



**New South Wales
Law Reform Commission**

Review of the Guardianship Act 1987

Background Paper

June 2016
www.lawreform.justice.nsw.gov.au



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Cataloguing-in-publication

Cataloguing-in-publication data is available from the National Library of Australia.

ISBN 978-1-922254-14-6

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Terms of reference

Pursuant to section 10 of the Law Reform Commission Act 1967, the NSW Law Reform Commission is asked to review and report on the desirability of changes to the *Guardianship Act 1987* (NSW) having regard to:

1. The relationship between the *Guardianship Act 1987* (NSW) and
 - The *NSW Trustee and Guardian Act 2009* (NSW)
 - The *Powers of Attorney Act 2003* (NSW)
 - The *Mental Health Act 2007* (NSW)
 - other relevant legislation.
2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.
3. The report of the 2014 ALRC Equality, Capacity and Disability in Commonwealth Laws.
4. The UN Convention on the Rights of Persons with Disabilities.
5. The demographics of NSW and in particular the increase in the ageing population.

In particular, the Commission is to consider:

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.
2. The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.
3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model including the costs of implementation.
4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation.
5. Whether the language of 'disability' is the appropriate conceptual language for the guardianship and financial management regime and to what extent 'decision making capacity' is more appropriate.
6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision making incapacity.
7. In the light of the requirement of the UNCRPD that there be regular reviews of any instrument that has the effect of removing or restricting autonomy, should the *Guardianship Act 1987* provide for the regular review of financial management orders.

8. The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.
9. Any other matters the NSW Law Reform Commission considers relevant to the Terms of Reference.

1. Introduction

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- 1.1 The Attorney General has asked us to review and report on the desirability of making changes to the *Guardianship Act 1987* (NSW). The Act currently allows a decision-maker to be identified or appointed to make personal, financial and medical decisions for someone who is incapable of making those decisions because of a disability.
- 1.2 The purpose of this Background Paper is to:
- § outline the approach we intend to take in conducting the review
 - § describe the provisions of the *Guardianship Act 1987*
 - § introduce some key concepts
 - § provide an overview of the landscape in which the laws operate
 - § describe how that landscape has changed since the *Guardianship Act 1987* became law, and
 - § outline recent reviews of guardianship law as well as recent changes to the law in other jurisdictions.

Our approach

A review among many

- 1.3 A number of recent reviews about guardianship law have been conducted both within Australia and overseas. These reviews, all publically available, constitute a significant body of work covering, among other things, the recent development of guardianship law and its variations across different jurisdictions. This material has informed our review but we do not intend to produce a detailed account of developments elsewhere. We will focus our analysis instead on comparing and contrasting possible future directions for guardianship law in NSW.

A series of consultation papers

- 1.4 Guardianship law is broad and complex. Some people have experience with a particular area of guardianship law but not with other areas. With this in mind, rather than publishing a single, longer consultation paper, we will publish separate papers

on the various subject areas we are covering. People with an interest and expertise in a specific area can then focus their attention on the paper dealing with that topic.

1.5 Unlike the question papers that will follow, this Background Paper does not ask any specific questions; rather it is a resource for people to refer to when considering the issues we raise in the other papers. However, if you have any specific comments about the Background Paper please let us know.

1.6 This paper is the first in a series of papers that we will be releasing:

1. **Background Paper:** An overview of guardianship law in NSW
2. **Question Paper 1:** Conditions for alternative decision-making arrangements
3. **Question Paper 2:** Decision-making models
4. **Question Paper 3:** Supporters and decision-makers: appointment, powers, responsibilities and accountability (including, under current arrangements, enduring guardians, guardianship orders, persons responsible, financial managers and informal decision-making arrangements)
5. **Question Paper 4:** NCAT and key agencies (including the operation of the Guardianship Division of the NSW Civil and Administrative Tribunal, the NSW Public Guardian, the NSW Trustee and Guardian, and the case for a Public Advocate)
6. **Question Paper 5:** Medical and dental treatment and restrictive practices
7. **Question Paper 6:** Miscellaneous (terminology and other amendments to the *Guardianship Act 1987*)
8. **Final report:** Containing our findings and recommendations

The above list is an indication only. As the review progresses, we may decide to vary the breakdown of topics, or what we have chosen to cover in each question paper, depending on further research and stakeholder views.

Other formats and consultation methods

1.7 All of the written documents we produce as part of our review, including this Background Paper, will be available in Easy English on our website: <http://www.lawreform.justice.nsw.gov.au>. We will also be posting surveys that you can complete instead of making a formal submission, and videos about the review.

1.8 We will be conducting targeted consultations on various topics with stakeholders.

1.9 See our website and follow us on Twitter @NSWLawReform for further information and updates.

Scope of review

- 1.10 A review of NSW guardianship law has the potential to touch upon a number of related topics, some of which are very broad. Elder abuse is one such topic. End-of-life decision-making is another. Both of these topics extend well beyond the subject matter of this review, which is limited to a review of the *Guardianship Act 1987*, into areas such as wills, succession and estate planning, criminal law, contract law and so on.
- 1.11 Other review bodies have recently explored or are currently exploring elder abuse, notably the NSW Legislative Council General Purpose Standing Committee No 2 with its inquiry into Elder Abuse in New South Wales (it tabled its report on 24 June 2016) and the Australian Law Reform Commission (ALRC), with its Inquiry into Elder Abuse (due to report in May 2017).
- 1.12 For these reasons, while our review will likely engage with these topics to some degree, we will only be engaging insofar as they are directly relevant to our terms of reference.

