21 February 2017

Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
DX 1227 SYDNEY

By email: nsw_lrc@agd.nsw.gov.au

Dear Mr Cameron

Review of the Guardianship Act 1987 – Question Paper 3: The Role of Guardians and Financial Managers

NSW Trustee and Guardian (NSWTG) was established on 1 July 2009 by the NSW Trustee and Guardian Act 2009 merging the former Office of the Protective Commissioner and the Public Trustee NSW. The position of Public Guardian (PG) continues and remains separate in its functions but reports administratively to the Chief Executive Officer of NSWTG. NSWTG operates pursuant to the NSW Trustee and Guardian Act 2009 and the NSW Trustee and Guardian Regulation 2008.

NSWTG provides personal trustee, financial management and substitute decision-making services.

NSWTG welcomes the opportunity to contribute to the NSW Law Reform Commission Review of the Guardianship Act 1987. We welcome the move towards legislative and institutional change in line with the Human Rights Principles of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

We are of the view that most people can be supported to make their own decisions. Guardianship is for people who are unable to make decisions with support, or when the support provided is not working in their interests.[1]

Responses to Question Paper 3 are set out below.

Questions

Question 2.1: Who can be an enduring guardian?

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

NSW Trustee and Guardian (NSWTG) is of the view that the criteria set out in the Guardianship Act 1987 continues to be relevant.

[1] http://www.publicguardian.justice.nsw.gov.au/Documents/Publications%20-%20Advocacy%20Report/PG_Advocacy_Report_2016.pdf

The person chosen to be an enduring guardian should be a trusted person who is at least 18 years of age and be willing to accept their appointment. The person should be someone who knows the person well and will consider their likes and dislikes when making decisions.

When choosing an enduring guardian it is helpful to consider:

- how willing is the person to take on this voluntary role?
- what is their ability to make decisions in potentially difficult and emotional circumstances?
- how well does the person understand the person's needs, wishes, values and beliefs?
- how easy will it be to contact the person when a decision needs to be made?
- their age and general health.[2]

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

Those providing treatment, accommodation, support or care on a paid basis should be ineligible to be appointed as enduring guardians.

Any siblings, parents or children of the abovementioned people should also be ineligible to be appointed. In short, anyone who has a potential conflict of interest should be ineligible for appointment**.**

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

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

As outlined in s17(1) of the *Guardianship Act 1987*, the person should be compatible with the person under guardianship, there should be no conflict of interest and the guardian must be willing and able to carry out the functions of the guardianship order.

The tribunal should also consider the person's health and age.

The chosen person should know the person's likes and dislikes and be supportive of the person's will and preferences.

The appointment would usually be a private person e.g. family member, friend or unpaid carer of the person.

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

A person should be ineligible to act as Guardian if:

- they are under the age of 18 years
- they are involved in the person's medical care, e.g. their GP, accommodation services, e.g. someone who works at the nursing home where the appointor lives

[2] http://planningaheadtools.com.au/wp-content/uploads/2015/09/OPG-Enduring-Guardianship-Booklet-FINAL-web.pdf

- they are paid workers for the person needing support.

The tribunal would need to consider:

- if the chosen person is readily available to make decisions
- are they easily contactable? Do they have the time and commitment to be involved?
- would they look at all options before making a decision?
- would they work co-operatively with other family members and any financial decision-makers?

Question 2.3: When should the Public Guardian be appointed? Should the Tribunal be able to appoint the Public Guardian as a guardian? If so, when should this occur?

The Public Guardian should be appointed as the last resort and when a person needs a legal substitute decision maker and there is no other person suitable or able to be the guardian.

The appointment would normally arise to protect the person from neglect and from abuse.

The Public Guardian upholds the following principles:

- the welfare and interests of the person should be given paramount consideration;
- freedom of decision and action of the person be restricted as little as possible
- the person should be encouraged as far as possible to live a normal life in the community
- the views of the person should be taken into consideration
- preservation of family relationships and cultural and linguistic environments
- the person should be encouraged as far as possible to be self-reliant in matters relating to personal, domestic and financial affairs
- the person should be protected from neglect, abuse and exploitation
- the community should be encouraged to apply and promote these principles

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

The Public Guardian should be appointed only after all other avenues for a support person are exhausted and it has been determined that there is no other person to carry out this role.

