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QUESTION 4.

SAFEGUARDS AND PROCEDURES

What this paper is about

This paper is about making sure you are treated well when someone else:

- makes decisions for you
- helps you make a decision.

The law says that someone can make decisions for you if you can't make them yourself.
Or, some people choose a person to help make decisions for them in the future.
They do this in case there is a time when they can't make decisions for themselves.
For example, some people get dementia as they get older, and this makes it harder to make decisions on their own.
A person who makes decisions for you has a big influence over your life.
For this reason, it's very important that the law:

- protects your rights
- helps to keep you safe.

Question 1: How should an enduring guardian be chosen?

Under the law, if you can still make your own decisions, you can choose someone to be your guardian in the future.
This person is called an **enduring guardian**.
Your enduring guardian will make decisions for you when you can't make decisions anymore.
There are some rules about choosing an enduring guardian.

If you want to officially choose an enduring guardian, you must:

- Fill in a form.
- Ask the enduring guardian to fill in a form.
- Have someone else witness the form – they must see you and the enduring guardian sign it.
- The witness has to say that:
  - they saw you sign the form
  - you understood it
  - no one made you sign it against your wishes.

What do you think?

Do you agree with this method of choosing an enduring guardian?
You can use the space below to share your thoughts.

(a) This is an important document and it should be prepared by a lawyer and the usual procedures should apply as when one is signing a Power of Attorney (PoA). The import of such document should be carefully explained not only as to the benefits but also the pitfalls. Both PoA and an Enduring Guardianship (EG) documents should be registered.

(b) The lawyer should be independent and both the lawyer and witness (2) each should sign a document stating that they were satisfied that the person understood.

(c) It is also important that the appropriate questions are asked of the person, i.e. ask them to repeat what they thought the document meant and also their understanding of the risks. Without proper questioning and tests, it would be inappropriate for the lawyer and witnesses to make a statement to the effect that the person understood.

(d) The lawyer must be required to complete a short training course (perhaps provided by appropriate geriatric specialists – i.e., communication experts) so that a set of questions are asked in a useful manner and actually formulated in a way which confirms the person's understanding. Asking questions such as "do you understand?" usually only achieve a response such as "yes" even though the person does not. Generally, elderly persons do not want to appear difficult, unintelligent or foolish and tend to agree with what they think will please the person asking the questions. That is why I think it is an essential requirement that training in this area is mandated. Without this training, no lawyer should be permitted to prepare a PoA and EG document for any person.

It would also be advisable for the person to leave a copy of those documents with the lawyer and also retain a certified copy stamped by the Registry . The lawyer might also suggest that the

documents are not given to the executors until he/she feels that supports are required.

Again, I repeat that the original documents should be registered. If someone tries to use it fraudulently, a national data base would certainly raise a red flag when cross-checked with the information on the data base and the identity of the fraudster.

A PoA and an EG document can have a great impact on a person's life be it detrimentally or beneficially. Therefore, careful selection of Trustees/Executors and the protection of such instruments is both important and necessary.

If a family member has been looking after an intellectually disabled person all his life, and that disabled person attains the age of 18 years, then guardianship should automatically rest with the family member/trusted friend, of the now adult child. Those persons should not have to place the child under the control of a Public Guardian in order to access services, as is required by the new NDIS programme.

If the child has never had the intellectual capability throughout his life, then to leave the family member without any legal control of the child beyond the age of 18, is ridiculous as it will plunge the family into a bureaucratic nightmare when trying to act on that disabled person's behalf.

If the child has some capacity, I believe that only guardianship and not enduring guardianship should be given to the parent. I make this distinction because I feel that if an adult child has the capability of making SOME decisions such as where they wish to live, with whom, if they want to marry, have children etc. then the parent must not override the wishes of the adult child even though there may be risks to the adult child. The adult child has the right to choose his own guardian and make decisions in his life with the necessary supports.

Question 2: When should an enduring guardian start making decisions for someone else?

At the moment, it might be unclear when an enduring guardian can start making decisions for you.
One idea to make this better is to say that a **Tribunal** needs to decide when the enduring guardian can start making decisions.
In NSW we have the Guardianship Division of the NSW Civil and Administrative Tribunal (the Tribunal).
The Tribunal is a group of people appointed by the government who work together to make decisions about:

- guardianship
- financial management.

What do you think?

Should the Tribunal decide when an enduring guardian can start making decisions for someone else?
You can use the space below to share your thoughts.

I ABSOLUTELY DO NOT believe that a Tribunal should decide when an enduring guardian can start making decisions.

To consider it appropriate for a Tribunal to do so, is to place yet another restriction on a person's freedom and, further, it insinuates that no one other than a Public Guardian is capable of making good, proper and necessary decisions for themselves or for the disabled person who may need supports.

To grant this power to a Tribunal would be yet another overreaching and intrusive interference by a Tribunal which already has too much power and places restrictions over a person's basic rights and freedoms.

An EG which is already in place with appointed executors has come about because the person who granted the enduring guardianship had the foresight to think about it in the first place and secondly, had trust in the executors to do what is best for them as and when the need arose.

It is not the place or business of a Tribunal to decide when an enduring guardianship should commence particularly when the Tribunal has no personal or intimate knowledge of the disabled person or his circumstances.

