NSW GOVERNMENT | Family & Community Services

Submission to NSW Law Reform Commission

Review of the Guardianship Act 1987 (NSW): Question Paper 3: The role of guardians and financial managers

1. Publication of submission

1.1 The Department of Family and Community Services (**FACS**) thanks the NSW Law Reform Commission (**the Commission**) for the opportunity to respond to *Question Paper 3: The role of guardians and financial managers* (**QP3**) and consents to the publication of this submission.

2. Context of submission

2.1 FACS has reviewed QP 3 in the context of its traditional role as the primary provider and funding body for disability supports in NSW.

2.2 FACS has also considered QP 3 in light of the transition of disability funding and supports to the National Disability Insurance Scheme (**NDIS**) and the transformation of the disability support sector from a managed environment to a mainstream market-based model. The nature of this transition brings with it an increased need for people to be engaged with and participate in decision-making processes.

3. General comments

3.1 QP3 considers how the operation of substitute decision-making arrangements does and should work in NSW. It further proposes a change from the “best interests” approach to a model that places either the person’s will and preferences, or their previous views, as the primary consideration.

3.2 In Question Paper 2 FACS advanced the position that, where possible, all persons should be supported to make those decisions that affect their lives. However, FACS also acknowledged the need for a continuing role for substitute decision-making in a revised Act. The complex support needs of the person, the nature of their disability and/or their willingness to participate in decisions about their lives may bring about a situation in which supported decision making is neither desired nor appropriate.

3.3 In FACS’ view, a legal system which rejects all forms of substitute consent and decision-making is not sustainable and would fail to address the lived reality of being a person with significant cognitive impairment, as a result of which the person is not able to negotiate complex, or even ordinary, decision-making situations. It also creates uncertainty for carers who rely on formalised substitute authority to care for a person with complex needs on a daily basis.

3.4 FACS considers that the Act’s current regime for substitute decision making provides a legitimate means by which people with disability and their carers can formalise support relationships which require the carer (or another person) to make significant decisions on behalf of the person with disability.

3.5 It also permits the appointment of the Public Guardian for those persons who do not have informal support networks or a primary carer who can support them in decision making, noting that the Public Guardian should be the guardian of last resort.

3.6 Substitute arrangements also provide certainty for service providers such as FACS to know that the decisions it makes are made within the scope of the relevant authority

e.g. in providing accommodation and other lifestyle and therapeutic services, from day programs to positive behaviour support.

3.7 In general FACS considers the model works well, however there are changes that could be made to clarify the roles of different parties in substitute decision-making arrangements to promote their understanding of their rights and obligations. The Act could also be strengthened by providing greater clarity as to the extent of a decision-maker's authority, for example, the differences between healthcare functions and medical and dental consents, or whether there are parts of a person's estate they are able to manage on their own.

3.8 The Act could also be more closely aligned with contemporary human rights approaches through the removal of the Guardianship Division of the NSW Civil and Administrative Tribunal's (**the Tribunal**) power to make plenary orders, and the incorporation of aspects of both "will and preferences" and "substituted judgement" as mandatory considerations in any decision made under the Act.

4. Who can be a Guardian or a Financial Manager

4.1 People with disability to whom FACS provides services generally have long term intellectual disability or cognitive impairment. As such, FACS rarely delivers services under the enduring guardianship regime. FACS does not have any comment on the appropriateness of the enduring guardianship mechanisms in the Act, except to say that the wishes of the person in the appointment and functions of the guardian should be implemented to the fullest extent practicable, subject to appropriate review.

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

4.2 FACS acknowledges that the removal of a person's ability to make their own decisions in any area of their life is of grave significance and needs to be subject to appropriate safeguards which promote positive outcomes for the person and maximum realisation of their rights.

4.3 It is FACS' experience that private guardians are able to assist people to achieve these outcomes when they know the person well, are engaged with the service system and have a clear understanding of the nature and scope of their role.

4.4 The current requirements expressed in s17 of the Act permit the Tribunal to consider a range of factors in determining compatibility along with what constitutes the "ability" to perform the functions of a guardian.