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

In an effort to make the Public Guardian the guardian of last resort, there is a push to engage private guardians to support those persons in need of a guardian.

NSWTG is of the view that such a model is costly in that the volunteers must be recruited, trained and overseen, presumably by the Office of the Public Guardian.

The administration costs are high as also is the risk of liability.

NSWTG is of the view that the funds would be better directed towards creating an advocacy arm of the Public Guardian.

"Advocacy gives a voice to people under guardianship so that their rights are upheld and their views are heard."[3]

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

Should this be considered, the potential benefit would be in building personal relationships which in turn build better decision-making capacity. It will also assist an isolated person who has few active family and social contacts.

Potentially, a community guardianship program can get people needing support in touch with their community.

The disadvantages are the potential for abuse, the costs involved in recruitment and oversight of the program. The cost of initial and ongoing training and supervision would require the allocation of substantial resources.

(2) Should NSW introduce a community guardianship program?

NSWTG is of the view that funds would be better diverted to establishing an office of Public Advocate to help develop the system of supported decision-making, to facilitate access to supported decision-making in the community and to provide some regulatory oversight of the system in NSW.[4]

(3) If NSW does introduce a community guardianship program:

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

Volunteers, via recruitment, link the person with their community. The Victorian experience has shown that recruitment is of people from a wide range of backgrounds and has included business people, parents of young children, retirees, tradespeople, engineers, lawyers, farmers, nurses and others. As a result of this range, the Victorian experience has shown that it is often possible to match a represented person with a community guardian on the basis of shared interests, background or location and build up the community support dimension of guardianship which is not always possible with a professional guardian.[5]

b. how should community guardians be appointed?

The Public Guardian could be expanded to carry on this role.

c. who should recruit, train and supervise the community guardians?
The Office of The Public Guardian would need to be expanded to carry out this role. The potential guardians would need to be recruited, trained and supervised.

---

[3] http://www.publicguardian.justice.nsw.gov.au/Documents/Publications%20-%20Advocacy%20Report/PG_Advocacy_Report_2016.pdf
[4] Ibid
[5] Office of the Public Advocate, April 2010 The Community Guardianship Program An Overview

There should also be a level of accountability to the tribunal for decisions made.

Question 2.5: Who can be a private manager?

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

In many cases, existing persons close to the person would assist them in making decisions about day to day life. If the need arises to appoint a private manager, the Tribunal should consider:

- the views of the person who will be managed
- the relationship to the person.
- the views of persons who have a good understanding of the person needing support
- the nature of the decisions to be made
- any conflicts of interest or potential conflicts.

This is not an exhaustive list. The Tribunal should be able to exercise absolute discretion when choosing a private manager.

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

Perhaps the "suitable person" test could be expanded with a non-exhaustive list of factors to assist in determining who a suitable person may be. Such a list should be flexible.

Ideally the person should be someone the person knows well and whom the person can trust. Someone who will consider the persons wishes and assist them in making decisions**.** The person should be someone who will build the person's decision-making capability**.**

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

NSWTG is of the view that there should be common eligibility criteria for both roles. The criteria should be flexible and support the person requiring assistance.

(4) What are the benefits and disadvantages of appointing private corporations to act as financial managers?

Professional and corporate financial managers have knowledge about appropriate options to meet the person's needs and wishes based on repeated experiences, access to professional advisors and resources, and reliance upon professional ethics and standards.

Potential conflict of interest may arise with regard to fees and charges the corporation will charge for undertaking this role.

There is also the potential for staff of corporations to lack empathy and also lack understanding of the person's needs and wishes.

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

(1) Should the Guardianship Act state explicitly that the Tribunal can only appoint the NSW Trustee as a last resort?
Yes, this is what occurs in practice and should be reflected in the legislation.

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

As in the Victorian legislation, no other person fulfils the requirements for appointment as the guardian of that person.[6]

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

(1) Should the Guardianship Act allow relatives, friends and others to express their views on who should be a person's guardian or financial manager in the future?
Yes, as this may bring to light any information which may need to be taken into consideration regarding a suitable guardian or financial manager.