If an intellectually disabled person has appropriate supports, caring family/trusted friend etc., then there is no necessity for the Tribunal to intervene at all. See comments regarding attainment of 18 years for an disabled person.

It strongly state that it should not be the Tribunal's role to make those decisions – it is the right of parent(s)/family/trusted friends who have been appointed guardianship by the person granting enduring guardianship to them.

Question 3: What powers should the Tribunal have?

The Tribunal can check how the enduring guardianship arrangement is working.

The Tribunal might:

- keep the enduring guardian's powers as they are
- make changes to the enduring guardian's powers
- take away the enduring guardian's powers and stop them making decisions, in some situations.

Some people say that the Tribunal should be able to do other things, like replace an enduring guardian.

What do you think?

What do you think about the Tribunal's powers to check how an enduring guardianship arrangement is working?
Do you have any other ideas?
You can use the space below to share your thoughts.

Under no circumstances should a Tribunal have more power. To give the Tribunal this additional power would only serve to escalate the abuse of power that it currently inflicts on its charges.

Despite its obligations under the Convention, NCAT retains the paternalistic model guardianship which has not been significantly reformed since the inception of The Guardianship Act 1987 (commenced in 1989) which essentially deprives a disabled person of his basic human rights and freedoms.

Tribunals are not an investigative body, nor do they have the skills or insight to be one, so how can one ensure that their "opinions" with regard to replacing an enduring guardian have merit or that it is the right thing to do?

I do not agree that the Tribunal is the appropriate vehicle to make such decisions nor should they be permitted to do so.

What is urgently needed is the establishment of a totally independent Public Advocacy Commission, with appropriate personnel experienced in understanding the needs of disabled person.

The Commission would have experienced investigators and field officers, like police detectives, who will systematically and thoroughly investigate (in the true meaning of the word) complaints and wrongdoing to establish whether those complaints are frivolous, vexatious or genuine.

Interference in the exercise of PoA or EG should only occur when there has been wrongdoing.

If intervention was necessary, then the investigative team would escalate the matter to its legal team who will be legally authorised to act on the disabled person's behalf and take the necessary steps to remedy the situation, protect the disabled person and, if appropriate, prosecute the perpetrator in the appropriate court and revoke the enduring guardianship.

The sole objective of an independent Public Advocacy would be to assist, support and provide, when necessary, appropriate remedies, to protect, safeguard and enhance the basic human rights of a disabled person. Unlike NCAT, it would not rely on head counts to justify its existence by placing as many people under guardianship.

Since Mr. Nick O'Neill, Mr. Schyvens and other NCAT principles, past and present, have stated "*it is not our role to establish the truth*" under what premise is it suggested that the Tribunal would be a competent examiner of who and what is best for the vulnerable person and whether or not an enduring guardianship is working ?

At the February 18, 2017 2nd Guardianship Conference in Hong Kong, Mr._Schyvens said "*In Australia, specialists tribunals predominantly exercise the power to answer these questions (relating to UNCRPD) using the framework of substitute decision making …… and the Tribunals are substantially in compliance with the Convention".*

The statements made by Mr. Schyvens are very misleading because although his speech outlined what the Tribunal is obliged to do, it is not, in fact, an accurate reflection of the "Tribunal's actual practices.

Mr. Schyvens then made a comparison between Hong Kong and NSW. For example,

- Hong Kong has a population of approx. 7.4m – NSW 7.7m.
- In 2012, Hong Kong received 284 guardianship applications
- In 2012 NSW received 2,668 applications
- In the 2015/2016 Financial Year, NSW received approx. 11,455 applications/review of orders and conducted 7,792 hearings.

Based on Mr. Schyvens' figures, NSW applications to the Tribunal in the past 5 years have increased at least five fold. The important question is **why**?

Mr. Schyvens hypothesised that difference may be "*the result of key cultural differences between the two populations*" that could explain the wide divide, ie reliance or non reliance on Govt. services, familial obligations and formal legal resolution v. internal disputes resolution. Coming from a culturally diverse background myself, and having lived in Australia since an infant, I consider this hypothesis, in general, has little merit.

It is because there are no other avenues available for disabled persons that application is made to the Guardianship Tribunal and this needs to change.

Question 4: How should we end enduring guardianships?

Sometimes, enduring guardianships don't work out.
If this happens, an enduring guardian may resign.
This means they sign a form to say that they don't want to be an enduring guardian any more.
Or, the person who chose the enduring guardian can cancel
the arrangement.
But they can only do this if they can make decisions for themselves.
The Tribunal can also cancel an enduring guardianship.
An enduring guardianship will end if the person gets married to someone who is not their guardian.

What do you think?

Are there any other ways you think an enduring guardianship should end? Should an enduring guardianship end when someone marries a person who isn't their guardian?
You can use the space below to share your thoughts.

Firstly, I believe that ALL Powers of Attorney and Enduring Guardianship should be registered, as should Revocations. The importance of such documentation cannot be underestimated and therefore requires safeguards in the form of legal procedures. Public education in this regard is also necessary.

Secondly, if a person wants to end an enduring guardianship then they should be able to do so themselves with the assistance of a lawyer (suitably trained as outlined above) if required, who will prepare the revocation and, if needed, draw up a replacement document.