Preliminary submissions and consultations

- 1.13 To help us identify issues and concerns relevant to the review, we invited preliminary submissions from stakeholders including peak disability bodies, the NSW Civil and Administrative Tribunal (NCAT), agencies such as the NSW Trustee and Guardian, and statutory appointees such as the NSW Public Guardian. We received 54 written submissions. We also held meetings with the NSW Trustee and Guardian, the NSW Public Guardian, NCAT, the Law Society of NSW's Elder Law and Succession Committee, the ALRC, two former heads of the Guardianship Tribunal (now the Guardianship Division of NCAT), the NSW Carers Advisory Council and the Consultative Forum of the Guardianship Division of NCAT. We are very grateful for the input we received at this initial stage.

2. The Guardianship Act 1987

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- 2.1 The *Guardianship Act 1987* (NSW) (the Act) allows a formal decision-maker to be identified or appointed to make personal, financial and medical decisions for someone incapable of making those decisions themselves.
- 2.2 Under the legislation, a person with decision-making capacity can appoint a substitute decision-maker for a time when they will no longer have capacity to make decisions.
- 2.3 The Act also enables the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) to appoint a substitute decision-maker for someone without decision-making capacity. The NCAT is unlikely to appoint a substitute decision-maker if informal arrangements, such as family members making decisions on behalf of a person with impaired capacity, appear to be operating successfully.
- 2.4 In addition, the Act identifies the “person responsible” for making decisions about someone’s medical and dental treatment if that person is incapable of making the decision for themselves.
- 2.5 The Act is one of a number of NSW statutes that provide for the appointment of substitute decision-makers. Others include the *NSW Trustee and Guardian Act 2009* (NSW), the *Powers of Attorney Act 2003* (NSW) and the *Mental Health Act 2007* (NSW).

History of the Act

- 2.6 The Act developed out of concern with the limited legal mechanisms that existed for protecting and promoting the rights of people with intellectual disabilities. Prior to the Act’s introduction, guardianship matters were chiefly dealt with by the Supreme Court. The model NSW chose to adopt was influenced by equivalent Victorian legislation that came into force in 1987.¹ The new legislation reflected the growing understanding among policy makers and the public of the different causes of decision-making disabilities and the different needs of people who had these disabilities. There was also a greater awareness of the rights of people with a disability to live as normal lives as possible in the community rather than in an institution.²
- 2.7 The defining features of the new regime included:

-
1. *Guardianship and Administration Board Act 1985* (Vic): see N O’Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [5.4.3].
 2. N O’Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [5.4.1].

- § The establishment of a multi-disciplinary tribunal, named the Guardianship Board, whose function was to issue guardianship and other orders in respect of a person with a disability.
 - § The establishment of the Office of the Public Guardian, which performed certain guardianship functions for people with disabilities who did not have any other person to act as guardian. The Protective Commissioner held the position of Public Guardian.
 - § The Supreme Court retained its powers to issue financial management orders. The Guardianship Board could also make a financial order, but only if the applicant applied for a guardianship order at the same time.³
- 2.8 In 1993 the *Disability Services and Guardianship Act 1987* was renamed the *Guardianship Act 1987*. In 1998 the Guardianship Board became the Guardianship Tribunal, which in 2013 became the Guardianship Division of NCAT. In 1999 the Protective Commissioner and Public Trustee were replaced by a statutory corporation, the NSW Trustee and Guardian. The Public Guardian is a statutory office within that corporation.

Legislative overview

- 2.9 Below we outline the key provisions of the *Guardianship Act 1987* (NSW).

General principles (section 4)

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.

3. T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 21.

Enduring guardians (Part 2)

- 2.10 A person who is 18 years or older with the mental capacity to do so may appoint another adult (or adults) to make personal decisions for them when they lose the capacity to make those decisions for themselves. These people are called enduring guardians.
- 2.11 An enduring guardian can make any lifestyle and health decisions that the appointer has approved them to make, such as deciding where the appointer will live; what health care and personal services they will receive; and giving consent to medical or dental treatment.⁴ This is different from the role of someone with general or enduring powers of attorney, who has the authority to manage an appointer's legal and financial affairs.⁵
- 2.12 The Act provides mechanisms for enduring guardians to resign their office⁶ and for NCAT to review and revoke the appointment of an enduring guardian if satisfied that it is in the best interests of the person who appointed them.⁷

Guardianship orders (Part 3)

- 2.13 One of the key roles of the Guardianship Division of NCAT is to make guardianship orders for people who are 16 years of age or older.⁸
- 2.14 Three categories of people can apply for an order:
- § the person that the order will relate to
 - § the Public Guardian (who will generally only make an application as a last resort when no one else will), and
 - § any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of a person.⁹

In practice, most applications are made by family members or by those who have a professional relationship with the person; for example their general practitioner or aged care provider.¹⁰

- 2.15 Before NCAT makes a guardianship order, it must be satisfied that the person the application is about is “a person in need of a guardian”, meaning someone who “because of a disability, is totally or partially incapable of managing his or her person”.¹¹
- 2.16 The Act defines “a person who has a disability” to mean a person who is intellectually, physically, psychologically or sensorily disabled, or of advanced age, or mentally ill, or otherwise disabled; and who by virtue of that fact, is “restricted in

4. *Guardianship Act 1987* (NSW) s 6E(1).

5. See *Powers of Attorney Act 2003* (NSW) and *Powers of Attorney Regulation 2011* (NSW).

6. *Guardianship Act 1987* (NSW) s 6HB.

7. *Guardianship Act 1987* (NSW) s 6J, s 6K.

8. *Guardianship Act 1987* (NSW) s 14(1), s 9(2).

9. *Guardianship Act 1987* (NSW) s 9(1)(a), s 9(1)(c), s 9(1)(d).

10. N O'Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [6.3.3].

11. *Guardianship Act 1987* (NSW) s 14(1), s 3(2).

