Review of the *Guardianship Act 1987*

Legal Aid NSW submission to the NSW Law Reform Commission's Question Papers 2 and 3

January 2017

Legal Aid NEW SOUTH WALES

323 CASTLEREAGH ST
HAYMARKET NSW 2000 / DX 5 SYDNEY

Table of Contents

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides civil law services to some of the most disadvantaged and vulnerable members of our society. Currently we have over 150 civil lawyers who provide advice across all areas of civil law.

The specialist Mental Health Advocacy Service of Legal Aid NSW provides representation to clients in the Guardianship Division of the NSW Civil and Administrative Decisions Tribunal (**the Tribunal**) on a direct representation basis and when the Tribunal orders that the client be separately represented. Solicitors in Legal Aid NSW regional offices also provide representation in guardianship matters.

The Legal Aid NSW Children's Civil Law Service (**CCLS**), established in 2013, provides a targeted and holistic legal service to young people identified as having complex needs. The CCLS also facilitates representation of its clients in matters before the Tribunal, either through liaising with the young person's separate representative to ensure the young person's views are heard, or directly representing the young person in the proceedings.

Legal Aid NSW provided 614 advice and minor assistance services relating to guardianship to clients in 2015–2016. We also provided 264 representation services in guardianship matters, through both in-house and private practitioners.

Legal Aid NSW welcomes the opportunity to respond to Question Paper 2: *Decision-making models* and Question Paper 3: *The role of guardians and financial managers*.

Should you have any questions about the submission, please contact:

[redacted]

or

[redacted]

Question Paper 2: Decision-making models

Question 5.1: Formal supported decision-making

As noted in QP2, informal supported decision-making arrangements are widespread. It is not clear that there is a pressing need for formalisation of these arrangements. Statutory models that have been established overseas are in their infancy and have not yet been evaluated.

On the other hand, there are some advantages in formal recognition of supportive decision-making arrangements. These include:

- facilitating access by the supporter to information about the supported person so that the supporter can more effectively support that person
- providing evidence of a supportive decision-making arrangement before the NSW Civil and Administrative Tribunal (**the Tribunal**) in guardianship proceedings[1]
- providing a clear, statutory 'less restrictive' alternative to a substituted decision-making arrangement, and
- clarifying, for both the supporter and the supported person, their roles and responsibilities.

For these reasons, Legal Aid NSW would support the amendment of the *Guardianship Act* to: acknowledge that a person may appoint a supporter; define the role of the supporter, and allow a supporter to access information for the purpose of helping a person make a decision.

In order to avoid the unnecessary intrusion of the state into private affairs, the following principles are important:

1. Functioning informal support arrangements should be permitted and encouraged to remain informal.
2. Formal appointment of supporters should occur only when there is a need for formality—for example, to enable access to medical records and information from health professionals.
3. Formal support arrangements should be positioned as a potential alternative to guardianship and substitute decision-making. The Tribunal should be precluded from making a guardianship order if a supported decision-making arrangement is available that would enable the person to make important life decisions.

[1] On the other hand, the recent case of *LBL* [2016] NSWCATGD 22 demonstrates that the Tribunal is able to take into account an informal supporter arrangement and will refuse to make a guardianship order if such an arrangement is in place.

The third point above is particularly important given the recent finding by the Tribunal that a person who needs significant support in making decisions is a person for whom a guardianship order may be made. In *UPN* [2015], the Tribunal commented:

> *In the Tribunal's view, if a person, because of a disability, requires substantial prompting or explanation as to the availability and desirability of particular options before he or she can reach a decision as to which course to take in important life matters such as health care, accommodation or the provision of services, then that person cannot be said to be independently capable of making important life decisions on those matters. … It follows that [Mr UPN] is someone for whom the Tribunal could make a guardianship order because his disabilities do prevent him from making some important life decisions.*[2]

Enshrining a supported decision-making model in the *Guardianship Act* would counter this restrictive approach, and provide an option that would maximise the autonomy of people with impaired decision-making capacity. When presented with a person who "requires substantial prompting or explanation as to the availability and desirability of particular options"[3], the Tribunal would not immediately turn to guardianship, but would instead look at whether adequate support could be made available to enable that person to exercise their capacity under a supported decision-making arrangement.

The recently introduced National Disability Insurance Scheme (**NDIS**) emphasises the involvement of participants in planning and making choices. The demands of this scheme may mean that people with disabilities need more decision-making support. [4] The formal recognition of supportive decision-making arrangements could avoid increased numbers of people under guardianship.