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

It gives the Tribunal a better understanding of the person and highlights any persons who may not have their best interest in mind. Friends and relatives could express their views on the suitability of any potential applicant.

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

NSWTG is of the view that the Tribunal should consider the wishes of a family member, carer or substitute decision maker expressed in relation to any future appointments however should not be compelled to give effect to those wishes.

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

Enduring guardians should have the power to decide accommodation issues, healthcare and access to support services.

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

NSWTG is of the view that the Tribunal should retain the discretion to make orders based on the circumstances before them and in this regard a

---

[6] **GUARDIANSHIP AND ADMINISTRATION ACT 1986 - SECT 23**

prescriptive list is not suitable. NSWTG is of the view however that's some guidance regarding precisely what the extent and limits of the role is, would be beneficial to the Tribunal when choosing a guardian. This will also assist the guardian in understanding their role and limitations.

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

It would be helpful to be clear as there is much confusion regarding what a person can and cannot do: e.g. the guardian cannot make, vary or cancel a will.

Question 3.2: Should the Tribunal be able to make plenary orders? What are the benefits and disadvantages of allowing the Tribunal to make plenary orders?

(1) Plenary orders are rare and should not be allowed as they enable the person to make decisions on any aspect of the person's life. There is a greater potential for abuse and disregard of a person's wishes with plenary orders.

NSWTG is of the view that plenary orders allow for full substituted decisions and would be in breach of human rights principles and also be in breach of the principles of UNCRPD.

(2) Should the *Guardianship Act*:

a. continue to enable the Tribunal to make plenary orders
No, for the reasons outlined above.

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

c. include some other arrangement for granting powers?

NSWTG is if the view that some guidance within the Guardianship Order outlining what a guardian can and cannot do would make it clearer for the guardian to carry out their role and also make it clearer when such a role is breached**.**

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

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

It would be beneficial to have some guidance regarding what the tribunal appointed guardian can and cannot do. This will clarify their role and also explain to any person who is asked to accept the order.

There is often confusion not only amongst the guardian but also amongst those who are asked to accept the Order precisely which areas/decisions can be made.

(2) Should such a list:

a. set out all the powers that a guardian can exercise, or

b. should it simply contain examples?

The list should be a guide. It should not be an exhaustive list.

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

(1) Should the *Guardianship Act* contain a list of powers and functions that the Tribunal cannot grant to a guardian?

If so, what should be included in this list?

It would be beneficial to clarify what the Guardian cannot do as often the errors made are as a result of lack of understanding.

The list should spell out what the Guardian cannot do, for example:

- vote or consent to marriage on behalf of the person under guardianship
- consent to medical or dental treatment on behalf of the person under guardianship where the person is objecting to that treatment
- consent to treatment that is defined as special medical treatment
- make decisions that are against the law e.g. Euthanasia.

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

(1) What powers and functions should be available to a private manager?

The private manager should be able to deal with all of a person's assets with any exclusions the Court or Tribunal believes is warranted.

It would be helpful for the private manager to be aware of the powers available to him/her. This non exhaustive list could be written into the legislation. It should also be tailored to the particular person and written into the order the Tribunal makes.

The orders made should be the least restrictive option, reflective of the needs of the individual.

(2) What powers and functions should the NSW Trustee have when acting as a financial manager? Refer to 3.5 (1).

(3) Are the current arrangements for granting powers to private managers adequate? If not, how should powers be granted to private managers?

The orders should be individualised to the person requiring support.

(4) Should the legislation list the powers that a financial manager cannot exercise? If so, what should be on this list?

It is unrealistic to expect most financial managers to be aware of the extent of their duties as fiduciaries. They must be made aware of the limits of the authority granted to them by the appointment or order, and their responsibility not to act beyond the scope of those powers.

A non-exhaustive list could be provided outlining specific examples of what a financial manager cannot do e.g. making a will or power of attorney.

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

Yes, to avoid any conflict issues and to utilise the best skills for the roles.

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

Keeping the roles separate may avoid lifestyle decisions being clouded by financial decisions.

A financial manager may not have the skills to deal with guardianship issues therefore by keeping them separate the correct person can be chosen based on their skills.

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

Having two people involved creates checks and balances.

