Review of the Guardianship Act 1987

Question Paper 6

Seniors Rights Service

Remaining Issues

Q1 Introduction

Q1.1 Other issues

Are there any issues you would like to raise that we have not covered in Question Papers 1-6?

SRS make no further comments.

Q2 Objectives, principles and language

Q2.1 Statutory objects

What, if anything, should be included in the list of statutory objects to guide the interpretation of guardianship law?

The statutory objects of the Guardianship Act should reflect the section 4 Principles of the current legislation but should also embody the human rights principles as set out in the United Nations Convention on the Rights of Persons with Disabilities.

Q2.2 General Principles

1. **What should be included in a list of general principles to guide those who do anything under guardianship law?**

   We support the inclusions of simple set of Principles similar to the section 4 Principles of the current legislation whilst including principles placing an emphasis on the will and preference of the older person, the right to privacy of the older person, and the human rights set out in the United Nations Convention on the Rights of Persons with Disabilities.

2. **Should there be multiple statements of principles that are tailored to particular decision-making situations? What are those situations and what principles should be included?**

   We would suggest that there should just be one set of principles so that the principles are easily understood and adopted by supporting and substitute decision makers.

Q2.3 Accommodating multicultural communities

How should multicultural communities be accommodated in guardianship law?

NSW has 1.2 million people aged over 65 years of age. More than 250,000 older people are from non-English speaking backgrounds. SRS conducts training programs to target CALD communities and acknowledges 11% of 10,000 people that accessed our advocacy and legal services were from CALD backgrounds.

SRS supports accommodating multicultural communities in guardianship law. SRS suggest the principles adopted in s5(3) of the Disability Inclusion Act might be adopted. These principles acknowledge that decision makers provide supports to persons from culturally and linguistically diverse backgrounds to access services and that decision makers be informed from consultation with the person's communities thus acknowledging the importance of cultural and family relationships in these communities.

Q2.4 Accommodating Aboriginal and Torres Strait Islanders

How should aboriginal people and Torres Strait Islanders be accommodated in guardianship law?

SRS supports accommodating aboriginal people in guardianship law. SRS supports principles similar to those set out in the Disability Inclusion Act s 5(2) being adopted.

Q2.5 Language of disability

1. **Is the language of disability the appropriate conceptual language for the guardianship and financial management system?**

   SRS submits that it might be more appropriate to move away from the term "disability" and use the term "decision making capacity" as this is more appropriate and defines what is being examined in making financial management and guardianship orders. SRS would support the inclusion of a legislative definition of capacity and refers to the Attorney General Tool Kit on capacity assessment as a useful guide as to the sorts of the provisions which could be included in the legislation to guide decision makers.

2. **What conceptual language should replace it?**

   We refer to our comments in Question 2.5(1) above.

Q2.6 Language of guardianship

What terms should be used to describe participants in substituted and supported decision making schemes?

SRS would support the use of the term "supporter" and "supported person" for decision making supporters and those they help, and "representative" and "represented person" for substitute decision makers and those they make decisions for.

Q2.7 Aboriginal and Torres Strait Islanders concepts of family

How could relationships be defined in the Guardianship Act 1987 (NSW) to take into account Aboriginal and Torres Strait Island concepts of family?

In relation to Aboriginal and Torres Strait Islander people so that "spouses" are recognised as "spouses married according to Aboriginal customary law" and a "relative" is a person who "is recognised as a relative under Aboriginal Tradition or Torres Strait Island custom".

Q3 Relationship with Commonwealth laws

Q3.1 Relationship between Commonwealth and NSW laws

What should be done to ensure the effective interrelationship between Commonwealth nominee or representative provisions and state based arrangements for managing a person's financial and personal affairs?

Where there is Commonwealth Legislation such as Social Security Act, Aged Care Act and National Disability Insurance Scheme which empower bodies to appoint decision making nominees for an older person, to avoid confusion, these bodies should be required to consider the existence of an guardians or financial managers under state based tribunal orders and appoint or approve only of the appointment of the same person.