Legal Aid NSW does not support the formal co-decision maker model. It does not appear to have a clear definition. It is also unclear what decision-making capacity is retained by the person, but the use of the word 'jointly' implies that a decision can only be made if both parties agree to it. The person subject to the arrangement is only able to make decisions that the other party agrees with. This is a substantial loss of decision-making capacity and autonomy. In practice, if it is working well then a supported decision-making framework would also have worked.

We also agree with the concerns outlined at 5.24–5.26 of QP2 regarding co-decision making becoming the compromise position, the potential for co-decision makers to become substitute decision makers, and the difficulty of the concept.

Legal Aid NSW has not addressed any of the subsequent questions in QP2 regarding co-decision making as we do not support this model.

---

[2] See *UPN* [2015] NSWCATGD 11.
[3] Ibid.
[4] For example, HKO, a non-verbal intellectually disabled man was found to require a guardian because his group home was being transferred from Ageing, Disability and Home Care NSW to a private provider pursuant to the NDIS: *HKO* [2016] NSWCATGD 14.

Question 5.2: Key features of a formal supported decision-making model

As noted above, the *Guardianship Act* should be amended to acknowledge that a person may appoint a supporter. At this stage, Legal Aid NSW does not see much benefit in empowering the Tribunal to appoint a supporter. If a supported decision-making arrangement is not consented to by both the supporter and the supported person, it is unlikely to be a truly supportive arrangement.

One exception might be where the Tribunal is considering making a guardianship order. It might be useful for the Tribunal to have, as an alternative, the option of appointing the Public Guardian as a supporter. This could provide an alternative to guardianship when the person does not have a family member or friend who is willing and able to act as a supporter. However, it would still be necessary to have the consent of the supported person for such an arrangement to be effective. Further, our practitioners have observed that currently, the Public Guardian does not take steps to improve the decision-making capacity of its clients. It may not, at the present time, have the capacity to provide decision-making supporters.

Legal Aid NSW is not persuaded that registration of supported decision-making agreements is necessary. There should be minimal formal requirements for the appointment of a supporter, such as the completion of an online or paper form.

Question 5.3: Retaining substitute decision-making as an option

It will still be necessary to retain substitute decision-making as an option for people who do not have the capacity to make or communicate their decisions. It should also be available in the circumstances listed in 5.36 of the Question Paper, that is:

- where the person is incapable of understanding the full nature and consequences of their decisions
- where the person does not have the capacity to articulate their wishes
- where the person would prefer a substitute decision maker to be appointed
- where there are likely risks or real evidence of serious financial loss, harm, neglect, overprotection or exploitation under a supported decision-making model, and
- where urgent action is needed because a person's own decisions or the influence of others puts their safety and well-being at imminent risk.

A substitute decision maker should not be appointed if there is a less restrictive option available, such as the appointment of a supporter. Legal Aid NSW supports the adoption of the ALRC Safeguards Guidelines, which provide that the appointment of a substitute decision maker should be:

- a last resort and not an alternative to appropriate support
- limited in scope, proportionate, and for the shortest time possible, and
- subject to review.

Question 6.1: When supporters and co-decision makers can be appointed

When a person appoints a supporter, there should be minimal formalities, eligibility requirements and preconditions, in light of the fact that the supported person is not giving up any legal rights.

Currently a person is eligible to be appointed as an enduring guardian if the person is over 18 and not providing certain services for a fee.[5] Legal Aid NSW considers that similar minimal eligibility requirements should be imposed on supporters when a personal appointment is made. However, we have observed that paid workers currently act as informal supporters, and consider that such workers should be eligible for appointment as supporters.

It is arguable that if the Tribunal appoints a supporter for a person, there should be more stringent requirements. As noted in QP2, the nature of the relationship between the person and their supporter is an important consideration. Currently when the Tribunal appoints a guardian, it must be satisfied that:

- the personality of the proposed guardian is generally compatible with that of the person under guardianship
- there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and
- the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.[6]

Legal Aid NSW considers that these matters are more relevant to the appointment of a supporter than, for example, whether the person has been convicted of certain offences or is bankrupt.

Question 6.5: Public agencies as supporters or co-decision makers

Supported decision-making arrangements should be available to anyone who needs them. If a person does not have a friend or family member to support their decision making, it would be useful to have a public agency such as the Public Guardian available. The Tribunal should only appoint the Public Guardian as a supporter if the person agrees to the appointment. Proper training would have to be provided on the role of the supporter, to clearly differentiate this role from the traditional substitute decision maker.