I also believe, going forward, that Powers of Attorney and enduring guardianship documents would preferably have two Executors, one principal and one alternative. In the event that one of them wishes to relinquish the role, the process would be obvious – one is removed and the other retained and another sought.

If both want to Revoke the Guardianship, then the disabled person or his family/trusted friend could make recommendation for suitable alternative executor(s)– preferably not the Public Guardian.

If an independent Public Advocacy Commission were to be established, it would have a special branch within the organisation dealing with Powers of Attorney, Enduring Guardianship, Revocations etc. It would be the branch's responsibility to keep a digitalised register of each of those documents.

In that Commission, legal personnel would be able to provide advice and offer suggestions to the parties involved. It would be up to the parties to finally decide – not the Public Advocacy Commission.

Everyone is an individual and it is not a case of "one size fits all and tick the box" as happens in the NCAT Guardianship regime. That is why, the Tribunal and its cohorts are not fit for purpose. The Tribunal's role should be restricted to cases of absolute and unequivocal "last resort".

Guardianship and financial management

A guardian can make personal decisions for someone else.
This includes decisions about your health and where you live.
A financial manager is someone who can make financial decisions for someone else.
This includes decisions about your **property** and **finances**.
Your property might include the house you own.
Your finances include money:

- you have now
- you will have in the future.

At the moment, the Tribunal can choose a guardian or financial manager for some people.
An important document called the United Nations *Convention on the Rights of Persons with Disabilities* explains how these relationships should work.
It says the relationship should:

- meet your needs
- only be in place for the shortest time possible
- be reviewed regularly by someone who is independent.

The law in NSW already supports some of these things.
However, some people think that the law could do more to protect people's rights.
The following sections:

- explain some of the ideas about this
- ask some questions.

Question 5: Should there be time limits for orders?

Guardianship orders

The Tribunal uses a **guardianship order** to appoint a guardian.
Guardianship orders have a time limit.
There are two types of guardianship orders:

- temporary
- continuing.

Temporary guardianship orders can last for up to 30 days.
They can be renewed for up to another30 days.
Continuing guardianship orders usually last for 1 year.
They can be renewed for up to another 3 years.
In some situations, the Tribunal can make longer guardianship orders but they still have time limits.

Financial management orders

The Tribunal might appoint somebody to manage another person's property or money.
This is called a **financial management order.**
Financial management orders do not have time limits.
Some people think they should.

What do you think?

What do you think about the time limits that apply to guardianship orders?
Are they too long or too short?
Do you think financial management orders should have time limits?
You can use the space below to share your thoughts.

Guardianship Orders:

Since the Tribunal does not comply with the spirit of the Act or the Principles and Guidelines of the Convention, what difference does it make if they place a 30 day, 60 day or 3 year Order? The Orders are rarely let lapse or overturned by NCAT when challenged.

I believe a Guardianship Order, under the current regime, should never be for more than a maximum of 12 months. If there are supports in place, there should be no guardianship order at all!

Renewal of Guardianship Orders should then only be considered upon a new application.

In the preamble to this question, it is stated that "….*the law in NSW already supports some of these things*…."(ie. UNCRPD)

Without legislation, there are no supports or safeguards. The Act grants Tribunal appointed substitute decision -makers wide ranging powers which allow their views and opinions to override the Principles and Guidelines of the Convention with total impunity. Those "supports", therefore, have no legal teeth and are purely academic.

Contrary to the statements made by the CEO of the Australian Law Reform Commission, I do not believe that Tribunals are subjected to -

> *" considerable scrutiny, and guardianship laws contain a range of accountability mechanisms that seek to ensure decision-makers exercise their powers appropriately."*

-and-

"Public Guardians and Administrators are also accountable for their activities to their employers." (Prof. R. Croucher, ALRC 2014 Modelling Supported Decision Making in commonwealth Laws – Making it Work - 2014)

On the surface, such statements may appear reasonable and correct given that the Principals of NCAT regularly make those claims and cite organisational policies to endorse them. However, it is certainly does not happen in reality. Stakeholders at the grass roots level with lived experience of the actual practices of NCAT invariably find such statement deeply troubling.

To my knowledge, there has never been an independent forensic investigation with an objective of -

a) examining case histories of stakeholders;
b) examining the reasons for NCAT, decisions
c) evaluating the outcome of those decisions;
d) comparing those decisions and NCAT's alignment and compliance with its obligation to uphold the Principles and Guidelines of the UNCRPD.

For an organisation to have such powers and influence over a person's life, it is extraordinary that no such investigation has taken place. This is particularly so in view of the myriad of submissions over the past 30 years complaining about the abuses of power by the Guardianship Tribunal, Public Guardian and Public Trustee.

I also am not aware of any reference to "family conflict" in the Act or the UNCRPD as a being a reason for a plenary Guardianship Order to be placed on a disabled person yet NCAT will use "family conflict" for that purpose. The end result is that

the disabled person is being "punished" by having all rights and freedoms removed and the agitators remain free to continue with their destructive behaviours with no restrictions placed on them by the Tribunal or Public Guardian.

So, it appears to me, that NCAT is incapable of making judicial decisions benefiting the disabled person and, therefore, orders should be made for the shortest time possible.

Financial Management Orders:
To my mind, the most important issue requiring investigation is why so many plenary guardianship orders are actually placed on the disabled person in the first place.