- one or more major life activities to such an extent that he or she requires supervision or social habilitation”.¹²
- 2.17 Once these criteria have been met, NCAT must consider a number of other factors before making an order, including the views of the person in need of a guardian and their spouse or carer.¹³
- 2.18 NCAT can appoint either a private person or the Public Guardian as a person’s guardian, and regularly appoints family members to the role. While the Act makes it clear that the Public Guardian is the guardian of last resort,¹⁴ the Public Guardian is the guardian for the majority of people under guardianship in NSW.¹⁵ One reason for this is that a major factor in whether a person is defined as a “person in need of a guardian” is whether they have family members or someone else in their life willing to assist them.¹⁶
- 2.19 Guardianship orders can be continuing, non-reviewable or temporary. NCAT reviews all continuing orders towards the end of the period they are made for, and anyone may request a review.
- 2.20 Orders are either “plenary” or “limited”.¹⁷ A plenary guardian has all the functions that a guardian has at law or in equity, while a limited guardian has one or more of the functions specified by the order.¹⁸ Typically guardians are given the authority to make decisions about accommodation, healthcare, medical and dental treatment and the provision of services. However, there are certain areas of decision-making that are so personal that a guardian is never given authority to make them on behalf of someone else. These include the decision to marry and the decision who to vote for in an election.
- 2.21 In the case of some people who have an intellectual disability or acquire a brain injury or develop dementia, restrictive practices and medication are sometimes needed to control difficult behaviour. In such cases NCAT may make guardianship orders authorising guardians to consent to the use of restrictive practices and medication. The tribunal’s practice is only to do this where there is clear evidence that it is necessary. NCAT usually includes a condition in its orders saying that the guardian may only consent to a restrictive practice if positive approaches are also being used to address the person’s behaviour and needs.¹⁹
- 2.22 When making decisions, guardians are under a duty to take the views of the person under guardianship into consideration, but they are not bound by them.²⁰
- 2.23 Sometimes the person who is the subject of a guardianship application will have a mental illness. Even if they have become a patient of a mental health facility under the *Mental Health Act 2007* (NSW), NCAT can still make a guardianship order in relation to them. The fact that a person under guardianship becomes a patient does

12. *Guardianship Act 1987* (NSW) s 3(2).

13. *Guardianship Act 1987* (NSW) s 14(2).

14. *Guardianship Act 1987* (NSW) s 15(3).

15. NSW, Guardianship Tribunal, *Annual Report 2012-2013* (2013) 39.

16. N O’Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [6.3.6].

17. *Guardianship Act 1987* (NSW) s 16(1)(c).

18. *Guardianship Act 1987* (NSW) s 21(1)-(2).

19. NSW Civil and Administrative Tribunal Guardianship Division, *Restrictive Practices and Guardianship*, Fact Sheet 3.

20. *Guardianship Act 1987* (NSW) s 4(d).

not mean that the guardianship order is suspended or revoked. However, any order that NCAT makes in relation to a person who is, or becomes, such a patient is effective only to the extent that its terms are consistent with any determination or order made under the *Mental Health Act*.²¹

Financial management (Part 3A)

- 2.24 Applications for financial management orders may be made to NCAT by anyone with a genuine concern for the welfare of the relevant person, the relevant person themselves or the NSW Trustee and Guardian.²² Before making an order, NCAT must be satisfied that the person is not capable of managing their own affairs, there is a need for someone else to do this on their behalf, and it is in the person's best interests that an order be made.²³ Unlike with guardianship orders, NCAT is not required to find that a person has a disability before it makes a financial management order.
- 2.25 NCAT is not the only body that can make financial management orders. The NSW Supreme Court can make such orders in accordance with the *NSW Trustee and Guardian Act*,²⁴ as well as under its inherent protective jurisdiction.
- 2.26 In June 2010, the Mental Health Review Tribunal took over from magistrates the jurisdiction to make financial management orders in relation to people who are going through the process of being admitted to a mental health facility.²⁵
- 2.27 A financial management order makes a person's estate "subject to management under the *NSW Trustee and Guardian Act 2009*".²⁶ The Tribunal may appoint a suitable person as manager of the estate or commit the management of the estate to the NSW Trustee.²⁷
- 2.28 The *NSW Trustee and Guardian Act* sets out the specific purposes for which the NSW Trustee may spend money from an estate under management, which include paying debts and expenses, taking care of spouses, children and other dependants (as well as the person themselves), and preserving and improving their estate.²⁸
- 2.29 If a private person has been appointed a financial manager, the NSW Trustee and Guardian provides them with detailed authorisation and direction to act. Financial managers must seek approval for any activity outside of these authorisations and must account to the NSW Trustee and Guardian annually.²⁹
- 2.30 NCAT has the power to review financial management orders and the appointment of financial managers.³⁰ The Tribunal can do so on its own motion or if the protected person, the NSW Trustee, an estate manager or someone with "a genuine concern

21. *Guardianship Act 1987* (NSW) s 3C.

22. *Guardianship Act 1987* (NSW) s 25I(1).

23. *Guardianship Act 1987* (NSW) s 25G.

24. *NSW Trustee and Guardian Act 2009* (NSW) s 64.

25. *Courts and Crimes Legislation further Amendment Act 2008* (NSW) sch 16. Commenced 21 June 2010.

26. *Guardianship Act 1987* (NSW) s 25E.

27. *Guardianship Act 1987* (NSW) s 25M.

28. *NSW Trustee and Guardian Act 2009* (NSW) s 59.

29. NSW Trustee and Guardian, *Private Managers Handbook*, 2010

30. *Guardianship Act 1987* (NSW) s 25N, s 25M.

for the welfare of the protected person” applies for a review.³¹ However, unlike with guardianship orders, there is no process of automatic review of financial management orders under the Act.

- 2.31 The Supreme Court may revoke an order on application of the person the order relates to.³² The Mental Health Review Tribunal (MHRT) may revoke an order on application provided it is satisfied that the person has regained capacity. Part 4.6 Division 2 of the *NSW Trustee and Guardian Act* gives the Trustee, in certain circumstances, the authority to review, confirm or terminate financial management orders where there is clear evidence the person has regained capacity.