4.5 FACS considers that these requirements could be tailored to more explicitly require the Tribunal to consider those functions which are to be conferred on the guardian. The nature of medical consents, which are usually given on the advice of medical professionals, vary considerably from those relating to service functions, particularly under the NDIS service model. This model requires people with disability to engage with NDIA support planners and the services sector, negotiate prices and service levels and ensure outcomes are being met and that provider continues to be the best choice for that person. Likewise, there is an expectation that a guardian who is authorised to make decisions about restrictive practices will understand and agree with the principles of positive behaviour support and be guided by experts in this field.

4.6 It is noted that the Tribunal routinely considers these matters when conducting hearings. However, if the jurisdiction is to remain informal (particularly where leave is

required for legal representation), it would be of benefit to codify the common law principles relied on by the Tribunal which would promote greater understanding of the process by the public.

4.7 It would also be of benefit to both the guardian and the person subject to the order if there was greater clarity as to the characteristics that make up a “willing and able” person (s.17(c)). FACS appreciates that many family members wish to do the best by their relatives and seek to act in the role of guardian without a full appreciation of what this involves. Clearer requirements in the Act may be of use to family members who find the hearing process daunting and lack the confidence to put themselves forward.

4.8 The Commission may wish to consider an additional requirement that the prospective guardian be provided with certain information prior to accepting the role.

4.9 FACS works closely with formal and informal support persons in delivering services to people with disability. It would be respectful of the nature of these relationships if the Tribunal was required to consult more broadly with those in close relationships with the person, aside from just the person’s spouse or primary carer (ss 14(2)(a)ii-iii). In many instances a family member may feel they are unable to undertake the role due to age or their own health, but their views and knowledge of the person are extremely relevant in determining the best person or entity to do so. This accords with the Carer’s Charter contained in the *Carer’s Recognition Act 2010.*

4.10 The Commission may also wish to consider introducing a greater level of scrutiny to the selection of a guardian through the inclusion of probity measures such as those in in the *Disability Inclusion Act 2014* (s.32). These apply to people employed or engaged to work with people with disability and require national criminal record checks with bars to employment for certain offences. Equivalent requirements could be applied to eligibility to act as a guardian, however the list of offences could be modified to align more closely with the responsibilties of a guardian.

4.11 Given the transition to a market-based disability service system, it may be prudent for the Commission to also consider excluding current paid carers (or their relatives) from acting as a guardian. The Tribunal could give consideration to whether there has historically been a paid or professional relationship between the person with disability and the proposed guardian. FACS agrees with the Northern Territory view that this should not necessarily exclude a person from acting as guardian, as there may be a positive relationship between the parties that will be of benefit to the person concerned. However, it is relevant to an examination of potential conflicts of interest and minimise the potential for abuse.

Question 2.3: When should the Public Guardian be appointed?

4.12 FACS agrees with the appointment of the Public Guardian as a last resort, provided there has been a genuine examination of the willingness and ability of a private guardian to assume the role.

4.13 FACS considers the benefits to include:

- a guardian who has a sophisticated understanding of the service system
- accountability mechanisms attached to public sector bodies
- the inherent advocacy role of the Public Guardian, which promotes positive outcomes for people under guardianship.

4.14 While there is generally a presumption that a family member will be in the best position

to make substitute decisions, in some instances this is the source of conflict. FACS has experienced situations in which two family members cannot agree on a decision, or staff are concerned that a private guardian is making decisions that are putting the person at risk.

Example A: A young adult with complex support needs has informal arrangements in place in which one family member makes decisions on behalf of the person. Conflict has arisen between two family members, who are unable to agree on an appropriate service provider. FACS is required to approach the Tribunal for a formal guardianship order and the Public Guardian is appointed, in the interests of preserving the person's relationship with both family members and ensuring that services can be delivered.

