NSW Law Reform Commission Review of the NSW Guardianship Act 1987
Question Paper 3: The role of guardians and financial managers

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NSW Public Guardian

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Mr Alan Cameron

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Dear Mr Cameron

The Office of the Public Guardian is pleased to be able to participate in the review of the NSW Guardianship Act.

We welcome the opportunity to respond to the Law Reform Commission papers and to play an active part in the consultation process.

Please see attached our submissions in response to Question Papers Number 2 and 3.

Kind regards

Graeme Smith

PUBLIC GUARDIAN

Introduction

The Office of the Public Guardian (the Public Guardian) believes it is appropriate to review the Guardianship Act at this time as it has been in operation for more than 25 years and much has changed over the past 25 years for people with disabilities in both our domestic law and in the international law.

Since 2008 a primary reference point when considering the rights of people with disabilities has been the United Nations Convention on the Rights of People with Disabilities (UNCRPD). The Public Guardian believes that the aspirations contained in the Convention should be the starting point when embarking on a process of reform of any legislation that relates to people with disabilities.

The National policy setting for people with disabilities in Australia is characterized by an emphasis on choice and control over the services they receive and who provides them.

The Public Guardian believes that people with disabilities should not be stripped of their legal personhood by the State when their ability to make decisions, to exercise choice and control, is limited or impaired. Instead they should have access to the support they need to assist them to make their own decisions. Sometimes the nature and the level of this support will be extensive.

At least until supported decision making is well established in the community access to fully supported (substitute) decision making may be required in a limited number of cases.

The Public Guardian has been involved in the developing field of supported decision making for several years. We have partnered with NSW Trustee and Guardian and NSW Family and Community Services in two supported decision making projects; one of these is continuing and is managed by this office. We have developed our decision making guideline for staff to be more explicit about the importance of establishing and following as far as possible the will and preferences of the represented person. We provide administrative support to the Australian Supported Decision Making Network.

Our experience in the field of supported decision making so far indicates that:

- Decision making support happens in communities that see people with cognitive disability as decision makers. So much depends on the good will and active support of the people around the individual.
- Support for decision making takes time and facilitation of a supportive relationship that involves challenging the supporter's assumptions. Many organisations aim to operate from a supported decision making paradigm but have not yet developed policies and procedures that support this approach. This leads us to believe that supported decision making is in its infancy.
- Further, there is no existing infrastructure from which people with disabilities can access decision making support and this will need to be developed through education and funding support by both levels of government. Ideally people will

access support from family and friends. This however, will not always be possible and so a network of support agencies will be needed.

This paper should be read alongside the Public Guardian's submission to NSW LRC Question Paper 2 on decision making models.

Question 2.1: Who can be an enduring guardian?

The Public Guardian believes the existing eligibility requirements are suitable. There could be value in greater emphasis on the appointee's understanding of the role and functions of enduring guardian, and where to seek information about performing the role.

From time to time the Public Guardian receives enquiries from individuals wishing to appoint the Public Guardian as their enduring guardian. This office has declined these requests on the basis of that the Guardianship Act requires a natural person to be appointed, rather than a statutory appointee subject to change. If the Public Guardian was appointed as enduring guardian, he would be unlikely to know when the person lost decision making ability and would be unfamiliar with the person's wishes. The Public Guardian believes the Guardianship Act ('the Act') remains the most effective safeguard for people unable or unwilling to appoint a friend or family member as their enduring guardian and that it may be helpful to specifically exclude the Public Guardian as an eligible appointee.

Question 2.2: Who can be a tribunal-appointed guardian?
Question 2.3: When should the Public Guardian be appointed?

Public Guardian as guardian of last resort

The Public Guardian is and should remain the guardian of last resort, where all alternatives to guardianship have been exhausted and where there is no private person able to take on the role. Evidence of the alternatives attempted should be given to the NSW Civil and Administrative Tribunal (NCAT or 'the Tribunal), including the level of support that has been offered to the person to allow them to make their own decisions.

The Public Guardian is frequently appointed where there is concern that appointing a family member as guardian will result in stress on the family relationship. In the Public Guardian's experience, the appointment of the Public Guardian may not lessen the impact of guardianship because the Public Guardian very much relies upon the person's family and friends to provide views and direct support and because conflict in a family usually has a long history and doesn't often diminish with a guardianship order. Guardianship by a family member may result in a similar amount of tension and has the advantage of avoiding the intrusion of a public agency in the family relationship.

Conflict

Similarly, the Public Guardian is often appointed in situations of conflict. Conflict between families is unfortunate but not an issue for guardianship except where the represented person is affected. However, where there is irreconcilable and intrusive conflict can prevent decision making or decision implementation. Where conflict can be reasonably expected to prevent decision making, guardianship appointments should be made with greater caution. It is not the guardian's role to resolve conflict. In the Public Guardian's experience, the guardian can become enmeshed in conflict and the guardianship order does not offer a practical benefit to the person.