Medical and dental treatment (Part 5)

- 2.32 Part 5 of the Act establishes a substitute decision-making regime in relation to the medical and dental treatment of people 16 years and older who are incapable of giving a valid consent to their own treatment.³³
- 2.33 The legislation defines medical treatment and provides different consent arrangements for five categories of treatment:

§ treatment that is outside the regime and does not require consent

§ urgent treatment

§ minor treatment

§ major treatment, and

§ special treatment.

The legislation makes it an offence to carry out treatment without the appropriate consent.³⁴

- 2.34 For minor or major treatment, it is the “person responsible” for someone incapable of making this type of decision who is the statutory substitute decision-maker. The Act establishes a hierarchy you must consult to determine who the “person responsible” is. The list, in order of priority, is: the person’s guardian (enduring or appointed under the Act, provided they have authority to make the relevant decision); the person’s spouse; the person’s carer; or a close friend or relative of the person.³⁵ NCAT operates as the default substitute decision-maker when there is no person responsible or that person cannot be contacted³⁶.

31. *Guardianship Act 1987* (NSW) s 25N(4), s 25R.

32. *NSW Trustee and Guardianship Act 2009* (NSW) s 86.

33. *Guardianship Act 1987* (NSW) s 34.

34. *Guardianship Act 1987* (NSW) s 35.

35. *Guardianship Act 1987* (NSW) s 33A(4).

36. *Guardianship Act 1987* (NSW) s 36(1).

2.35 Only NCAT can authorise:

§ special treatment, for example, sterilising treatment, but only in certain circumstances³⁷ (a guardian with specific authorisation can then consent to continuing or further treatment of a similar nature)³⁸, and

§ a person without capacity to participate in a clinical trial. The tribunal may give such approval only if satisfied of a number of conditions; for example, that the drugs or techniques being tested are intended to cure or alleviate a particular condition from which the patient suffers; and that it is in the best interests of the person to take part in the trial.³⁹

2.36 There are also circumstances in which urgent or minor treatment can be carried out without the consent arrangements the Act otherwise provides for.⁴⁰

37. *Guardianship Act 1987* (NSW) s 45.

38. *Guardianship Act 1987* (NSW) s 45A.

39. *Guardianship Act 1987* (NSW) s 45AA.

40. *Guardianship Act 1987* (NSW) s 37.

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- 3.1 Since NSW introduced the *Guardianship Act 1987* (NSW), the way people think about disability has significantly shifted. This is partly because of developments in human rights law. Changes to the make-up of the population in NSW have also affected how the Act operates and to whom it ordinarily applies. This chapter summarises the key changes to the environment in which our guardianship laws exist.

A changing population

- 3.2 The profile of people making guardianship applications in NSW has changed a great deal since the *Guardianship Act* came into force. Initially the largest cohort coming before the Guardianship Board (as it then was) was people with an intellectual disability. Based on the 2014-2015 figures, cases involving people with dementia are the most common, making up approximately 44% of the work of the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT).¹
- 3.3 The growth in the number of dementia cases has not only increased the workload of NCAT² but added case complexity. It is now common for NCAT to make orders in relation to people who have diminishing (as opposed to fixed) capacity levels, people who have complicated financial arrangements and people whose family members have competing interests.³ Given the increase in the number of dementia cases corresponds with the state’s steadily ageing population⁴, we are likely to continue to see a rise in the numbers of these types of matters for some time.

1. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2014-2015* (c2015) 41. In the same financial year intellectual disability was the disability identified in 16% of cases.

2. The workload of the Guardianship Division of NCAT has seen the application rate grow by about 23% since 2010-2011. In 2014-15 about 63% of applications were made concerning people 65 years of age or older, and 26% concerning people 85 years of age and older: NSW Civil and Administrative Tribunal, *NCAT Annual Report 2014-2015* (c2015) 40.

3. NSW Civil and Administrative Tribunal, *Consultation PCGA4*.

4. In 2014 there were more than 1.1 million people aged 65 and over living in NSW. Population projections in NSW indicate all areas outside of Sydney will have more older residents than under 15s by as early as 2021: NSW Department of Planning and Environment, (2015) *Population NSW*, Issue 7, 2.

- 3.4 Cases involving people with a mental illness or brain injury also make up a significant number of matters that NCAT hears.⁵
- 3.5 These trends raise the question whether our current guardianship framework, primarily designed for people with an intellectual disability, is suited to the range of cases NCAT now deals with.

United Nations Convention and the 'social model' of disability

- 3.6 In July 2008 Australia ratified the United Nations *Convention on the Rights of Persons with Disabilities*.⁶ The *UN Convention* clarifies how existing international human rights obligations apply to people with disabilities. Its principles include the right of people with disabilities to dignity, autonomy, full and active participation in society and equal recognition before the law.
- 3.7 While international conventions do not become a part of Australian law until incorporated into domestic law by statute⁷, by ratifying the *UN Convention* Australia has committed in good faith to give effect to it.⁸ Despite this obligation, Australian state and territory laws have yet to incorporate the *UN Convention* and its underlying principles in any significant sense, as we discuss below.

A new way of thinking about disability

- 3.8 The *UN Convention* represents a shift away from previous ways of thinking about disability:
- ...from viewing persons with disabilities as "objects" of charity, medical treatment and social protection, towards viewing them as "subjects" having "rights", ... as such, they are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as of being active members of society.⁹
- 3.9 In his evidence to the 2010 NSW Parliamentary Inquiry into Substituted Decision-Making, Professor Ronald McCallum described the different models of disability that have been prominent over the years.

