Law Reform Commission Review of Guardianship Act QP3

This submission is a collaborative effort between Disability Advocacy NSW ('DA') and Mid North Coast Community Legal Centre ('MNCCLC'). DA and MNCCLC are grateful for the opportunity to provide the NSW Law Reform Commission ('NSWLRC') with input relevant to their review of the *Guardianship Act 1987* (NSW) ('the Act').

About Disability Advocacy ('DA')

DA helps people of all ages with any type of disability or mental illness get fair treatment in the Hunter, New England, Mid North Coast, Central West and Hawkesbury-Nepean regions of NSW. DA's core purpose is to ensure that people with a disability realise these rights in practice by advocating with and for them.

About Mid North Coast Community Legal Centre ('MNCCLC')

MNCCLC provides safe, reliable and accessible legal services to socio-economically disadvantaged people living in the local government areas of Kempsey Shire, Port Macquarie-Hastings and MidCoast (Manning region). MNCCLC aims to increase access to justice and empower individuals with knowledge of their rights and the ability to resolve their legal issues.

Both organisations believe strongly in advocating for people with impaired ability. In a just and fair society, where the legal system is accessible to all members of the community, there is a need for our laws to reflect current normative values regarding disability. As the NSWLRC has noted, the increased frequency with which the NSW Civil and Administrative Tribunal ('NCAT') is dealing with guardianship applications from people with diminished capacity shows there is a need to review the suitability of the current legal framework governing guardianship in NSW.[1]

MNCCLC and DA have not addressed every question in Question Paper 3, but rather have identified those questions to which our work and experience relates. We have chosen to provide responses to the following questions.

[1] New South Wales Law Reform Commission, *Review of the Guardianship Act*, Background Paper (2016) 12–13[3.1]–[3.5].

Question 2.1: Who can be an enduring guardian?

Section 6B of the existing Act sets out eligibility criteria for the appointment of an enduring guardian by another person who has legal capacity. MNCCLC and DA do not feel that these criteria should change. However, our organisations support the provision of education to people who have been appointed as enduring guardians, based on the human rights approach.

The National Association of Community Legal Centres has previously published a brochure on using the human rights approach to exercise guardianship[2]. This brochure provides a good foundation for education on the topic. Education should be available regionally as well as in major cities, and should be accessible and free. Ideally, education should be strongly supported by legal professionals who prepare the relevant documents for their clients.

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 principles currently articulated in Sections 4 and 14 of the Act provide suitable guidance to the Tribunal in determining appropriate appointees.

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?*

MNCCLC and DA submit that the Tribunal should be able to appoint the Public Guardian as a last resort, where there are concerns for the rights of the individual requiring a guardian. The benefits of the Public Guardian are that it is impartial, and may be of assistance where other persons are not suitable to act due to lack of understanding of the role.

[2] http://www.naclc.org.au/resources/NACLC_Guardianship_web_2012_FINAL.pdf accessed 31/1/2107

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

Our organisations submit that there should be defined limits to the Tribunal's ability to appoint the Public Guardian. The Tribunal should not be able to do so where the capacity of the individual has not been fully established, due to lack of opportunity to demonstrate capacity. It may be appropriate for the Tribunal to appoint the Public Guardian in cases where family conflict prevents the appointment of another party.

Case Study DA

X is a young man with Autism Spectrum Disorder and mental illness. X's parents were separated and could not agree on decisions about X's care and medical treatment. X himself felt that he could not make decisions independently of his parents, as he would feel he was betraying or siding with one or the other.

X's father wished for X to be removed from all his psychiatric medication, against his doctors' recommendation. X's mother did not want to be appointed as X's guardian as she felt it would put further strain on the family breakdown. His father, meanwhile, informed the Tribunal that if he were appointed guardian he would disregard the opinions of X's mother and doctors, and make decisions based on his own views.

In this case, the Public Guardian was the appropriate appointment, as it would be required to consult with X's family and seek professional opinions when making decisions about X.