Ideally, there would come a time when the Commonwealth is conferred the power to make laws in relation to guardianship and power of attorney and financial management matters and a national law would apply, resolving any confusion between the interaction of state based and commonwealth based laws.

Q4 Adoption information directions

What changes if any should be made to the Guardianship Act 1987 (NSW) that relates to adoption information directions?

SRS does not deal with this area of law.

Q5 Age

Q 5.1 Age threshold for guardianship orders

What should the age threshold for guardianship orders in the Guardianship Act 1987 (NSW) be?

SRS deals with applications for guardianship for persons 60 years and over and does not deal with applications for guardianship for younger persons on a case management basis.

Q5.2 Financial management orders for young people

Should the NSW Civil and Administrative Tribunal have power to make financial management orders for children and young people?

SRS deals with applications for guardianship for persons 60 years and over and does not deal with applications for guardianship for younger persons on a case management basis.

Q5.3 Appointing young people as guardians

Under what circumstances, if any, should the Tribunal be able to appoint 16 and 17 year olds as guardians?

SRS support the requirement that guardians be 18 years and over however SRS state that there would be scope for a younger person to be a guardian if the Tribunal were to tailor the order with powers consistent with the young person's decision making ability, and review the order.

Q5.4 Young people in NSW Civil and Administrative Tribunal proceedings

1. **Should young people have standing in the NSW Civil and Administrative Tribunal?**

   Carers Australia reports there are an estimated 104,500 carers who are young people between the ages of 15 and 25. In light of these statistics we would support the view that where a young person is a designated primary carer of an older person the subject of proceedings, that person should be able to participate directly in proceedings as a party and their views be taken into account.

2. **In what circumstances should the Tribunal be able to take the views of the young person into account?**

   We refer to our comments in Question 5.4 (1) above.

Q 5.5 Process for appointing parents as guardians

1. **Should NSW introduce a streamlined method for parents of adult children with profound intellectual disability to become their guardian when they turn 18 without the need or the Tribunal hearing?**

   We would support the implementation of a stream lined process for parents to become financial managers and guardians of their children once they turn 18, to assist them in making decision about an intellectually disabled child's affairs.

2. **What other mechanisms could be made available for parents to make decisions for an adult with profound decision making incapacity?**

   We refer to our comments in 5.5(1) above.

<u>Q6 Interstate appointments and orders</u>

Q6.1 Interstate court or tribunal appointments

1. **Are the arrangements in relation to interstate appointments in the Guardianship Act 1987 (NSW) operating well?**

   SRS agrees with the current process that an interstate order be given recognition in NSW by order of NCAT.

2. **Should the legislation clarify what the effect of registration of interstate appointments is and when it is required?**

   The current procedure for registration of the interstate appointments and that recognition takes place on registration would appear clear. Perhaps the principles developed in the case law could be set out in the legislation for clarity. We refer in this regard to the principles at point 6.7 on page 34.

3. **Should the Tribunal have a discretion not to recognise an appointment in certain circumstances?**

   There should be a discretion not to recognise an appointment if it is not in the best interests for the older person to do so. We refer to the example given in page 35 where an older person's estate was incurring additional fees from the NSW Trustee due to recognition with no tangible benefit as the aged care home accepted the ACT financial management order without recognition.

   The NCAT should also have discretion to decline to recognise the order if abuse is occurring and to refer the matter back to the original Tribunal for a review and revocation of the order.

4. **What if any other changes should be made?**

   We refer to our comments above.

Q6.2 Tribunal powers of review of interstate court or tribunal appointments

Should the Guardianship Act 1987 (NSW) clarify the powers of the Tribunal to vary an interstate recognition order?

We refer to our comments above. The NCAT should have discretion to decline to recognise the order, or review vary or revoke the order, if abuse is occurring and to refer the matter back to the original Tribunal for a review and revocation of the order.