The literature states that a Financial Management Order is placed on the disabled person because they are "*deemed as being incapable of managing their estates*" but to remove the Order, the disabled person is required to prove that they "*are capable of managing their estates*"!! Needless to say, the order is rarely removed.

The Tribunal does not nor is it required to consider a disabled person's overall cognitive ability. A person may be able to manage some parts of his affairs but, with appropriate personal supports, such as family, trusted friends etc., the remainder of other aspects of the financial affairs are capable of being managed WITHOUT the interference of the Public Trustee

- or -

A disabled person may already have a family member/long time trusted friend already carrying out financial management tasks competently and without any question of financial abuse. Yet the Tribunal will invariably place financial management orders when

no order is required and, more particularly, when the estates have a high resale value.

As the commercial arm of the Government, the Public Trustee has a vested interest in obtaining and retaining control over as many estates as it can, and for the most part, not only manages them in a deplorable manner but does so without transparency or accountability. This is not acceptable on any level.

In my view, the appointment of a Public Trustee for a Financial Management order must not be placed over the person's estate for more than 12months and then should automatically lapse.

The Public Trustee should only be appointed as "a last resort" meaning only in extraordinary and exceptional cases. If a family/trusted friend/carer is assisting a disabled person in an honest and diligent manner, then there is no need for the Public Guardian or Public Trustee to be approached or become involved.

I am aware of cases which successfully removed the Public Trustee as Financial Manager, but those came at great all round cost. The applicant needs to be a formidable challenger with an arsenal of supports.

In this particular case, it included intervention by the International Criminal Court, Global Lawyers Alliance, production of 8 independent separate medical experts' reports, lawyers, barrister, demand that a judicial member be removed because of extreme bias and belligerence, and included a tome of evidence and the support of various advocates.

Throughout this ordeal, the applicant was stonewalled, subjected to constant delays in obtaining reviews and hearings and subjected to intimidation and legal threats.

Today, May 10, 2017 after almost three years, Tribunal hearing ordered that the Public Trustee, as Financial Manager, be removed – is this how a cheap, speedy and just Tribunal is supposed to operate? How many other applicants are able to undertake such a formidable and determined exercise in the pursuit of justice?

Question 6: Should there be other limits to financial management orders?

Your **estate** includes your property and finances.

The Tribunal can say that a financial manager *should not* look after some parts of a person's estate.

Some people think it would be better if the Tribunal could say what parts *should* be looked after.

This might mean you can still look after parts of your estate yourself.

What do you think?

You can use the space below to write your ideas.

The current situation regarding "private financial managers", i.e. family, friends, accountants etc. is that they are subject to stringent reporting requirements (the Public Trustee is not). If the Tribunal considered that a financial manager's abilities were questionable, then one wonders why that person was appointed in the first place.

Not all estates are complex and are well within the capabilities of the average person. A private financial manager can respond in a timely fashion to make purchases that are required for the disabled person, pay their bills without incurring late fees, as occurs with the Public Trustee, and do all other things necessary to manage an estate in a competent and timely manner, and at no cost to the estate. Private managers are not financially compensated for that role – the Public Trustee is.

The Public Trustee's recent and poorly considered practice of insisting that private managers must pay an exorbitant Surety Bond from the protected person's estate, is just another example of the incompetence of the Public Trustee. If checks and reporting requirements are already in place, then I fail to see why the Public Trustee as a supervisor, should place an impost on the private manager. If the Public Trustee fails in its supervisory role (for which they receive a fee from the estate), THEY should be accountable and responsible for any losses.

Interference by the Public Trustee into the affairs of disabled persons is counter productive.

In any event, I have not seen an explanation from either the ALRC or the NSWLRC as to which supporter has the final say in a co-decision making model – the supporter or the disabled person?

Financial wrongdoing means fraud and misappropriation – it does not mean using a shoebox for invoices instead of a spreadsheet! A common-sense approach should be taken when interpreting“wrongdoing”.

A disabled person’s family/friends should be able to seek legal redress for these crimes in just the same way as anyone else and should not be precluded from equality before the law because of their disability. If the family/trusted friend etc. can prove that the disabled person has been defrauded etc., then they should have a legal right to pursue justice on behalf of the disabled person.

Question 7: When should the Tribunal be able to review orders?

The Tribunal must review guardianship or financial management orders if it is asked.
Or the Tribunal might choose to review an order without being asked.
There are different rules for guardianship orders and financial management orders.
Guardianship orders must be reviewed when they reach their time limit.
Because financial management orders don't have a time limit, the Tribunal doesn't need to review them regularly.
But some people think the Tribunal should review them regularly.
They think this would let the Tribunal check if:

- a person still needs the financial management order
- the order is still working.

Other people say regular reviews would:

- cost too much money
- take too much time
- not be helpful
- upset some people.

What do you think?

Do you think the Tribunal should review financial management orders regularly?
You can use the space below to share your thoughts.

Yes. I believe all Orders, appointing public or private financial trustees, should be automatically reviewed every 12 months. An Order should not continue arbitrarily. There must be valid reasons as to why the Order is required and only be formally required as a "last resort". If there is no wrongdoing by a financial manager, the Order should lapse.

I also believe that an early request for a review should also be permissible particularly if the Order is not benefiting the disabled person.