Question 6.6: Paid workers and organisations as supporters

As noted above, Legal Aid NSW considers that paid workers and organisations should be eligible to be appointed as supporters. In many cases, paid workers spend more time with a person than their family and friends do, and are more familiar with their wishes and preferences. While there is a risk of conflict of interest, this is also the case with family and

[5] *Guardianship Act 1987* (NSW) s 6B.
[6] *Guardianship Act 1987* (NSW) s 17.

friends. In some cases, the appointment of a paid worker as a supporter will avoid having to choose between family members.

A professional organisation should be eligible to be appointed as a supporter if, as part of its function, it employs and supervises people to be supporters. The example of PO-Skane, an independent Swedish NGO that provides personal ombudsmen to disabled people, would be worth exploring.[7]

Question 6.7: Volunteers as supporters

Legal Aid NSW has concerns about the risk of appointing community volunteers to support vulnerable people. Careful examination of such an approach would be necessary to ensure proper safeguards were in place.

Question 6.8: Powers and functions of supporters

Generally, Legal Aid NSW has concerns about the use of the term 'powers' in relation to supporters. It must be emphasised that supporters do not have powers, but only responsibilities to assist the supported person to do the things listed in 6.42 of QP2, that is, to

- obtain relevant information
- understand this information and other considerations relating to the decision
- express their will and preferences
- make a decision
- let other people know about their decision, and
- give effect to their decision.

The only power that a supporter should have is the power to obtain information. The *Guardianship Act* should provide that information that is confidential to a supported person may be provided to a supporter where that information is relevant to a supported decision and may lawfully be obtained by the supported person (as proposed in the Victorian Bill). The Act should also impose a duty of confidentiality on the supporter.

We do not consider that it is necessary to list powers that the supporter cannot exercise. Rather, the statute should make clear that the supporter does not make decisions or exercise powers on behalf of the supported person, with the exception of the power to access information.

[7] See further Alex L Pearl (2013) "Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward?" *Leeds Journal of Law & Criminology* vol 1 no 1, 23.

Question 6.10: Duties and responsibilities of supporters

We have addressed the responsibilities of supporters above. It may be useful for the statute or guidelines for supporters to outline general principles, for example:

- The wishes and preferences of people with impaired decision-making ability should inform decisions about their lives.
- People with impaired decision-making ability are entitled to take reasonable risks and make choices that other people might disagree with.
- Even if a person has appointed a supporter, that person may choose not to be supported to make a decision.

It may also be useful for guidelines to remind supporters that they

- must not attempt to access information for a purpose other than supporting the person
- must not use that information other than to support the person, and
- must keep that information confidential.

Question Paper 3: The role of guardians and financial managers

Question 2.1 and 2.2: Who can be a guardian or financial manager?

Legal Aid NSW does not have concerns about the eligibility criteria for private guardians and financial managers.

Question 2.3: When should the Public Guardian be appointed?

The Tribunal should only appoint the Public Guardian in circumstances where there is no other suitable person able and willing to be appointed as guardian.

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

A community guardian could provide a more personal and culturally appropriate service for the person under guardianship, but there are risks in this approach. Legal Aid NSW supports Recommendation 29 of the Legislative Council Standing Committee on Social Issues, which called for assessment of the Public Guardian's proposed community guardianship program, and in particular, (among other things), "the adequacy of safeguards for the person under guardianship in terms of the recruitment, screening, training and supervision of community guardians."[8]

[8] NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity,* Report 43 (2010) rec 29.

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

While the Tribunal has the power to make plenary orders, our observation is that they are not made and we understand that the Tribunal has a policy not to make them. We agree with that approach. The power to make plenary orders should be removed. The Tribunal should only be able to make orders giving powers and functions that are demonstrated to be necessary, and should be required to specify the guardian's powers and functions in each guardianship order.

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

The Act should contain a non-exhaustive list of the powers that the Tribunal can grant to a guardian. This would include those commonly given, including accommodation, medical and dental consent, access to services and advocacy.

In our view one of the most important functions of a guardian is to support and develop the person's decision-making capacity.

Case study

A Legal Aid NSW client, Cindy, was 17. She had impaired decision-making capacity and had not been assisted by her family to gain decision-making skills. A guardian was appointed for Cindy but her guardian also did not work with her to improve her decision making capacity. Cindy's solicitor observed that her guardian seemed more concerned with protecting her than with promoting her enjoyment of and participation in life.

The *Guardianship Act* should make clear that a guardian's role includes working with the person to develop their ability to gather information, consider options, take advice and communicate their decisions (see for example *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(3)(a)).

Question 3.4 Are there any powers and functions that guardians should not be able to have?

It is not necessary to include a list of powers and functions that cannot be granted. We are not aware of any occasions where the Tribunal has granted inappropriate powers such as making a will or terminating a relationship. A list may be counterproductive as it could not anticipate every inappropriate power and may by inference suggest that something omitted is acceptable.