For the first two thirds of the twentieth century and earlier the prevalent model looking after persons with disability was the medical model. The notion was that we should try to cure as many persons with disability as we can and, if not, they should be looked after. Many were institutionalised in those days. By the 1970s we had moved forward, certainly in this country, to what we might call the social welfare model. Welfare was provided to enhance the lives of persons with

5. In 2014-2015, in 16% of applications to the Guardianship Division of NCAT the disability reported was mental illness, and in 7% the disability reported was brain injury: NSW Civil and Administrative Tribunal, *NCAT Annual Report 2014-2015* (c2015) 41.

6. United Nations, *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008).

7. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-8, 315.

8. *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, (entered into force 27 January 1980) art 26.

9. United Nations, *Global Issues: Persons with Disabilities* <<http://www.un.org/en/globalissues/disabilities/>>.

disabilities, and many of us were encouraged and, indeed, assisted by Federal, State and on some occasions municipal governments to gain employment.¹⁰

- 3.10 Since the 1970s, the preferred model has shifted again. The *UN Convention* adopts the “social model”, which is now widely considered the leading model. This model recognises that:

[D]isability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.¹¹

- 3.11 Key principles underlying the social model that are embodied in the *UN Convention* include the presumption of capacity and an emphasis on supported or assisted decision-making rather than substitute decision-making.

Capacity

- 3.12 In guardianship law “capacity” generally refers to a person’s ability to make decisions in their everyday life, whether in personal matters, financial and property matters, or health and medical matters. The *UN Convention* provides that “State parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”¹²

- 3.13 “Legal capacity” is different from “mental capacity”. The UN Convention Committee has commented that “[u]nder Article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.”¹³ A related issue is that a person’s disability *status* should not of itself determine their decision-making capacity.¹⁴ For example, just because a person has an intellectual disability, this does not mean they lack the capacity to make any decisions for themselves.

- 3.14 Defining capacity by disability status also fails to recognise that a person’s capacity to make decisions is not static. It can depend on what type of decision needs to be made, and can change from time to time. In its preliminary submission the NSW Department of Family and Community Services gave the following examples:

[A] young person may have capacity that is limited by a developmental stage; or, in the case of an adult, is episodically limited by mental illness. Alternatively, a person may have reduced capacity due to a condition that is likely to be permanent or deteriorate.¹⁵

10. Evidence to the Legislative Council Standing Committee on Social Issues *Inquiry into Substitute Decision-Making for People Lacking Capacity*, 4 November 2009, 2-3 (R McCallum).

11. United Nations, *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3, (entered into force 3 May 2008) Preamble (e).

12. United Nations, *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3, (entered into force 3 May 2008) art 12(2).

13. United Nations Committee on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, General Comment No 1 (2014) [13].

14. NSW Disability Network Forum, *Submission PGA05*, 6; Council on the Ageing NSW, *Submission PGA10*, 3; Alzheimer’s Australia NSW, *Submission PGA14*, 5; BEING, *Submission PGA22*, 4; Institute of Legal Executives, *Submission PGA35*, 4.

15. NSW Department of Family and Community Services, *Submission PGA54*, 3.

Supported decision-making

- 3.15 The preference for “supported” as opposed to “substitute” decision-making is another important element of the social model of disability reflected in the *UN Convention*. Supported decision-making (sometimes referred to as “assisted decision-making”) emphasises the ability of a person with impaired capacity to make decisions for themselves provided they have the necessary support to make and communicate those decisions. It enables the person to retain legal capacity regardless of the level of support they need¹⁶ and recognises that all independent adults have the right to make decisions, including the right to make risky or “bad” decisions.
- 3.16 This approach is a shift away from more traditional, paternalistic decision-making models that form the basis of most of Australia’s current legislative frameworks and involve a person (or “substitute”) making decisions *on behalf of* someone else and according to certain principles; for example, by considering the “best interests” of the person they are making a decision for.
- 3.17 In 2013 the UN Committee on the Rights of Persons with Disabilities recommended that:
- [Australia] take immediate steps to replace substitute decision-making with supported decision making and provide[s] a wide range of measures which respect the person’s autonomy, will and preferences and is in full conformity with article 12 of the Convention.¹⁷
- 3.18 Supported decision-making takes many forms and there is limited agreement about the basic concepts and principles that define it.¹⁸ A key question is how the model applies in situations where no amount of support will assist, such as where a person has a severe cognitive impairment that means they are unable to understand, make or communicate a decision. Other questions include how to balance informal with formal supported decision-making arrangements and how to provide adequate safeguards against abuse. We will need to consider these kinds of questions and their practical implications carefully before making our recommendations.

The current state of guardianship law and the momentum for change

New South Wales

- 3.19 New South Wales introduced the *Guardianship Act* at a time when the “social welfare” approach to disability was the leading approach. This is reflected in the legislation; for example:

§ a preference for substitute decision-making over supported decision-making

16. M Bach, “Supported decision making under Article 12 of the UN Convention on the Rights of Persons with Disabilities: questions and challenges” Paper presented at the Conference on Legal Capacity and Supported Decision-Making, Athlone, Ireland, 3 November 2007, 4.

17. United Nations, Committee on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, Concluding Observations on the initial report of Australia adopted by the Committee at its tenth session (2-13 September 2013) [25].