Public Trustees:
The Public Trustee's own management competencies should be also be scrutinised. If the family, carer/friends believe and they can show that there is mismanagement, incompetence and dereliction of duty on the part of the Public Trustee, then that Order should be dismissed and the Public Trustee removed from

the role of financial manager. There should not be one set of rules for "private" and one for "public" trustees.

The Public Trustee is a huge bungling bureaucracy. It has a poor record, limited security protocols, checks and balances and limited data entry and record keeping. It should only be used as an absolute "last resort".

Private Financial Manager: (family/trusted friends etc.
If a private financial manager has a history and audit trail in place which protects the estate and confirms good management, then I believe the Public Trustee's involvement becomes redundant and the Order for Public Financial Management should be removed.

Many family members/trusted friends/supporters can carry out that role without the oversight and burdens placed on them by the Public Trustee.

I would like to see the Public Trustee and Public Guardian replaced by new model such as , small satellite Community Centres, with appropriately trained personnel, which offer various levels of support including assistance with bill paying, banking etc. rather than a huge impersonal institution/bureaucracy attending to these functions. It would be more efficient, controllable, and services provided in a timely manner.

Question 8: When should the Tribunal be able to cancel a financial management order?
After a review, the Tribunal might decide to:

- let the order continue
- change the order
- cancel the order.

The Tribunal can only cancel the order if:

- the person can look after their own estate

or

- it is in the best interests of the person.

Some people believe the Tribunal:

- shouldn't be thinking about the person's best interests
- should think about what the person wants
- should be able to cancel a financial management order when the person doesn't need it anymore.

What do you think?

You can use the space below to share your thoughts.

If a financial management order has been made, and a family person or trusted friend has been managing the matter competently, prudently and honestly, then the Tribunal should never have appointed the Public Trustee in the first place.

Everyone is different and each person should be entitled to and have the right and freedom to chose how they want to live and manage lives.

Removing the Public Trustee is an enormous and difficult task. The Tribunal will rarely order the removal of a Financial Management Order. Restricting the removal to the only two reasons stated above, i.e., capacity and bests interests, is unreasonable, unjust and not in accordance with the UNCRPD.

If a person is without anyone in this world, has assets has no cognitive ability whatsoever and/or is totally and absolutely in a vegetative state, then the Public Trustee is the lesser of two evils, the first being that predators of all persuasions could denude the person of his estate and do so without ANY checks and balances.

The Public Trustee may mismanage the estate but it would be obliged to budget and pay for the provision of the person's on-going care.

The Public Trustee's recent and poorly considered practice of insisting that private managers must pay an exorbitant Surety

Bond from the protected person's estate, is just another example of the incompetence of the Public Trustee. If checks and reporting requirements are already in place, then I fail to see why the Public Trustee as a supervisor, should place an impost on the private manager. If the Public Trustee fails in its supervisory role (for which they receive a fee from the estate), THEY should be accountable and responsible for any losses.

If there is wrongdoing, then the much hoped for Public Advocacy Commission for disabled persons would be the best approach for legal redress. Financial wrongdoing means fraud and misappropriation – it does not mean using a shoebox for invoices instead of a spreadsheet! A common-sense approach should be taken when interpreting"wrongdoing".

A disabled person's family/friends should be able to seek legal redress for these crimes in just the same way as anyone else and should not be precluded from equality before the law because of their disability. If the family/trusted friend etc. can prove that the disabled person has been defrauded etc., then they should have a legal right to pursue justice on behalf of the disabled person.

Question 9: What should happen when a guardian or financial manager dies?

The law explains what should happen when a guardian dies.

If there's no other guardian, the **Public Guardian** takes over.
The Public Guardian is a person who works for the government.

They stay the person's guardian until the Tribunal can look over the guardianship order.

The law does not say what should happen when a financial manager dies.

There is a government agency called the NSW Trustee.
Some people think the NSW Trustee should step in and become the person's financial manager if their financial manager dies.
If the NSW Trustee doesn't step in, some people who need a financial manager might not have one until the Tribunal chooses someone else.

What do you think?

You can use the space below to share your thoughts.

In circumstances where there is no immediate family or trusted friend/carer, then a temporary order appointing the Public Trustee should be arranged. This should not be for more than 12 months after which time the appointment must be reviewed.

However, if a trusted and authenticated person who has a long standing connection with the person, is located or steps forward and is willing to act in that capacity and has the necessary ability to manage the estate, then that person should be appointed as the "guardian and financial manager" . There is no need for plenary guardianship orders nor should any be made.

The same principles would apply in the case of the death of a guardian.

A Tribunal is not required to investigate the person's credentials and bona fides so there is every chance that a skilled perpetrator with his own agenda, could be erroneously appointed.
This is all the more reason why an independent investigative body such a a Public Advocacy Commission should be established to check a potential guardian/financial manager's background. The Tribunal is not suitable for this role.

A registration system

Question 10: Should NSW have a registration system?

Some people think NSW should have a registration system.
Registering could involve sending documents to the government.
People could register all their documents about the appointment and powers of:

- enduring guardians

- guardians
- financial managers
- supporters.

Some people would be able to look up these documents.
This could help:

- banks
- healthcare services
- other service providers.

They could check:

- if someone has:
  - an enduring guardian
  - a guardian
  - a financial manager
  - a supporter
- what powers they have.