Example B: Consent of a guardian with an accommodation function is required to enable a person to move to a group home. Demand for placements is very high and requires a detailed matching and suitability process. If a guardian does not consent to a placement it can be a long time for an alternative placement can be found, during which time the person may be in an inappropriate living arrangement or be at risk of homelessness. FACS has, on occasion, been required to seek a review of the guardianship order and request the appointment of the Public Guardian, who has a clearer understanding of the service system and can make a decision about realistic accommodation options for the person.

4.15 There are naturally some disadvantages to the appointment of the Public Guardian instead of a private guardian:

- it may take a long time for the guardian to understand a person's communication needs and to develop a relationship with that person which enables them to effectively take the person's views into account
- if the principal guardian is not available the duty guardian may be under pressure to make a decision when they do not know the person
- a private guardian who is a relative or friend is often located near the person under guardianship and able to engage with them more regularly

4.16 Notwithstanding the above, it is important that the State ensure that no person is disadvantaged in being able to access to health and essential services because they do not have a close relative or friend who can act as their guardian.

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

4.17 FACS does not reject the notion of community guardians, provided the following conditions are met:

- robust screening prior to a volunteer's commencement in the role
- adequate training by the Public Guardian or similar body
- an agreed period of service appropriate to the significance of the role
- reporting and accountability arrangements involving oversight by a NSW Government body and which trigger existing NSW complaints, review and appeal mechanisms (e.g. the NSW Ombudsman and NCAT)

4.18 In addition, the Act should include a means to assess the suitability of the volunteer guardian to work with a particular individual, taking into account the religious beliefs, sexuality, cultural background or other characteristics of the person under guardianship and in order to ensure that the appointment of the guardian does not restrict the ability of the person to express those characteristics. It should reasonably be expected that a public officer will be impartial in these matters, however volunteer organisations (and individual volunteers) are motivated by a range of factors which could affect how they undertake a guardianship role.

4.19 FACS' experience is that a locally-based guardian with knowledge of the person achieves the best outcomes for people in a service-delivery context. Community volunteers may be in a position to provide this, within an appropriate governance framework.

4.20 Alternatively, it has been suggested within FACS that a form of mentoring could assist people with guardians and financial managers to understand why they have a substitute decision maker and how they can work with that person to achieve positive outcomes. This might be a more suitable role for community volunteers.

Question 2.5: Who can be a private manager?

4.21 FACS routinely deals with private managers to address the financial aspects of a person's service delivery arrangements. In most cases these arrangements are made without incident. In some circumstances it has been found, however:

- private managers have absconded with funds belonging the client
- private managers have not agreed to the payment of fees for a particular service.

4.22 The codification of the common law requirements for suitability may assist in selecting an appropriate manager. In FACS' view, the criteria set out at page 14 of QP3 may assist potential managers to understand the role more fully. Whether this would result in a loss of nuance in the common law approach is likely to be a matter of drafting.

4.23 Application of these criteria by the Tribunal may involve a greater evidentiary requirement for prospective managers prior to their appointment. FACS has been a party to proceedings in the Tribunal in which a manager is appointed over the phone without prior contact with the Tribunal or a robust method of verifying information provided. Given the gravity of the appointment and potential for fraud, it is our view that such a process is inadequate. While the NSW Trustee and Guardian is responsible for issuing Directions and Authorities in respect of the person's estate, it has no role in the initial appointment of the financial manager.

4.24 Along with the existing penalties for providing false and misleading information (s 105), the Commission may wish to consider arrangements for the Tribunal to verify data with other NSW and Commonwealth agencies, so that a robust examination of the proposed appointment can be made prior to the hearing.

4.25 In respect of the second point raised, the existing mechanisms for seeking reviews of orders are appropriate to manage situations in which FACS and the financial manager do not agree on the payment of fees. This will generally result in some financial loss to FACS, as FACS ensures that services continue to be delivered so as not to disadvantage the person.

4.26 In the context of the NDIS there is a greater risk of loss of services if arrangements for payment cannot be reached. It may be useful for the Act to spell out that the person

appointed must have an understanding of the types of payments likely to be required and the need to regularly engage with Centrelink, Medicare, financial institutions and other service providers.