Q6.3 Interstate enduring appointments

1. **Should interstate enduring appointments be reviewable in NSW?**

   SRS recommends that both enduring guardianship and power of attorney appointments in NSW and other states be reviewable by NCAT. This is important to prevent exploitation of a the decision makers fiduciary obligations under the document.

2. **Should NSW introduce a system of registration for interstate appointments? If so, should there be a process for confirming the powers confirmed by the interstate instrument or order?**

   SRS supports a national register of enduring power of attorney and enduring guardianship appointments. SRS is of the view that a register with random audits would assist in negating abuse of enduring power of attorney appointments in NSW.

Q7 Orders for Guardianship and Financial Management

Q7.1 A single order for guardianship and financial management

1. **Should there continue to be separate orders for guardianship and financial management?**

   SRS supports the view that the distinction between financial management and guardianship orders be maintained as financial decision making and personal decision making often requires significantly different skills. It would be, or course, important, if there are separate individuals in these roles for these individuals to work together.

2. **What arrangements would be required if a single order were to cover both personal and financial decisions?**

   We refer to our comments in Question 7.1A(1) above.

Q7.2 Effect of orders on enduring appointments

What arrangements should be made for the operation of enduring appointments when the NSW Civil and Administrative Tribunal or Supreme Court of NSW has also appointed a guardian or financial manager?

Guardianship Orders

Where a guardianship order is made the current law states that the enduring guardianship appointment is suspended. This works well where there is extensive family conflict as it clarifies who the decision maker will be.

If only a limited guardianship order is given, such as access, and it is intended that the guardian under the enduring guardianship appointment retain other functions, such as health care, it is recommended that this be specifically stated in the guardianship order to make decision making authority clear and resolve further disputes.

Financial Management Orders

In relation to a financial management order and a power of attorney appointment it is recommended that the legislation make it clear the financial management order suspends the enduring power of attorney appointment. If the financial management order is only to cover part of the estate and the attorney is to manage the other part this should be specified in the financial management order so decision making authority is clear and to resolve further disputes.

Q7.3 Resolving Disputes between decision makers

1. **How should disputes between decision makers be resolved?**

   We would recommend that disputes be resolved in the first instance through mediation. This could be conducted by a body established through NCAT.

2. **Who should conduct or facilitate any dispute resolution process?**

   We refer to our comments in Question 7.3 (1) above.

3. **What could justify preferring the decision of one substitute decision maker over another?**

   Caution should be exercised in preferring the decision of one substitute decision maker over the other. If the dispute cannot be resolved the matter should be referred to NCAT for directions.

Q8 Search and Removal Powers

1. **Is there a need for the provisions of the Guardianship Act 1987 (NSW) that empower police or NSW Civil and Administrative Tribunal employees to search premises and remove people deemed in need of protection?**

   We would submit that a coercive power by the Tribunal to remove a person from premises where they are at risk and place them in a safe environment would be required (s11) and obtain a search warrant and remove a person (s12). It is a power which should only be granted as a last resort based on the circumstances of the case. The police should only use such force as is reasonably necessary and appropriate and in the older person's best interests.

2. **What changes if any should be made to these provisions?**

   The Guardianship Act could include some legislative guidelines as to when such an order is appropriate. It would appear to be in cases where:

   - the health and safety of person is seriously at risk,

- to protect the older person and / or others from harm, and
- the police officer is unable to assist the older person reach an understanding of this risk and the need to move from the premises.
- Force should be used as a last resort and only as appropriate in the circumstances.

Q9 Enforcing Guardian's decisions

Q91. Enforcing guardians' decisions

1. **What provision (if any) should be made for a guardianship order to permit guardians to enforce their decisions?**

   We submit that the provisions in current legislation s21A, s21B, and s21C for the enforcement of a guardian's decisions are appropriate.

2. **What limits should be placed on any part of an order that permits such enforcement?**

   We submit the limits to liability of a guardian as set out in section 21A (2) are appropriate.