Some people think it could protect people from being abused or taken advantage of.

A registration system could also help people keep track of all their documents.
Other people are worried it might:

- take away people's privacy
- cost a lot
- be hard for people to use
- stop people from wanting to appoint an enduring guardian.

What do you think?

What do you think about a registration system? Should NSW have one?

_____

There is no question that a registration system is extremely important and it should happen sooner rather than later. This role could form part of the duties of a special department within the proposed Public Advocacy Commission for disabled persons.

The benefits of such a system far outweigh the hypothetical risks of -

(a) privacy,
(b) cost,

(c) difficulties of use
(d) appointments of guardianship

Registration need not be a costly exercise and, in any event, it is should follow automatically as a legal requirement when a lawyer prepares a PoA and EG.

Powers of Attorney and Enduring Guardianship can already be registered. I see no reason why it should not be mandatory.

A Registry would also make it more difficult for unscrupulous persons to manipulate a disabled person into revoking a Power of Attorney and Enduring Guardianship and replacing it with a fraudulently obtained replacement at a time when the person is cognitively impaired. This is not an unusual occurrence and the Complaints Department of the Law Society does nothing about it when complaints are made regarding the conduct of lawyers who are complicit in the fraud.

Paying a small fee for registration as an additional protection should be a price that everyone should be expected and willing to pay.

For purposes of Centrelink, Medicare, RTA and other govt. bodies, including Banks, a data base which keeps registration as to the name of the authorised supporter and what that supporter is permitted to do on behalf of the disabled person could be the role of the hopefully established independent Pubic Advocacy Commission for disabled persons.

Making sure guardians and financial managers do the right thing

Question 11: What should the law do to make guardians and financial managers responsible for their actions?

It is important that the law has ways to:

- prevent guardians and financial managers from abusing their power
- let people take action if this does happen.

The law already tries to do this by:

- using the NSW Trustee to supervise the work financial managers do
- letting people ask for a review of decisions made by the:
  - Public Guardian
  - NSW Trustee
- letting the Tribunal take power away from guardians and financial managers who do the wrong thing.

Some people think the law could do more.
Some of their suggestions include:

- changing the law so it explains what a guardian or financial manager's duties are
- making sure that guardians:
  - keep good records
  - report on their activities
- changing the law so guardians and financial managers can't abuse, neglect or take advantage of the person they are supposed to help
- giving the Tribunal the power to make people who do the wrong thing pay money back to people they have hurt.

What do you think?

What do you think about these suggestions?
Do you have any other ideas?
You can write your ideas in the space below.

It appears from the above, that the questions relate only to family/friends of the disabled person and not the Public Guardian and Public Trustee.

It is, therefore, of concern to me that the practices of NCAT are not being scrutinised and that concentration is being placed on aberrant family and trusted friends who, allegedly and according to NCAT, are principal abusers. There is no doubt that families can be and sometimes are perpetrators. However, perpetrators come in all manner and form and the types of abuse are varied.

From reports that I have received from other stakeholders, some Public Guardians, particularly in regional areas are more compliant with the Act and the Convention. The same does not apply to Public Guardians and Public Trustees in NCAT's Sydney office.

Without a balanced view, which is examining both sides of the fence, I do not see how law reformers can recommend new laws to provide effective safeguards if the focus is solely on only on aberrant private individuals.

Anyone, including govt. organisations, who abuse the trust and responsibilities of a guardian and/or financial manager should be held responsible for their actions, punished and ordered by law to make restitution of any financial loss.

If a guardian and/or financial manager is derelict in its duties and such actions or inactions are clearly detrimental to the protected person, they should also be removed from their positions as trustees and/or guardians.

Unfortunately, as disabled persons do not have equality before the law, acts of fraud and/ violence abuse and neglect, disabled persons and their concerned family members have nowhere to turn for help.

The Police will not get involved, the organisations purported to help do not want to get involved, for whatever reason, so they have no place to go other than a Tribunal which does nothing other than put the person under plenary guardianship. It is simply jumping from one lion's den into another!

Cognitively impaired citizens do not have legal equality in line with other members of Australian society. Again, another reason

to have an independent Public Advocacy Commission with full investigative powers and legal authority to litigate on behalf of the disabled person including prosecuting public service employees who have committed a fraud.

No complainant is going to get a fair and unbiased hearing in an NCAT review. The bias is so systemic against a complainant, that asking NCAT to review a Tribunal decision is equivalent to asking a criminal to judge a criminal – a guaranteed get out of jail card!

NCAT decision-makers do not have to **prove** that -

a) placing a person under "plenary guardianship" was a case of **last resort,** or
b) selling a disabled person's home is a financial necessity, or
c) why they failed to act despite irrefutable evidence that the disabled person is being mistreated and abused;

or explain and identify which part of the Act(s) and/or the Principles and Guidelines of the UNCRPD supported their actions as to -

d) why they refused to release funds (when there is more than adequate reserves) to purchase necessary aids for the disabled person is "in their best interests";or
e) why they remove people from their own homes and force them into nursing homes when there are ample supports and is there is no necessity; or
why institutionalisation is the preferred option despite explicit wishes of the disabled person and their family;
f) why they ordered/demanded that hospitals confine a person in hospital (sometimes up to 3 months) despite medical advice recommending discharge into their homes one week after admission, whilst they search for nursing homes when there is no reason for them to be placed in one;

g) why they arrogantly ignore, disrespect and treat with contempt key carers, their opinions and requests which are made in good faith and in the best interests and wellbeing of the disabled person;

(h) why do they reduce some people to purchasing clothing items from op shops because the meagre stipend they allow each week is just at subsistence level when the estate has over $1m in liquid assets.