4.27 It is relevant for the Tribunal to consider compatibility to some degree in the appointment of a financial manager. Access to funds will impact on the activities a person can undertake, regardless of whether they have a guardian. For example, a person under financial management may have certain lifestyle preferences which are inconsistent with those of the manager, such as smoking. There may also be some contention as to the therapeutic benefits of certain services for people with disability, depending on the manager's views. Loss of access to funds may amount to a restriction outside the scope of a financial manager.

4.28 In FACS's experience these issues rarely arise following the appointment of the NSW Trustee.

4.29 In respect of question 2.5(4), any involvement by corporate interests would need to be balanced by rigorous accountability mechanisms. These should include:

- a form of prequalified panel of appropriate organisations
- a mechanism by which entities are selected, including appropriate probity requirements
- scheduled fees for services, that should not exceed the fees charged by the NSW Trustee by more than a small margin.

4.30 Consideration should also be given as to whether corporate trustees are in a position to adopt a rights-based approach to decision-making, should this arise as a result of the current review.

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

4.31 It is the Tribunal's function to appoint a financial manager who is best able to act for the person concerned. FACS notes the Commission's comments as to the hierarchy of provisions in the Act and considers these to be adequate.

4.32 And while it is preferable for a financial manager to have knowledge of the person, it is also crucial that the person or entity has sufficient expertise to be able to discharge their/its functions.

4.33 Further, appointment of an external party to manage the person's finances may prevent conflict between the person and family member which can result from a loss of independent access to funds.

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

4.34 QP3 proposes a means by which family members can register a document that states their wishes for future guradianship decisions, in the event they cannot participate.

4.35 The views of carers and close family members should be considered in the appointment of all substitute decision makers and in the discharge of the guardian or financial manager's functions.

4.36 Many people supported by FACS have older parent carers who are concerned, due to age or ill-health, that they will not be able to make their views known in future. FACS supports this change as a valuable opportuntiy for carers to provide input.

5. What powers and functions should guardians and financial managers have?

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

5.1 FACS understands the Tribunal rarely makes plenary orders due to the restrictive impact of these orders on the persons affected. FACS supports the removal of the power to grant plenary orders from the Act.

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

5.2 FACS does not have concerns with the functions currently allocated to guardians. However, there is scope to provide greater clarity around the types of decisions that fall within each function and a clearer delineation of roles. This would assist service providers in understanding the scope of a substitute decision maker's authority and where an individual's decision-making power remains.

5.3 FACS staff often find it difficult to determine the precise limits of a substitute decision maker's authority. This may occur when a private guardian wishes to assist a person to make decisions outside of the functions in the order. Staff require assistance to understand which decisions should be referred back to the individual, however this has the potential to create confusion and conflict among those concerned.

5.4 A potential overlap of functions is evident in the context of supported disability accommodation.

> *Example C: In group home accommodation, a decision about where a person will live will be made under an accommodation function, but the services they receive within their home are likely to be consented to under a services function. The services and accommodation have traditionally been delivered by the same organisations. Where a guardian exercises both functions the decision is uncontentious, but where this is not the case, or (more commonly) where the Public Guardian exercises one function and a private guardian the other, there is an additional burden on staff to ensure decisions are made in accordance with the order.*

5.5 Under the NDIS accommodation model there is a deliberate split between the accommodation and services component of specialist accommodation, which will require the Tribunal to clearly set out the nature and scope of the decisions to be made by a guardian or guardians exercising these functions.

5.6 FACS staff in the NDIS sites have reported confusion as to the roles of guardian, financial manager and informal supporters in approving an NDIS Plan and in initiating payment of the allocated funding. This results in delays in people accessing the services they require. The operation of guardianship functions may need to be further considered once the NDIS is fully operational across the State.

5.7 Further complications arise in obtaining access to information about the client in making a decision and the obligations imposed on staff under the *Privacy and Personal Information Protection Act 1998* and the *Health Records Information Protection Act 2002.* In circumstances where an order is limited to a small number of functions, staff require guidance on the types of information they are able to release in relation to a

guardian, and those documents the release of which would require the consent of the person.