18. T Carney, “Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?” (2015) 4 *Laws* 37, 41.

- § no explicit presumption of capacity
 - § no legislative recognition that capacity can fluctuate, and that capacity may be impaired for one set of circumstances but not others, and
 - § terminology that is now considered out-dated, and/or tends to lower the dignity of people with disabilities.
- 3.20 In recent years, the appetite to reflect within our legislation the changes in thinking about disability has steadily grown. In 2010 the NSW Legislative Council Standing Committee on Social Issues reviewed certain aspects of guardianship law as part of its inquiry into *Substitute Decision-Making for People Lacking Capacity*. The Committee stated that the principles of the *UN Convention* should be explicitly imported into NSW legislation.¹⁹ It recommended legislative amendments to achieve this. For example, it made recommendations to amend guardianship legislation to:
- § introduce a definition of capacity that acknowledges the fact that a person's decision-making capacity varies from domain to domain and from time to time
 - § make clear that a person is not considered incapable of making a particular decision simply because they have a disability
 - § explicitly require a presumption of capacity as the starting point for any considerations
 - § include an explicit statement to the effect that the legislation supports the principle of assisted or supported decision-making, and
 - § provide for the relevant courts and tribunals to make orders for assisted decision-making arrangements and to prescribe the criteria that must be met for orders to be made.²⁰
- 3.21 The NSW Government supported many of the Standing Committee's recommendations and asked that others be referred to us for further consideration.²¹ To date none of the recommendations has been implemented.
- 3.22 In May 2013 as part of its review of the *Mental Health Act 2007* (NSW) the Ministry of Health recommended monitoring and evaluating the implementation of supported decision-making models in other jurisdictions to inform any future possible approach in NSW.²²
- 3.23 In December 2014 the *Disability Inclusion Act 2014* (NSW) commenced. The Act governs how state agencies provide disability supports and services. It replaces the *Disability Services Act 1993* (NSW) and gives expression to the social model of disability, with objectives including:

19. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [2.12].

20. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) Rec 1, 2, 4, 5.

21. NSW, *Substitute Decision-Making for People Lacking Capacity*, Government Response to Legislative Council Standing Committee on social Issues Inquiry (2010).

22. NSW Ministry of Health, *Review of the NSW Mental Health Act 2007* (2013) 17.

- § to acknowledge that people with disability have the same human rights as other members of the community and that the state and the community have a responsibility to facilitate the exercise of those rights, and
- § to support, to the extent reasonably practicable, the purposes and principles of the *United Nations Convention on the Rights of Persons with Disabilities*.²³

Some of the ways in which the Act promotes the inclusion of people with disability are by requiring government departments and local councils to engage in disability inclusion action planning and providing safeguards for people accessing disability supports and services. These include new employment screening requirements for disability workers.²⁴

- 3.24 The momentum for change is also reflected in the preliminary submissions we received to this review. Numerous stakeholders supported changes to our laws that are consistent with the principles of the *UN Convention*. For example, there was broad acknowledgement of the fluctuating nature of capacity. Many submitted that our guardianship laws should reflect the fact that people have differing levels of incapacity that can change over time and depending on the decision being made.²⁵
- 3.25 In response to the *UN Convention's* requirement that any instrument that removes or restricts autonomy should be subject to regular review,²⁶ a number of submissions call for the regular automatic review of financial management orders,²⁷ for which the *Guardianship Act* does not currently provide. An alternate view expressed is that the legislation already provides appropriate safeguards to ensure financial management orders do not continue indefinitely.²⁸
- 3.26 A number of stakeholders also favour enshrining a supported decision-making model into the *Guardianship Act* or better facilitating its use.²⁹ Some stakeholders submit that substitute decision-making should be removed from the legislation entirely³⁰ while others advocate for an approach where substitute decision-making is the last resort in limited circumstances.³¹

23. *Disability Inclusion Act 2014* (NSW) s 3.

24. *Disability Inclusion Act 2014* (NSW) pt 2 and s 36.

25. Senior Rights Service, *Submission PGA07*, 8, 9; Bridgette Pace, *Submission PGA09*, 6; Council on the Ageing NSW, *Submission PGA10*, 4; BEING, *Submission PGA22*, 5; Disability Council NSW, *Submission PGA26*, 3; NSW Official Visitors Program, *Submission PGA33*, 2-3; NSW Trustee & Guardian, *Submission PGA50*, 6-7.

26. United Nations, *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(4).

27. NSW Council for Intellectual Disability, *Submission PGA18*, 6; NSW Ombudsman Office, *Submission PGA41*, 6; Intellectual Disability Rights Service, *Submission PGA44*, 7-8.

28. NSW Trustee & Guardian, *Submission PGA50*, 11.

29. Mental Health Coordinating Council, *Submission PGA08*, 5; Council on the Ageing NSW, *Submission PGA10*, 5; NSW Council for Civil Liberties, *Submission PGA19*, 3, 4; Disability Council NSW, *Submission PGA26*, 11-12; NSW Young Lawyers, *Submission PGA32*, [1.2]; NSW Trustee & Guardian, *Submission PGA50*, 1, 9.

30. Bridgette Pace, *Submission PGA09*, 8.

31. Senior Rights Service, *Submission PGA07*, 8; Council on the Ageing NSW, *Submission PGA10*, 2; Disability Council NSW, *Submission PGA26*, 15; Mary Lou Carter, *Submission PGA37*, 4; NSW Ombudsman Office, *Submission PGA41*, 5; Law Society of NSW, *Submission PGA43*, 2; Intellectual Disability Rights Service, *Submission PGA44*, 2; NSW Trustee & Guardian, *Submission PGA50*, 2; Australian Lawyers Alliance, *Submission PGA52*, 2.

- 3.27 There is recognition as well of the complex issues involved in introducing supported decision-making. The Mental Health and Wellbeing Consumer Advisory Group, BEING, says:

[T]here will need to be safeguards and accountability measures to ensure the support person is genuinely supportive. For example, the support person would need to effectively communicate to the person the information they would need to make the decision. The Commission would need to consider the extent that the support person should be held accountable for the decision made. There is a risk that support persons, for fear of being held accountable for decisions, would prevent individuals from making ‘bad’ decisions – even if the individual is genuinely exercising their choice and control.³²

Other jurisdictions within Australia

- 3.28 All Australian states and territories have guardianship laws that are broadly similar to those in NSW. With the exception of some recent amendments to Victoria’s powers of attorney laws,³³ no Australian jurisdiction has yet introduced any legislative basis for supported decision-making mechanisms. Only Victoria, Queensland and Western Australia give the presumption of capacity statutory force.³⁴

- 3.29 Like in NSW, other jurisdictions have recommendations outstanding to change their legislation, and those recommendations largely represent a shift towards the principles that underpin the *UN Convention*.