If NCAT requires private guardians and financial managers to account to them in a meticulous fashion, then why does the same requirement NOT apply to its own organisation?

I do not believe that NCAT should be given additional powers. Instead, I believe the role of family members and carers should be recognised in Commonwealth laws. Their views and decisions should override those of a Public Guardian.

It is the family members/trusted carers etc. who know the disabled person best and it they to whom formal decision makers should listen, learn and act upon communications from the individual and their carers as to what is important to the disabled person.

The Public Trustee and Public Guardian do not acknowledge and respect that each individual, in their own way, is an expert on their own life and NCAT's current practices and in-house culture should be completely overhauled so that Public Guardians and Public Trustees work in partnership, in a non adversarial and inclusive with the disabled persons, their families/trusted friends.

Keeping people who use supported decision-making safe

Question 12: What should the law do to make supporters responsible for their actions?

Supported decision-making means giving someone help to make decisions, rather than making decisions for them.

A **supporter** is someone who helps someone else make a decision.

Some people say the law needs to stop supporters from doing the wrong thing.
This could be done by:

- explaining clearly what the role of a supporter is
- having someone who checks what supporters do
- making sure that supporters keep good records and report about what they are doing
- letting someone cancel a supporter's powers if they want to
- letting the Tribunal review supported decision-making arrangements.

What do you think?

You can write your ideas in the space below.

My question are: If there are already good and appropriate supports in place why is a Tribunal involved in the first place?

And why is it presumed that supporters need "training" to do a job when they are already supporting the disabled person in a competent, caring and honestly manner and in accordance with the disabled person's needs and wishes?

A Public Guardian is required to visit the protected person at least twice each year. It is not uncommon for no visits to have taken place during a three year period, other than if there is a review, then the Public Guardian will make a point of visiting the disabled person a day or two before the hearing (or immediately just prior to the hearing). What kind of Guardian is that?

The "inquisitorial" efforts of the Tribunal at the hearing are usually limited to "Have you seen Mrs. X". to which the answer is "Yes". Do Tribunal members ask -

(a) when did you visit her?;
(b) how often did you visit her?;

(c) what were the conditions of the home/care?;
(d) what did you talk about?;
(e) what was her demeanour?;
(f) did she look well looked after?;
(g) did you ask her about her carers?;
(h) did she make any positive or negative comments about her care/carers?;
(I) does she have any preference as to who should look after her?;
(j) was she happy at home when they were looking after her?;
(k) do you want so and so to look after you?;
(l) if not, why not and why do you prefer the others?;

So, if a Tribunal cannot adopt even the most rudimentary inquisitorial procedures, then how can it be considered as an appropriate authority to make decisions as to who would be suitable overseers of a support person and if and when that support should continue?

A Tribunal appointed supporter-decision maker is a nonsense. It is just another thinly veiled layer of plenary guardianship. I also believe the suggested name change of Public Guardian to "representative" is also ridiculous and will cause confusion.

Centrelink regards as a "representative" a person nominated by a client, as being able to access their files and receive correspondence etc. This is simply done in letter form and signed by both parties.

A supporter is precisely that and would know that he/she -

(a) cannot change legal documents;
(b) that all expenses should be accompanied by invoices;
(c) cannot make lifestyle (nursing home) or medical decisions (surgery etc.) without a prior report of medical personnel and

without the agreement of the disabled person EVEN if, not to do so, would be to the detriment of the disabled person.

Formalising the role of a "supporter" via a Tribunal process would make it difficult for a disabled person to refuse to retain a support person if they do not wish them to remain. There must be a clause where the supporter can be dismissed if the disabled person no longer wishes that person to remain in that role.

I think there could be a standard form, which is legally recognised, setting out the authority and role of the support person to do certain things. This could be done through an informal discussion. The supports would vary from person to person and in accordance with their needs. Both parties would sign and date the document. This could be a role for the Public Advocacy Commission for disabled person, if it were ever established.

The law cannot and will never be able to provide 100% protection to disabled persons but with appropriate and legally enforceable safeguards in place, that in itself will go a long way towards providing some legal remedies against malevolent persons. Currently there are none.

The powers of the NSW Public Guardian

Question 13: Should the Public Guardian have new powers?

The NSW Public Guardian has an important job.
He or she can:

- be a person's guardian
- give people information about how guardianship works
- help people who are guardians.

There are some things the NSW Public Guardian can't do:

- help people who don't have guardianship orders
- see if someone might need a guardianship order
- look into complaints about:
  - abuse
  - neglect
  - people being taken advantage of.

Some people say the NSW Public Guardian should have these powers.
Other people say NSW needs another government person to do these things.

What do you think?

What do you think the NSW Public Guardian should be able to do?
Do you think another government person should do some of these things?
You can write your ideas in the space below.

