law Reform Commission that the duty to act in a person's 'best interest' should be replaced with a duty to act in a way that promotes the personal and social wellbeing of the represented person.[3]

Question 4.2: Should guardians and financial managers be required to give effect to a person's "will and preferences"?

(1) What are the advantages and disadvantages of the current emphasis on "welfare and interests" in the *Guardianship Act's* general principles?

The current standard in the *Guardianship Act* of reflecting a person's welfare and interests conflicts with Article 12 of the UNCRPD, which requires decisions to be made in accordance with a person's will

[3].Victorian Law Reform Commission, *Guardianship,* Report 24 (2012) [17.100], rec 284.

and preferences. However, it is important to consider the circumstances of people with disability who under the influence of others, hold variable views or have extremely limited abilities to communicate and understand options and consequences. The current standard takes account of this, but rewording the standard as 'personal and social well-being" would emphasise the need to take account of a person's will and preferences where possible.

(2) Should "welfare and interests" continue to be the "paramount consideration" for guardians and financial managers?

The DNF considers that the phrase 'welfare and interests' should not be used in the *Guardianship Act* as it is reminiscent of the 'best interests' standard, contradicting the focus on a person's will and preferences in Article 12 of the UNCRPD.

However, we recognise that in some situations a person's will and preference may be difficult to ascertain (even with the maximum possible support) or a decision based on a person's will and preference may harm them.

Accordingly, some members believe the *Guardianship Act* should specify that the paramount consideration for decision-makers is a person's human rights. Other members believe that considering a person's broader context and network of relationships, the phrase "personal and social well-being" would be a more appropriate standard.

(3)What could be the benefits and disadvantages of requiring guardians and financial managers to give effect to a person's will and preferences?

As highlighted above, the will and preferences standard promotes a person's autonomy and is consistent with Article 12 of the UNCRPD. However, in some situations a person's will and preferences may be affected by their previous lack of choice and control, so broadening their life experience would change their will and preference. In these cases, it would be beneficial to look more broadly at the personal and social wellbeing of a person or their human rights.

(4) Should guardians and financial managers be required to give effect to a person's will and preferences?

In accordance with Article 12 of the UNCRPD, the *Guardianship Act* should require guardians and financial managers to give effect to a person's will and preferences except where:

- A person's will and preferences cannot be determined, even when they have been given the maximum possible support, in which case guardians and financial managers should look to determine the person's likely will and preferences; and
- A person's will and preferences is likely to cause them harm (including social harm), in which case a decision should be made in accordance with their human rights and personal and social well-being.

Question 4.3: Should NSW adopt a "substituted judgment" model?

(1) **What could be the benefits and disadvantages of a "substituted judgment" approach to decision-making?**

A substitute judgement approach - whereby a decision-maker makes the decision the person would have made if they had capacity to do so - preserve's a person's autonomy, in accordance with Article 12 of the UNCRPD. However, we recognise the risk that decision-makers may impose their own views

or values when deciding what the person would have wanted, as well as the difficulty for a decision-maker in determining what a person would have wanted, or in balancing a person's past and present in the event of a conflict. A standardised process or guideline to guide the making of a substituted judgement may be useful to overcome some of this difficulty.

(2) If so, how would guardians and financial managers work out what the person would have wanted? Should the legislation set out the steps they should take?

It is important for the *Guardianship Act* to set out the factors for decision-makers to consider when determining what a person would have wanted if they had capacity. If these factors are not set out, there is a high risk that the decision-maker will apply their own judgement instead of a substitute judgement.

The DNF endorses the factors put forward by the Victorian Law Reform Commission:

(a) the wishes and preferences the person expresses at the time a decision needs to be made, in whatever form the person expresses them;

(b) any wishes the person has previously expressed, in whatever form the person has expressed them;

(c) any considerations the person was unaware of when expressing their wishes which are likely to have significantly affected those wishes;

(d) any circumstances that have changed since the person expressed their wishes which would be likely to significantly affect those wishes; and

(e) the history of the person, including their views, beliefs, values and goals in life.

Question 4.4: Should NSW adopt a "structured will and preferences" model?

(1) What could be the benefits and disadvantages of a "structured will and preferences" approach to decision-making?

A **"**structured will and preferences" approach to decision-making aligns with Article 12 of the UNCRPD and provides guidance to decision-makers about what steps to take if a person's will and preferences cannot be determined.

As highlighted above, a person's will and preference may be affected by their limited opportunities Therefore, a disadvantage of this model is that a decision made in accordance with their will and preferences would undermine their personal and social well-being.

(2) Should guardians and financial managers be required to make decisions based upon a person's will and preferences?

See answer to 4.2(4) above.

(3) If so, how would guardians and financial managers work out a person's will and preferences? Should the legislation set out the steps they should take?

If a structured will and preferences model is to be effective, it is important that the *Guardianship Act* provide guidance to decision-makers about what steps should be followed. The DNF endorses the approach in the *My Health Records Act 2012 (Cth)* where a decision-maker has a 'hierarchy' of duties as follows:

1. Give effect to a person's will and preferences;

2. If a person's will and preferences cannot be determined, give effect to their likely will and preferences, where possible consulting people who may be aware of these preferences. A person's previous will and preferences, as well as their values and beliefs, should be considered when determining their likely will and preferences;

3. If a person's likely will and preferences cannot be determined, acting in a way that promotes their personal and social well-being.

Some DNF members suggest a modification of the test, so that decision-makers are required to act in accordance with a person's human rights at point 3 instead of their personal and social wellbeing.

(4) What should a guardian or financial manager be required to do if they cannot determine a person's will and preferences?

See above at Question 4.4(3).

(5) Should a guardian or financial manager ever be able to override a person's will and preferences? If so, when should they be allowed to do this?

The DNF considers decision-makers should be able to override a person's will and preferences if they would pose a serious risk to the person's personal and social well-being. In the context of people developing opportunities for choice and control, 'harm' should be conceptualised as including personal, social and psychological harm.