   We agree that if a specified officer such as an ambulance officer or police officer is authorised to implement the decision of a guardian and is to be entitled to use reasonable force as is necessary and appropriate then this should be explicitly stated in the order.

3. **Should any such provision expressly mention groups of people who may be permitted to enforce a guardian's decision, such as, for example, police officers or ambulance officers?**

   We support the expression in the order of the persons or class of persons who are able to implement the guardians' decision.

4. **What limits should be placed on the amount of force authorised to enforce any such decision?**

   We submit that any use of force should only be used as a last resort and only to the extent appropriate and proportionate in the circumstances. An officer should always try to explain to the older person the reasons for the decision and seek to obtain their understanding and consent to the decision before attempting an action with reasonable use of force.

Q10. Handling Personal Information

Q10.1 Access to personal information

In what circumstances should different decision-makers and supporters be able to access a person's personal, health or financial information?

We support the incorporation of the human right to privacy as recognised in the United Nations Convention of People with Disabilities being incorporated in the section 4 Principles of the Guardianship Act.

SRS support the view of the Victorian Law Reform Commission that attorneys under enduring power of attorney appointments, guardians under enduring guardianship appointments, financial managers and guardians under guardianship orders, all have the right to access personal information on behalf of an older person to the extent that it is relevant to the exercise of their functions.

Q10.2 Disclosure of personal information

1. **In what circumstances should various decision-makers and supporters be permitted to disclose a person's personal, health or financial information?**

   We support the exceptions to confidentiality set out in the Guardianship and Administration Act 2000 (Qld) which states disclosure:

   - Was authorised by law or the person to whom the information relates
   - It was necessary for legal proceedings under Guardianship and Administration Act 2000 (Qld)
   - It was authorised by a court or tribunal in the interests of justice
   - It was necessary to prevent serious risk to life, health, or safety
   - It was necessary to seek legal or financial advice or counselling, advice or other treatment, or
   - It was necessary to report suspected offence

2. **In what circumstances should various decision-makers and supporters be prohibited from disclosing a person's personal, health or financial information?**

   SRS support the view of the Victorian Law Reform Commission that a substitute decision maker should only collect personal information that is relevant to and necessary for carrying out their role and that it should be an offence for substitute decision makers to breach confidentiality.

Q11 Supreme Court

Q11.1 Supreme Court's inherent protective jurisdiction

What if anything should the legislation say about the relationship between the Supreme Court of NSW's inherent protective jurisdiction and the operation of guardianship law?

It would appear the current position is satisfactory as the Supreme Court has regard to the statutory regime set up by the Guardianship Act for specialist tribunals such as Guardianship Division of NCAT when exercising its inherit jurisdiction and only departs from it in exceptional circumstances.

Q11.2 Interactions between the Supreme Court and the Tribunal

1. **Are the provisions that deal with the interaction between the Supreme Court and the NSW Civil and Administrative Tribunal adequate?**

   Guardianship Order

   It is submitted that the current position that the Tribunal cannot make a guardianship order where there is an order in place by the Supreme Court in its inherent jurisdiction, unless the Court consents to the order, is adequate.

   Financial Management Order

   The current position that the Tribunal cannot make a financial management order if the "the question of the persons capability to manage their own affairs is before the Supreme Court" should be closely monitored. If there is no real issue in dispute as to the person's capacity the Supreme Court should provide prompt consent for the Tribunal to hear the matter.

   The Tribunal should be able to make orders in relation to financial management, where there is an order in place by the Supreme Court in its inherent jurisdiction, where the Court consents to the Tribunal making an order.

2. **What changes, if any, should be made to these provisions?**

   Refer to Question 11.2 (1).

Q11.3 Supervision, review and appeals

Are there any issues that should be raised about the Supreme Court of NSWs supervisory review and appellate jurisdictions?

SRS makes no further comment about the supervisory, review and appellate jurisdictions of the Supreme Court of NSW.