Question 3.5: What powers and functions should financial managers have?

Legal Aid NSW does not have any major concerns about the powers and functions of financial managers that are provided for in the *Guardianship Act*. However, we do consider that the Act could more clearly enshrine the function or responsibility of financial managers to build the financial management capacity of their clients.

Financial managers are required to exercise their powers in accordance with the general principles of the Guardianship Act, which include that "persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs".[9] Section 71 of the *Guardianship Act* allows managed clients to request an agreement that allows them to manage some or all of their money. This provision could be an avenue to allow clients to acquire experience and skills in money management. However, Legal Aid NSW's clients report that their financial manager (usually the NSW Trustee and Guardian (**TAG**)) does not provide any financial decision-making training or education to their clients.

Case study

Jared is 18 and single. His assets of $600,000 and his Disability Support Pension are under financial management. He would like to manage some of his own money. Although TAG advised that they may be willing to consider an agreement to release part of Jared's Centrelink income to him to manage directly, they advised that this is subject to him demonstrating he can properly budget his money. When asked what budgeting or financial management training they could offer or recommend, TAG advised that they did not offer any services and did not know of any services to refer Jared to but 'maybe the Salvos runs something'. Jared's financial management orders are only in place for a limited time (until he turns 25) and it is essential for him to be supported to learn budgeting and financial management skills.

To address this issue, the *Guardianship Act* should be amended to make clear that financial managers must not only protect and administer their client's funds, but also support their client to develop their own financial management skills. At a minimum, they should refer their client to educational services.

[9] *Guardianship Act 1987* (NSW) s 4.

Powers that a financial manager should not have

The legislation should include at least the following in a non-exhaustive list of decisions that cannot be made by financial managers:

- making or revoking the person's will, and
- making decisions that restrict the person's personal decision-making autonomy, but cannot be reasonably justified in order to ensure proper management of their finances.

Our clients have indicated to us that at times, financial managers exercise their powers with the intention of influencing the client's lifestyle choices, rather than to protect their financial interests.

Case study

Kalinda is in her mid-fifties and single. Her assets of $500 000 and her Disability Support Pension of $20 000 per year are under financial management. Her financial manager pays her bills and gives her a weekly allowance of $200. Kalinda pays approximately $8000 per year to her manager in fees. Sometimes, she cannot afford to go out to dinner with her friends, and she asked her manager for an increase in her weekly allowance. Her manager refused, saying that she should buy fewer cigarettes. Legal Aid NSW negotiated an increase on her behalf.

Case study

Jared, mentioned above, is 18. His financial manager has expressed inappropriate levels of judgement regarding his request for access to money for $800 to purchase a phone and $240 for shoes.

Financial managers are appointed to protect and administer the financial affairs of people who are unable to do so themselves, not to make judgements about their lifestyle and priorities. Legal Aid NSW acknowledges that lifestyle and financial decisions are closely intertwined. However, it would be useful for the legislation to clarify that financial managers should exercise their powers only to ensure the proper management of their clients' finances, and not to limit their lifestyle choices. People with disabilities should not be criticised for wishing to make purchases that are typical for their age group and are well within their means.

The VLRC recommended that the legislation should specify powers that cannot be given to a financial manager, including "making decisions that restrict the person's personal

decision-making autonomy, but cannot be reasonably justified in order to ensure proper management of their finances".[1] Legal Aid NSW supports this approach.

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

The roles of financial managers and guardians should remain separate, although they can be performed by the same person. They are different functions and require different skills. Some people only require support with lifestyle decisions, and others only require support with financial decisions. Keeping the roles separate means that the person is only subject to substitute decision making where absolutely necessary.

Question 4: What decision-making principles should guardians and financial managers observe?

The term 'welfare and interests' in the *Guardianship Act* is somewhat outdated, and is reminiscent of the welfare-based approach to disability. It contrasts with the United Nation Convention on the Rights of Persons with Disabilities (**the UN Convention**), which calls upon parties to "ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person". We would be open to modernising the *Guardianship Act* so that its principles are more consistent with the human rights-based approach of the UN Convention.

However, we have some concerns with an approach which requires a substitute decision-maker to give effect to a person's will and preferences. While a person's will and preferences should be of central importance to substituted decision-making, there is some tension between this principle and the reality that guardians and financial managers are acting on behalf of people who have been found not to have the capacity to make or communicate their decisions. The person may be unable to understand the available options, to assess the merits of the options, or to remember having already made a choice. If a person is able to do these things, then they should not be subject to substitute decision-making, but to less restrictive arrangements such as supported decision-making. If a person is not able to do these things, then giving effect to their will and preference may not adequately protect their rights or interests.