5.8 We will await the Commission's further paper on restrictive practices to discuss the operation of that function within a service delivery context.

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

5.9 FACS notes there are some medical matters that can only be consented to by the Tribunal, and understands this will be addressed in a later paper.

5.10 FACS is not aware of any allegations of guardians attempting to make those decisions set out at p.29 of QP3. Existing safeguards within each of these processes are likely to prevent a guardian taking such action on behalf of another person. For example, entering into or terminating a civil partnership requires the involvement of external persons (including solicitors) who are likely to be aware of issues as to capacity or decision making.

5.11 However, FACS does not take issue with any amendment that clarifies the limitations on guardianship for the benefit of the person, the guardian and others involved in decision-making.

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

5.12 FACS has no concerns with the existing powers and functions of financial managers.

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

5.13 FACS does not consider it essential to maintain separation between guardianship and financial management. There is existing confusion operationally as to which applies, and this might be remedied by making financial management a function of guardianship.

5.14 There would be additional benefits in that the guardian who is consenting to the delivery of a service is also authorised under the same legislation to pay for it. This is particularly the case under the NDIS funding arrangements which allow for the determination of the "nominee" for the purposes of administering funding and engaging services.

5.15 FACS and the Minister for Disability Services have received complaints about the operation of the current model, as carers are required to navigate complex systems to properly give effect to decisions they make to support their family member or other person with a disability. A combined application process and order could help simplify these arrangements.

5.16 However, FACS notes that this would require the review and amendment of the *NSW Trustee and Guardian Act 2009* and may require consideration of s.19 of the *Powers of Attorney Act 2003.*

5.17 An alternate view put forward within the Department is that to combine these powers could be daunting for those carers who wish to act as guardian for their family member in terms of lifestyle and medical matters, but who would not be comfortable managing another person's financial affairs. Integrating financial management into a guardianship

order could therefore be a deterrent for carers who might otherwise take on the role.

6. What decision-making principles should guardians and financial managers observe?

6.1 Consideration of decision-making principles presents a valuable opportunity to bring aspects of substituted decision-making into alignment with contemporary approaches to human rights.

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

6.2 In 2014 FACS introduced the *Disability Inclusion Act 2014* which included updated Principles (s4) as follows:

1. *For the purposes of this Act, the "disability principles" relating to people with disability are the general principles set out in this section.*
2. *People with disability have an inherent right to respect for their worth and dignity as individuals.*
3. *People with disability have the right to participate in and contribute to social and economic life and should be supported to develop and enhance their skills and experience.*
4. *People with disability have the right to realise their physical, social, sexual, reproductive, emotional and intellectual capacities.*
5. *People with disability have the same rights as other members of the community to make decisions that affect their lives (including decisions involving risk) to the full extent of their capacity to do so and to be supported in making those decisions if they want or require support.*
6. *People with disability have the right to respect for their cultural or linguistic diversity, age, gender, sexual orientation and religious beliefs.*
7. *The right to privacy and confidentiality for people with disability is to be respected.*
8. *People with disability have the right to live free from neglect, abuse and exploitation.*
9. *People with disability have the right to access information in a way that is appropriate for their disability and cultural background, and enables them to make informed choices.*
10. *People with disability have the same right as other members of the community to pursue complaints.*
11. *The crucial role of families, carers and other significant persons in the lives of people with disability, and the importance of preserving relationships with families, carers and other significant persons, is to be acknowledged and respected.*
12. *The needs of children with disability as they mature, and their rights as equal members of the community, are to be respected.*

13. The changing abilities, strengths, goals and needs of people with disability as they age are to be respected.

6.3 We confirm FACS's comments in respect of Question Paper 1 that "disability" should not be the starting point for assessment of decision-making capacity under the Act. However, FACS considers the majority of these principles apply to people for whom guardianship or financial management orders have been made. For the purpose of the current review, the Commission should consider the inclusion of Principles in subsections 2, 5, 6, 7, 9 and 11. Please see below for proposed decision-making framework.