- 3.30 The Queensland Law Reform Commission reviewed the state’s guardianship laws in 2010.³⁵ Its recommendations included:

- § incorporating principles of the *UN Convention* into the general principles of the legislation
- § clarifying within the legislation how the presumption of capacity is to be applied, and
- § giving greater recognition to the rights and interests of adults who have fluctuating capacity by allowing limits to be placed on an appointed decision-maker’s powers depending on the capacity the adult has at any given time.

These recommendations have yet to be implemented.

- 3.31 The Victorian Law Reform Commission completed a review of Victoria’s guardianship laws in 2012.³⁶ Its recommendations included introducing:

- § a modern capacity standard and new capacity assessment principles that reflected a more realistic understanding of capacity

32. BEING, *Submission PGA22*, 3.

33. See *Powers of Attorney Act 2014* (Vic) discussed further below.

34. *Powers of Attorney Act 2014* (Vic) s 4(2); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1; *Guardianship and Administration Act 1990* (WA) s 4(3).

35. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010).

36. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012).

- § a requirement that substitute decision-makers consider the expressed wishes of the person – both past and present – and place those wishes in the context of the person’s current circumstances
- § a wider range of decision-making assistance based on laws introduced in Canada, including new supported decision-making arrangements and new co-decision-making arrangements
- § a new tripartite authorisation process for use by some hospitals, supported accommodation and residential facilities when action is taken to restrict a person’s liberty
- § improved accountability mechanisms for people who have responsibilities under guardianship law
- § new civil penalties for abusing, neglecting or exploiting a person with impaired decision-making ability, and
- § a stronger role for the Public Advocate.

In September 2015 the *Powers of Attorney Act 2014* (Vic) commenced, which adopted some of the review’s recommendations. Among other things it introduced a new role of “supportive attorney”. Supportive attorney appointments provide a way for a person to be supported to make and act on their decisions, while retaining decision-making authority. Many other recommendations were contained in the Guardianship and Administration Bill 2014 (Vic) which to date has not been passed.

- 3.32 In 2014 the Australian Law Reform Commission (ALRC) released the report *Equality, Capacity and Disability in Commonwealth Laws*.³⁷ Its recommendations included the adoption of four National Decision-Making Principles: the rights of all people to make and have decisions respected; to be supported to make decisions; for supported decisions to be directed by the “will, preferences and rights” of the person, and for provision of appropriate safeguards.³⁸
- 3.33 In addition to these principles, the ALRC recommended that a supported decision-making model be introduced at Commonwealth level and applied to the National Disability Insurance Scheme (discussed further below) and other existing Commonwealth legislative schemes.
- 3.34 The ALRC further recommended that state and territory governments review their decision-making legislation to ensure laws are consistent with its National Decision-Making Principles and Commonwealth decision-making model.
- 3.35 In November 2015 the Commonwealth Senate Community Affairs References Committee reported on *Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings*.³⁹ Its recommendations included driving a

37. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report 124 (2014).

38. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report 124 (2014) Rec 3-1.

39. Commonwealth, Senate Community Affairs References Committee, *Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability*, Final Report (2015)

nationally consistent move away from substitute decision-making towards supported decision-making models.⁴⁰

- 3.36 Neither the Commonwealth nor other states and territories have yet moved to incorporate any of the recommendations of the ALRC or Senate reports into their guardianship laws.
- 3.37 The ACT Law Reform Advisory Council is currently reviewing its *Guardianship and Management of Property Act 1991* (ACT) but has yet to make any recommendations.

Other jurisdictions overseas

- 3.38 Several Canadian provinces have introduced mechanisms to facilitate and encourage supported decision-making arrangements; for example, supported decision-making authorisations and co-decision making orders in Alberta,⁴¹ property co-decision makers in Saskatchewan⁴² and representation agreements in British Columbia.⁴³
- 3.39 In England and Wales the *Mental Capacity Act 2005* includes a detailed incapacity standard as well as principles that have to be applied when assessing whether a person meets the standard. A person cannot be found to be incapable of making autonomous decisions until all practical steps have been undertaken to demonstrate this.⁴⁴
- 3.40 Ireland's *Assisted Decision-Making (Capacity) Act 2015* specifically recognises that if a person lacks decision-making capacity in a particular matter, this will not necessarily mean that they lack capacity in other matters.⁴⁵ The Act also recognises that capacity can fluctuate.⁴⁶ It introduces three types of decision-making support options to respond to the range of support needs that people may have in relation to decision-making capacity: assisted decision-making, co-decision-making and the appointment of a decision-making representative for people who are not able to make decisions even with help.⁴⁷

Non-legislative developments

- 3.41 There have been a number of recent developments in guardianship policy and practice within Australia. Supported decision-making models have been piloted in different parts of the country.⁴⁸ The pilots, while small and limited in scope, have

40. Commonwealth, Senate Community Affairs References Committee, *Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability*, Final Report (2015) Rec 10.

41. *Adult Guardianship and Trusteeship Act*, SA 2008 (Can).

42. *Adult Guardianship and Co-decision-making Act*, SS 2000 (Can).

43. *Representation Agreement Act*, RSBC 1996 (Can).

44. *Mental Capacity Act 2005* (UK) s 1.

45. *Assisted Decision-Making (Capacity) Act 2015* (Eir) s 3(6).

46. *Assisted Decision-Making (Capacity) Act 2015* (Eir) s 3(5).

47. *Assisted Decision-Making (Capacity) Act 2015* (Eir) pt 3, pt 4 and pt 5 ch 4.

48. For example, the Supported Decision Making Project conducted by the South Australian Office of the Public Advocate between 2010 and 2012; the South Australian Office of Health and

provided some useful insights into how supported decision-making models could work.