On balance, Legal Aid NSW therefore prefers the substituted judgment approach, which calls for the decision maker to make the decision that the person would make in the circumstances, if they had decision-making capacity. We generally support the approach recommended by the VLRC, which

- sets out the purpose of the substitute decision-making arrangement
- lists the actions that will promote that purpose, the first of these being to make the decision that the person would have made, and
- indicates how a decision-maker is to identify the decision that the person would have made.

The VLRC proposed that the purpose of the arrangement would be to promote the personal and social wellbeing of the person. We have reservations about this term, as it appears too close to the "welfare and interests" model and does not mention the rights of the person. We would prefer the purpose of the substituted decision-making arrangement to be to promote "the wellbeing and rights" of the person, "rights and interests" of the person, or similar language.

The VLRC proposed that in order to promote the wellbeing of the person, decision-makers should, so far as possible:

(a) have paramount regard to making the judgments and decisions that the person would make themselves after due consideration if able to do so

(b) act in consultation with the person, giving effect to their wishes

(c) support the person to make or participate in decisions

(d) act as an advocate for the person, and promote and protect their rights and dignity

(e) encourage the person to be independent and self-reliant

(f) encourage the person to participate in the life of the community

(g) respect the person's supportive relationships, friendships and connections with others

(h) recognise and take into account the person's cultural and linguistic circumstances, and

(i) protect the person from abuse, neglect and exploitation.[10]

Legal Aid NSW supports this structured approach to substitute decision-making. The seven considerations make clear that the person's wellbeing is promoted by respecting their autonomy, giving effect to their wishes, promoting their participation in decision making and in the community, and preventing abuse.

We emphasise that the substituted judgment model is only suitable for those who have seriously impaired decision-making capacity or who are unable to make or communicate decisions. It should be reserved for the small group of people for whom supported decision-making is either impossible or would put the person at serious risk (as outlined in the response to Q 5.3). Many of Legal Aid NSW's clients who are currently subject to substitute decision-making could make decisions themselves if appropriate support were available. The introduction of a new model of decision-making should be accompanied by serious efforts to ensure that substitute decision-making arrangements are used as a last resort.

[10] VLRC *Guardianship* at 399.

We share the reservations outlined at 4.52-4.54 of QP 3 about the risks and disadvantages of a substituted judgment model. In any substitute decision-making arrangement, there are risks and difficulties, including:

- the risk of paternalistic decision making
- difficulties balancing the person's previously expressed preferences with their current ones, and
- difficulties in determining if implementing the person's will might result in an unacceptable risk of harm.

These risks and difficulties should be addressed by careful drafting of the legislation, but more importantly, by

- providing education and training for substitute decision makers
- monitoring the arrangements, and
- creating accessible pathways for review of decisions and dispute resolution.

Practical considerations

Both the substituted judgment model and the will and preferences model outlined in QP 3 would require some significant practical changes for representative decision makers, particularly the Public Guardian and TAG.

As is often the case, Legal Aid NSW clients raise concerns about the implementation of the current laws, rather than about the laws themselves. They report that their guardian does not consult with them before making decisions, or does not take their wishes into account. Family members of people under guardianship also raise concerns about not being consulted about decisions. Consultation is already required under the existing decision-making model, but foregrounding the wishes of the person in the decision-making model would require guardians to do more to engage with their clients.

Despite the general principles in section 4 of the *Guardianship Act*, our clients consider that their freedom of decision and action is unnecessarily restricted and their views are not taken into consideration by their financial managers. They report that financial managers take a very conservative approach to the management of funds, placing great weight on the preservation of assets when our clients wish to use their money for consumption.

Case study

Kalinda, mentioned above, is in her mid-fifties and has $500,000 under financial management. She would like to have a holiday but finds it difficult to access her money for this purpose. She would like to move out of her group home and live independently but has not been able to access her money to achieve this goal either.

It may be that if substitute decision making were truly treated as a last resort, Kalinda would not be subject to this regime. However even if Kalinda does not have decision-making capacity, her aspirations and rights must be respected. Preventing her from using her own funds to live independently may breach her right under article 19 of the UN Convention to choose her place of residence and to live independently. Preventing her from using her own funds to have a holiday may breach the right to participation in cultural life, recreation, leisure and sport in article 30.

A shift to a substituted judgment decision-making model that respects the will and preferences of the person should see Kalinda's financial manager place more weight on her preferences and be more protective of her rights. However, it would be imperative to provide guardians and financial managers with education and training around the new model, to ensure that it is properly implemented.