(3) Should the roles of tribunal-appointed guardians and financial managers remain separate?
NSWTG of the view that the roles should remain separate.

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

Apart from the principles outlined in section 4 of the Guardianship Act 1987[7], the National Decision-Making Principles and accompanying Guidelines proposed by the Australian Law Reform Commission[8] should be observed. The principles are essentially four key ideas which emphasise autonomy and independence of the person and that their wishes and preferences must drive decisions either made by themselves or by their support person. Such concepts are consistent with The Committee on the Rights of Persons with Disabilities (CRPD).

The principles are:

- Every adult has the right to make decisions that affect their life and to have those decisions respected;
- Persons who may require support in decision-making must be provided with 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
- Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.

---

[7] http://www.austlii.edu.au/au/legis/nsw/consol_act/ga1987136/s4.html
[8] Equality, Capacity and Disability in Commonwealth Laws, Discussion Paper

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

The same principles referred to in Q 4.1.

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

Yes

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

In the shift away from best interests, the wording should be varied to reflect Article 12 of the UNCRPD "will and preferences" rather than the welfare and interests wording in the Guardianship Act's general principles.

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

This wording has connotations of a best interests approach. NSWTG believes there should be a move towards will and preferences concepts in line with s12 of UNCRPD. A person's will and preferences should be sought wherever possible and this human rights approach should be reflected in the legislation.

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

The benefit of giving effect to a person's will and preferences is giving the person some autonomy over decisions, giving back their human right to be heard.

There will be difficulty where one cannot determine a person's will and preference or where the person's will and preference is detrimental to the person in situations where the person's will and preferences may place them in a situation of unacceptable risk..

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

In line with the UN Convention, NSWTG is of the view that guardians and financial managers should give effect to a person's will and preference.

In situations where a person's will and preference cannot be determined notwithstanding extensive support, a person's likely will and preferences must be determined.

Any decision made must be the least restrictive option moving away from paternalistic methods of support.

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

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

There will be situations where a person has such a profound disability or is placed in a situation of unacceptable risk that substituted judgment will be necessary.

The advantage of the substituted judgment approach is that to a certain extent, the person's autonomy is preserved as a decision is made based on what the person would want.

The disadvantages to this is that the person may have changed their view and they may not have communicated their views to any person. Also, there is also the potential for the support person to put forward their own views based on what they believe the person would have wanted or what is best for the person.

(2) Should the *Guardianship Act* require guardians and financial managers to give effect to the decision the person would have made if they had decision-making capacity (that is, a "substituted judgment" approach)?

Wherever possible, the will and preference of the person must be sought. Even if it is difficult to determine what the person wants, the decision-maker should look at his/her past preferences rather than putting in place the views and decisions of the decision maker. The decision maker should ask: What were the person's likes and dislikes, their beliefs and values? Did the person ever express previous wishes and preferences?

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

NSWTG is of the view that any guidance available to the guardians and financial managers benefits both parties.

The Victorian Law Reform Commission sets out guiding principles[9] namely:

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

b. any wishes the person has previously expressed, in whatever form the person has expressed them

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

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

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

Communication can take many forms e.g. asking them what they would like with regard to every decision and asking family and friends what they would

[9] http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_FinalReport_Full%20text.pdf at 286

have liked. Respecting the person's supportive relationships, friendships and connections with others.

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

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

A will and preferences model is in line with the UN convention.

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

The person's views should always be sought firstly by communicating with the person to determine their views, if this is not possible, by determining their likely will and preferences.

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

It would be beneficial if the legislation would provide guiding principles similar to those principles the Office of the Public Guardian.[10]

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

See 4.4 (3) above.

If all attempts to determine the person's will and preference fails, the guardian or financial manger should act in a way which promotes the person's well-being.

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

NSWTG is of the view that a guardian or financial manager should be able to override a person's will and preference if the preference expressed poses a serious risk to the person and further to protect the person from abuse, neglect and exploitation.

Yours faithfully

[redacted]

Damon Quinn
Chief Executive Officer
NSW Trustee and Guardian

---

10 http://www.publicguardian.justice.nsw.gov.au/Documents/Practice%20Guidelines/PG%20Decision%20Making%20Guideline%20EXT.pdf