Section 14(2)(d) of the Act requires the Tribunal to consider "the practicability of services being provided to the person without the need for the making of such an order". Consideration could be given to a greater emphasis on mediation and conciliation. Families

and others are required to take steps to resolve their conflict before a guardianship order is made. For example, the Tribunal could require that a certain number of mediation sessions are attended before a guardianship order is considered.

Non-reviewable orders

The Public Guardian believes consideration should be given to amending the Act so that reviewable orders are created as an exception and on the basis of demonstrable need. In all other cases non-reviewable orders should be considered standard. (That is, non-reviewable orders would lapse at the end of the period. They would not continue indefinitely.)

Principles

The appointment of a guardian and decisions made by guardians could be required to be more explicitly linked to the general principles of the Act and could incorporate the Australian Law Reform Commission's decision making principles, discussed at question 4.1 and in the Public Guardian's Question Paper 2 submission.

Building capacity

The proposed guardian or representative's preparedness to support a person to make their own decisions should be a condition of appointment.

Private Guardian Support Unit

The Public Guardian's Private Guardian Support Unit offers support (not supervision) in various forms to people appointed as guardians and enduring guardians. Private guardians could be encouraged by the Act to access information services when making decisions or managing conflict.

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

Community guardianship is likely to be a resource heavy investment and bring with it questions of quality and safeguarding. Rather than extending the reach of guardianship, the Public Guardian would prefer to see investment in supported decision making resources in the community, as discussed in the Public Guardian's Question Paper 2 submission.

Question 2.5: Who can be a private manager?
Question 2.6: Should the NSW Trustee be appointed only as a last resort?

The Public Guardian supports the inclusion in the Act of a statement that guardianship and administration are last resorts after alternatives have been explored and exhausted.

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

The NCAT hearing process allows an opportunity for the person and people in their lives to express their views about the need for guardianship and who the guardian should be. The Act should continue its focus on the person as an individual, and guardianship should remain a last resort where all other alternatives have been explored. While the views of others may be critical to the Tribunal's determination, it is the current needs of the person and their views, will and preferences that should direct the outcome. The Public Guardian does not support a requirement for the Tribunal to give effect to the wishes of others in a succession planning statement.

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

The Public Guardian believes the existing powers are sufficient but a more specific list, as discussed in the Question Paper may offer further safeguards.

In the Public Guardian's experience, the Act could offer greater certainty about circumstances in which a person regains the ability to make decisions, as community members have told us about their confusion about whether the appointment, once enacted, must continue or be revoked.

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

The possibility of plenary orders should be removed from the Guardianship Act. The Public Guardian believes that plenary orders, with the accompanying loss of decision making rights offer no benefits to a person. This office cannot recall being appointed under a plenary guardianship order or observing a need for one.

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

Please see the Public Guardian's submission in response to Question Paper 2, which considers alternatives to the current system of guardianship.

Should the status quo be maintained, the Public Guardian comments that the Tribunal is able to make appointments based on the needs of the person as an individual and the Public Guardian believes that this system generally works well. However, the Public Guardian supports the Act being clearer about the right of the person to continue to make their own decisions where they are able to. A simple example of the intrusion of guardianship is when a person makes their personal goals, such as to go on a cruise. If a guardian is appointed with the relevant function, the guardian must consent to a proposal for the person to achieve their personal goals, regardless of whether the appointment was based on some other need. Better use of a guardian's efforts would be to investigate and seek to reduce risks or concerns that might stand in the way of the person's own wishes and personal choices.

Responsibility to build capacity

Guardians could be required to assess the person's need for support to make their own decision. There could be an obligation that the guardian takes steps or at a minimum considers options to build the person's capacity to become a decision maker.

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

A list of powers and functions that guardians do not hold may offer greater clarity about the limits to the role and function of a guardian and promoting the rights of people subject to the Act.

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

The Public Guardian believes that financial management orders of indefinite length are inconsistent with the principle of least restriction. Legislation could be amended so that financial management orders must be time limited and reviewed. It may be possible to consider financial management orders being non-reviewable at some point, in the sense that they would lapse like a guardianship order, rather than never be reviewed.

Along with the authority a financial manager exercises in administering a financial management order, they can also have a critical role in the development of the person's capability so that they can take a greater role in managing their finances. The Public Guardian believes legislation should encourage, require or expect financial managers to take

an active role in promoting greater financial independence by the person and developing their financial capability.

Currently, people under financial management have different experiences of decision making support and different opportunities to develop their abilities, depending on their individual financial manager. A responsibility to develop the person's capacity will be most effective if spelt out in legislation rather than expressed as a principle only. Financial managers will need education and information to understand and fulfil this role.

There are some provisions within the legislation concerning financial management that could be developed into forms of decision making support.