Case Study DA

Y is a young man with a mild intellectual disability and schizophrenia. Y's brother and sister are his appointed guardians. Y lived in supported accommodation, however wished to live independently in the community with support from services.

Y sought DA's assistance because his guardians refused to let him move. The manager of Y's accommodation service argued that Y was unable to live independently as he often needed "prompting to complete tasks". Y's guardians accepted this opinion and refused to let him pursue his goal. At the time of the Guardianship Order, there was no documented evidence around Y's daily living skills.

With DA's assistance, Y underwent an assessment with an independent Occupational Therapist, which showed that Y was capable of living independently with drop-in support services.

In this case, the Public Guardian may have been a more appropriate appointment, as it would be required to seek professional opinions when making decisions about Y.

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?*

Potential advantages of a community guardianship program are that it would allow personal relationships to develop between guardians and individuals, and provide an alternative in regional and rural areas where Public Guardians may never meet their clients and therefore do not fully understand their situation and needs. There is also a cost-saving benefit to engaging volunteers as opposed to public agencies.

However, disadvantages of a community guardianship program are that some volunteers may be inappropriate for appointment. There will need to be an appropriately funded body with administrative oversight and responsibility for supervising and maintaining a volunteer program. Volunteer programs are also successful insofar as they have sufficient committed volunteers. If there were inconsistent volunteers this may have a detrimental impact on

people using that service.

2. *Should NSW introduce a community guardianship program?*

Community guardianship programs have been successfully implemented in Victoria and Western Australia. If NSW were to introduce a community guardianship program, legislated safeguards such as reporting obligations should be in place, and sufficient funding to ensure its success would need to be directed toward it.

3. *If NSW does introduce a community guardianship program:*

a. *Who should be able to be a community guardian?*

Persons who could be able to be community guardians should possess the following:

- Demonstrated commitment to the rights of people with a disability;
- Evidence of good character and reputation

c. *Who should recruit, train and supervise the community guardians?*

MNCCLC and DA submit that should such a program be introduced, an independent organization should be responsible for arranging training and supervision of community guardians. There should be some safeguards such as requirements for police checks, similar to the system currently in place in Victoria[3].

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?*

Section 25G of the Act provides grounds for making a Financial Management Order. These include that an Order can only be made if the Tribunal has considered the capacity of the individual to manage their own affairs, the need for an alternative party to do so, and the best interests of the individual being served by the appointment of a financial manager.

[3] Office of the Public Advocate Community Guardianship Program "An Overview" April 2010

Section 25M allows for the appointment of a suitable person or the NSW Trustee as financial manager once Section 25G has been satisfied.

MNCCLC and DA consider that the NSW Trustee should be appointed only as a last resort, and that this should be stated explicitly in the Act. The NSW Trustee operates according to the guidelines provided by the Act; however, at times this may impede their ability to respond promptly to changes in lifestyle or preference. However, the NSW Trustee does provide an important service to people who have no suitable alternative and yet require financial management assistance.

Question 3.3: What powers and functions should Tribunal-appointed guardians have?

1. *Should the Guardianship Act list the powers and functions that the Tribunal can grant to a guardian? If so, what should be included in this list?*

Through DA's advocacy for clients brought before the Guardianship Division of NCAT, it is understood that a guardian can be granted the functions of making decisions about accommodation, access to services, medical and dental treatment and legal matters.

However, the existing Act is silent on the powers that NCAT could give to a private or public guardian. Currently, Section 21B of the Act provides only that "a guardian may, on behalf of a person under guardianship, sign and do all such things as are necessary to give effect to any function of the guardian." MNCCLC and DA submit that the Act should list the powers and functions that the Tribunal can grant to a guardian. The Act (s6B (1)) does list the powers and functions of someone appointed to be an enduring guardian and we consider that this list should be replicated into a section of the Act covering guardianship.