I believe the Public Guardian does not perform its role in the way it was intended. It has inappropriate personnel, it is destructive rather than productive and it has an all encompassing culture of "them and us". It is an institution with a bureaucratic mentality far divorced from what a disabled person truly needs.

The Public Guardian and Public Trustee should ONLY operate for the benefit of people who have no one in the world to care for them, are at risk of harm and harm to others and have no ability whatsoever to take care of themselves – i.e. ONLY cases of last resort.

I am strongly against the Public Guardian and Public Trustee being given any additional powers. I believe they should have less.

I reiterate, the only way disabled persons will be able to receive the support they need is to establish an independent Public Advocacy Commission for disabled person coupled with a Community Support Centre.

Approaches to these organisations will be made on a voluntary basis and withdrawn on a voluntary basis. The independent Public Advocacy Commission will not have a conflict of interest as does NCAT – head counts justifying their existence. The establishment of a Public Advocacy Commission will NOT operate in that manner. It will be a service provider.

The Public Advocacy Commission should be set up as a one-stop shop which offers a number of services to its clients. Within the Commission, there would be special divisions which cater for -

a) Legal counsel – litigious matters;
b) Investigators – fraud, violence and neglect
c) Document preparation, Powers of Attorney, Enduring Guardianship, Wills
d) Agreement for Supporter roles – advice and preparation
e) Conflict resolution - mediation

How the Tribunal works

Question 14: How could we improve the way the Tribunal works?

The Tribunal does an important job.
It deals with cases about:

- guardianship
- financial management
- medical issues.

Tribunals are supposed to be different to the courts.
They should be:

- less formal
- cheaper.

It should be easier to find and use the services of the Tribunal.
The Tribunal can:

- decide how it wants to do things
- do things in a way that lets people have their say.

Most people who go to the Tribunal don't have lawyers.

What do you think?

Do you have any ideas about how the Tribunal could do things better?
You can write your ideas in the space below.

This question has essentially been answered in the body of this submission.

Improvements can only be made to something that is already in good working order – the Tribunal is not.

The culture and systemic bias towards substitute-decision making is entrenched throughout NCAT and has remained so for the past thirty years. The canker starts from the top and flows through the ranks – just as it always has throughout its history.

Formal support decision making or co-decision making schemes will not work. Who has the right of final decision?

Public Guardians and Public Trustees are already required to collaborate with families/trusted friends with regard to the disabled person's "best interests". This has failed. There is no reason to expect that the replacement of "best interests" to "will and preferences" will make any difference.

It is the culture of "them and us" and "ownership and control" of the disabled person that is impossible to eradicate. The institutionalised and bureaucratic mentality within the public service of "tick the box" with no care and responsibility is also impossible to eradicate.

The suggested name change from "public guardian" to "public representative" is simply window dressing – it is a nonsense.

Until there is a total restructure (or dismantling) of NCAT and its current model of operations, the only way to safeguard the basic human rights of a disabled person is to amend the laws by legislation to -

a) limit the time frame for all formal orders to max. 12 months;
b) allow the disabled person/family/friends to have legal representation at the Tribunal to advocate on behalf of the disabled person;
c) disallow the Tribunal from setting aside Powers of Attorney and Enduring Guardianship, which were in place before the person became disabled, UNLESS there is clear evidence of wrongdoing on the part of the Executors;
d) grant legal recognition and status to family/trusted carers of the disabled person as supporters and advocates;
e) disallow "family conflict" to be used as a lever to place plenary guardianship over the disabled person;
f) legislation into domestic law the Principles and guidelines of the UNCRPD.

Question 15: Are there any other issues or ideas that you would like to share with us?

I think an independent forensic audit of NCAT, Guardianship Tribunal should take place.

If stakeholders are going to be ignored and the issues of concern paid little heed, then an independent forensic investigation of NCAT's operations is essential. That investigation must focus on examining how Orders and Decisions made by NCAT correlate with the statutes of the Act and the Principles and Guidelines of the UNCRPD.

If the current guardianship regime is not reformed so as to restore a disabled person's basic human rights and freedoms, and provide safeguards and procedures to ensure that they are, then legislators and those in authorities clearly do not respect or share the values of a civil society.

What's next?

Thank you for taking the time to answer our questions.
We will think about all the answers that you and other people give us. We will do this when we write down our ideas for making changes to
the law.
If you'd like more information, please contact us. Our contact details are on page 30.

How to tell us what you think

You can send your answers to us by email or post.
nsw-lrc@justice.nsw.gov.au
GPO Box 31
Sydney
NSW 2001
We need to receive your answers by Friday 12 May 2017.
We may publish your answers on our website, or include them in things that we write.
If we do this, people will be able to read your answers.
Please tell us if you don't want us to publish some, or all, of
your answers.

Word list

Enduring guardian

A person who makes decisions for someone else.

Estate

Your estate includes your property and finances.

Finances

Money:

- you have now
- you will have in the future.

Financial management order

When the Tribunal appoints somebody to manage a person's property or finances.

Guardianship order

When the Tribunal appoints a guardian.

Property

The things you own. It can include your house.

Supported decision-making

Giving someone help to make decisions, rather than making decisions for them.

Supporter

Someone who helps someone else make a decision.

Tribunal

A group of people appointed by the government who work together to make decisions about:

- guardianship
- financial management.

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