6.4 In drafting these Principles, FACS consulted broadly across the State and the disability sector. Care was taken to use respectful language that reflects the spirit of the Convention on the UN Convention on the Rights of People with Disabilities and aligns with the NDIS Act. FACS is working across Government to encourage application of the Principles within mainstream services and promote inclusion of people with disability.

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

6.5 A key issue in QP3, which was addressed to a degree in FACS's submission to QP1, is the extent to which a "best interests" approach is consistent with the CRPD, or whether it amounts to a breach of human rights. If that is the case, should the Act require that the paramount consideration be the "will and preferences" of the person under guardianship or financial management?

6.6 This asks a different question to whether the decision-maker should take into account a person's views or wishes when making a decision on their behalf. Rather, the Commission presents this as a replacement standard to "best interests" which goes further than simply considering a person's views, to ensuring that the decision is determined by their will and their preferences.

6.7 Reliance on will and preferences *is* the appropriate standard for supported decision-making arrangements where a person is able to arrive at a decision themselves, albeit with assistance and support.

6.8 FACS acknowledges that capacity is a continuum and that there will be a large number of people with guardians and financial managers who, while not participating in supported decision-making arrangements, are still able to express a preference about decisions in their lives. For people who are able to do so, these preferences should be taken into account and if the outcome does not present an unreasonable risk to the person, the decision should be made in this manner.

6.9 However, if a body with the appropriate level of expertise and with the right information before them makes a determination that a person cannot make their own decisions, it is ultimately the role of the guardian to minimise harm to the person and to make decisions to promote positive outcomes for the person, even if the person does not agree.

6.10 FACS supports a substitute decision-making regime which *reflects* the will and preferences of a person to the greatest extent practicable, while still assisting the person to achieve positive outcomes.

6.11 This accords with the FACS approach to dignity of risk and the right of all people to participate in decisions about their lives, including the right to make the wrong decision.

In the FACS *Duty of Care and Dignity of Risk Policy*, however, this is balanced with the need to meet the duty of care owed to the person by the guardian.

6.12 FACS has experienced instances in which a person wishes to live in an environment that is not safe or in which they are not able to access appropriate support to meet their needs. Likewise, FACS is aware of circumstances in which a guardian has had to rely on an access function to limit a person's contact with another, because of the detrimental effects on the person of that relationship.

6.13 Absolute reliance on the actual will and preferences of the person would have undermined the power of guardian or financial manager to fulfil their functions in acting as a substitute decision maker. It would also deny the lived experience of carers and service providers in delivering supports to people with highly complex needs who are not able to express their will and preferences.

6.14 FACS notes that the Commission is yet to issue its paper on restrictive practices, however the current model for managing restrictive practices in a behaviour support context in NSW is by substitute consent. That is, a person's substitute decision-maker must consent to the practice, which may range from limiting access to certain items (e.g. for people who cannot control food consumption) to physical or chemical restraint. It is unclear how the notion of "will and preferences" can be reflected in this context.

6.15 The area of medical consents will also challenge the guardian, as there may be painful or unpleasant treatments a person does not wish to undergo, but which will ultimately promote their health and wellbeing.

6.16 However, if the Commission prefers "will and preferences" as the decision-making standard, the Act should also contain a process for decision-makers to follow in circumstances where the decision-maker is not able to ascertain the will and preferences of the person.

6.17 Further, the Act would need to include exemption from liability for situations in which the guardian has followed the will and preferences of the person and this has resulted in harm to that person.

Question 4.5: Should NSW adopt a "substituted judgment" model?

6.18 FACS notes the "substituted judgement" model is based on a person's wishes when they had capacity.

6.19 This model is useful to support people who once had capacity to make their own decisions, and serves as a means to ascertain what a person's will and preferences might be for future decisions. For those people with acquired brain injury or other conditions which affect decision-making capacity later in life, it serves as a means to apply the person's own value system to decisions which affect them.