Section 71 NSW Trustee and Guardian Act 2009

Under section 71(2) of the NSW Trustee and Guardian Act 2009 there is a mechanism for the financial manager to return to the person some responsibility for managing their own financial affairs. In practise this can also enable a person to develop and demonstrate their capacity to manage a portion of their finances. The Supported Decision Making Project currently led by the Public Guardian in partnership with NSW Trustee & Guardian and the NSW Department of Family and Community Services has been working with people with financial management orders to see how they can be enabled through the provision of support to become more financially independent. The project has observed that granting s71(2) authorities is an effective tool for enabling the person to develop their abilities and confidence to manage some or all of their affairs, and in some cases, to gain evidence to seek a review of their financial management orders. This is particularly so when the person is also offered opportunities to develop their capability through financial literacy training.

Granting s71(2) authorities is at the discretion of the financial manager. While there is evidence of NSW Trustee and Guardian's use of this provision, it is unclear how it is used by other financial managers. The section could be amended to require all financial managers to promote and encourage the development of the person's financial management skills and capability and to give back to them the responsibility for managing those aspects of their financial affairs of which they are capable. This could also be a mechanism for appointment of supporters or co-decision makers for financial decisions as discussed in question 6 of Question Paper 2.

Section 20 NSW Trustee and Guardian Act 2009

Section 20 could be effective mechanism to enable delegation of authority to a person or party of the person's choosing where a review of order is not possible or appropriate. It also provides the additional safeguard of continued monitoring and oversight by NSW Trustee and Guardian.

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

The Public Guardian believes the roles of guardians and financial managers should remain separate. As the Question Paper notes, different skills are involved in making lifestyle and financial decisions. The Public Guardian would have concerns about the potential for financial decision making to dominate lifestyle decisions if the roles were combined. Currently, guardianship orders are made for set and limited periods and often are often non-

reviewable. Financial management orders tend to be 'for life' unless a review is sought. By combining the two roles guardianship may be unnecessarily extended. Even if the guardianship portion of the appointment was time limited, the impact of combining the two roles may be that guardianship decisions continue to be made 'informally' by the financial manager.

The Public Guardian's Information and Support branch runs education sessions throughout NSW. Our observation is that there is a very low level of understanding in the community, including in professional communities, about the difference between guardianship and financial management. For example, a belief that a person acting with a power of attorney can give consent to medical treatment, or that a guardian can make financial decisions. There is a clear need for continued education about substitute decision making and the limits of authority.

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

The existing section 4 General Principles are relied upon heavily by this office but the Public Guardian is strongly supportive of the inclusion of principles that enhance the person's involvement in decision making. Currently the person's 'welfare and interests' are the paramount principle. In seeking to put this principle into practice the Public Guardian has determined that the best way to ensure a person's 'welfare and interests' are met is to understand and be guided by the person's views. However it's possible for a more paternalistic interpretation to be made.

The Public Guardian would support the use of an alternative term, 'to promote the person's personal and social wellbeing'. In addition to the existing principles (b) to (h), reference could be made to the Australian Law Reform Commission's decision making principles to include:

- All adults have an equal right to make decisions that affect their lives and to have those decisions respected.
- Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.
- The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

The same principles could apply to financial managers.

Question 4.2: Should guardians and financial managers be required to give effect to a person's "will and preferences"?
Question 4.3: Should NSW adopt a "substituted judgment" model?
Question 4.4: Should NSW adopt a "structured will and preferences" model?

The concept of 'will and preferences' encapsulates a deeper awareness of the represented person: their values, priorities and vision for their lives. Knowledge of a person's will and preferences creates a decision making foundation.

The Public Guardian has long grappled with the tension between substituted judgement and a best interest approaches. The office attempts in the first instance to take a substituted

judgement approach, where information is sought from the person and other sources about their previous and current choices and their lifestyle preferences. While being guided by the principles of the Act, the Public Guardian seeks to identify the choice that the person would have been likely to make when they had greater decision making ability, or if they were able to explicitly express and opinion.

For example, the Public Guardian has made decisions about whether a person enters residential aged care based on information about the person's previously stated wishes, their previous choices about living with others or having close involvement in the lives of their friends and family. The Public Guardian has made decisions about a person with a history of rough sleeping that are consistent with the person's stated and actioned wishes over many years. Where there is insufficient information about the person's wishes, where their preferred options are not available or where they are significantly unsafe for the person, the Public Guardian essentially makes a 'best interests' decision based on the principles of the Act.

There can be challenges with substituted judgement decision making:

- the represented person's choices may be controversial and conflict may result
- risk may need to be managed carefully to make the person's choice possible
- there may be disagreement about the person's 'true wishes'
- the person may have made choices previously on the basis of limited experience or little or no access to opportunities
- the person, for example with dementia, may have a 'new reality' that contradicts their previous choices
- the person should be afforded the right to change their mind.

However, the Public Guardian believes that a will and preferences model can work well with a substituted judgement approach and that the challenges can be managed, particularly with the guidance of the principles of the Act.