6.20 However, many FACS clients have never been in a position to make their own decisions during their adult life. For example, FACS supports a number of people who were born with or acquired a disability as children and have spent a considerable part of their lives in institutional care. While this does not negate the rights of these people to influence decisions about their lives, it does not provide a sound basis on which to determine how such persons would act if they had capacity.

6.21 QP3 suggests that substituted judgment be applied in circumstances where there is knowledge and evidence of a person's prior views. Where this is not the case, the

decision-maker must draw inferences and come to a conclusion about what those views might have been, taking into account any significant changes in circumstances.

6.22 The key difference between this approach and a "best interests" model is that it focuses on forming a view about what the person might want and does not look at the actual decision and the potential outcomes for the person. As such, it might be considered that the decision maker is only doing part of what is required to ensure that any limitations to a person's decision-making capacity do not cause them disadvantage.

6.23 Further, the greater the level of discretion allowed a decision-maker in forming judgments about what a person *might* have wanted, the more difficult it is for a review body to look at the decision and consider whether it was properly made and achieved an acceptable outcome.

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

6.24 The notion of a "structured will and preferences" model begins with the premise that a person's will and preferences be given effect, and then sets out steps to be taken if the person's will and preferences cannot be ascertained. In this regard it appears a more pragmatic approach to ascertaining the views of people with complex needs.

6.25 Unlike the "will and preferences" model discussed earlier, this model permits the decision-maker to override a person's wishes in "exceptional circumstances". It is realistic that the ALRC model provides for an exemption, however FACS agrees with the views of IRDS and NSWCID that clarity would be required as to what constitutes "harm" and what would constitute "exceptional circumstances" contemplated by the legislation.

6.26 Ambiguity in the decision-making process may give rise to an infringement of rights and limit the scope for administrative review of the decision.

7. Proposed decision-making model

7.1 In this submission FACS has expressed reservations about the movement of the conceptual approach to decision-making in the Act from a "best interests" approach to another model by which the decision-maker is bound to give effect to the actual, assumed, or constructive will and preferences of a person the subject of a guardianship or financial management order.

7.2 FACS does not consider that an approach that ultimately promotes personal and social wellbeing of a person is automatically an infringement on rights, and does not consider substitute decision-making to be in contravention of the CRPD.

7.3 While it is essential to consider the will and preferences of a person, for some people these will not be able to be determined and the previous views of the person might never be able to ascertained. In these instances a decision maker would need to consider "best interests" principles to arrive at a decision. The result of this process is that there would be number of different standards of decision-making applied across the jurisdiction. This limits transparency and uniformity in the operation of substituted decision-making and may give rise to an infringement on the person's rights.

7.4 FACS proposes that the "best interests" approach generally be maintained, subject to a number of conditions precedent which must be demonstrated prior to consenting to a

matter or making a decision. This would aim to promote the best outcome for the person, and recognition of all those rights enunciated in the Convention.

7.5 First, while we have referred to “best interests” in this and previous submissions, FACS’s preference is to move to the language of the Victorian and NDIS legislation and adopt the language of “personal and social wellbeing”. Indicators of a person’s personal and social wellbeing could be included as part of the Principles or established elsewhere.

7.6 In all decisions made under the Act the decision-maker must treat the personal and social wellbeing of the person as the primary objective, provided that:

a. The decision-maker must seek to ascertain the views of the person and consider the person’s preferences as to the outcome of the decision;
b. Where the person previously had capacity, the decision-maker must seek to determine whether the person had a view on the issue in the past, and the practicability of making the decision in accordance with this view;
c. The decision -maker must seek the views of the person’s primary carer/s as to the decision, where that person or those people are close friends or family of the person, and
d. The decision maker must have regard to the Principles in the Act (to the extent that these are to guide individual decisions).

7.7 For decisions of a guardian or financial manager to be effectively reviewed, the Act would also need to contain minimum requirement in terms of record-keeping. Alternatively, the Act could prescribe certain information to be provided to private guardians to support them to manage records and document decisions.