- 3.42 In NSW, in a joint initiative, the Trustee and Guardian, the Public Guardian and the Department of Family and Community Services (FACS), Ageing Disability and Home Care (ADHC) conducted a small scale pilot project in 2013/14 to explore what supported decision-making might look like in practice in the NSW context.⁴⁹ As a result of the pilot and the subsequent evaluation recommendations FACS has facilitated six additional projects with the aim of building supported decision-making capacity.⁵⁰
- 3.43 Government agencies are also changing their day-to-day practices to reflect *UN Convention* principles. For example, in 2015 the NSW Public Guardian updated its decision-making guideline to align it more closely with current thinking about rights for people with decision-making impairments.⁵¹

National Disability Insurance Scheme

- 3.44 In July 2013 the National Disability Insurance Scheme (NDIS) was initiated in Australia. The objective of the NDIS is to provide people living with disability greater choice and control over the disability services and support they receive. The scheme will progressively replace the existing disability arrangements in the states and territories participating in the NDIS and the Commonwealth. The gradual roll out of the full scheme in all states and territories (except Western Australia) begins in July 2016.⁵²
- 3.45 Under the NDIS eligible individuals will receive allocated funding for disability supports, rather than that funding going directly to providers of supports:
- ...[E]ligible people will talk to a planner about their goals and what supports they need to meet their goals. An individual support plan will be drawn up and the person with disability, their guardian or nominee then chooses who will provide their supports and how, when and where they get delivered.⁵³
- 3.46 A question for our review is how the provisions of the Commonwealth regime interact with NSW guardianship laws. For example, in its preliminary submission the Mental Health Review Tribunal noted:

Community Services Complaints Commissioner's project to train and mentor disability service workers to implement the model trialled by the Office of the Public Advocate; the ACT Supported Decision Making Research Project conducted in the lead up to the launch of the NDIS; and the Supported Decision Making trial overseen by the Office of the Public Advocate in Victoria that concluded in June 2015.

49. NSW Family and Community Services, *Supported Decision Making* <http://www.adhc.nsw.gov.au/individuals/inclusion_and_participation/supported-decision-making/>.
50. NSW Family and Community Services, *Supported Decision Making Projects* <http://www.adhc.nsw.gov.au/individuals/inclusion_and_participation/supported-decision-making/sdm-projects/>
51. NSW Public Guardian, *Decision Making Guideline*, 2015.
52. Australia, National Disability Insurance Agency, *Our Sites* <<http://www.ndis.gov.au/about-us/our-sites/>>
53. Australia, Disability Reform Council, *Consultation Paper: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework* (2015) 3.

[W]ith the NDIS being introduced with its own supported decision-making model in NSW, some consumers, their advisors and practitioners may be faced with a confusing level of change and complexity, having to deal with multiple institutions, different legislation and different decision-making models.⁵⁴

- 3.47 NCAT has already seen an increase in the number of guardianship applications under the Guardianship Act because of the NDIS.⁵⁵ The Australian Guardianship and Administration Council (AGAC) has credited the increase to the fact that the NDIS has created “a number of decision-making ‘events’ and a greater degree of scrutiny of informal substitute decision-makers or supporters.”⁵⁶ Given the NDIS roll out begins in July 2016, our review will need to explore whether the increase in guardianship applications is likely to continue, and if so, how this can be managed.
- 3.48 Another question we will need to consider is the interrelationship between a “nominee” under the NDIS and an appointed guardian or financial manager under NSW law.⁵⁷ One of the preliminary submissions we received expressed the view that there should be a presumption that an existing NSW appointed decision-maker with comparable powers and responsibilities is appointed as an NDIS representative.⁵⁸ The ALRC has recommended that amendments to the legislation governing state and territory decision-makers should be made to facilitate this where necessary.⁵⁹
- 3.49 In its preliminary submission the NSW Ombudsman argues the case for information exchange mechanisms to ensure NSW bodies and the National Disability Insurance Authority are making informed decisions regarding appointments:
- This includes, for example, where information provided to one body raises concerns about the conduct of a person who may be considered by another body as a nominee, guardian or financial manager.⁶⁰
- 3.50 We also need to ensure that State and Commonwealth oversight mechanisms interact effectively to guarantee the safety of people with disabilities and prevent abuse. This is especially important considering there are no federal agencies equivalent to the gatekeepers and monitors that operate at a state level, such as the NSW Office of the Public Guardian and the NSW Trustee and Guardian. One key issue is the provision of appropriate oversight in relation to the use of restrictive practices.⁶¹ A number of stakeholders who made preliminary submissions suggest that the *Guardianship Act* should contain specific provisions about restrictive practices.⁶² Relevant to this issue will be the NDIS Quality and Safeguarding

54. Mental Health Review Tribunal, *Submission PGA21*, 2.

55. NSW Civil and Administrative Tribunal, *NCAT Annual Report, 2014-2015* (c2015) 39.

56. Australian Guardianship and Administration Council, AGAC, *Submission 51* quoted in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report 124 (2014) [5.90].

57. See, for example, the discussion in *KCG* [2014] NSWCATGD 7.

58. NSW Council for Intellectual Disability, *Submission PGA18*, 5-6

59. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report 124 (2014) [5.4].

60. NSW Ombudsman Office, *Submission PGA41*, 7.

61. For a brief overview of restrictive practices, see Chapter 2 [2.21] above.

62. Alzheimer’s Australia NSW, *Submission PGA14*, 6; National Disability Services, *Submission PGA24*, 6; Disability Council NSW, *Submission PGA26*, 3; Bernhard Ripperger and Laura Joseph, *Submission PGA31*, 11-12; NSW Ombudsman Office, *Submission PGA41*, 7; Nell Brown, *Submission PGA42*, 6; Intellectual Disability Rights Service, *Submission PGA44*, 9;

Framework, expected to be finalised this year, which will detail complaint management requirements and safeguards for people accessing services as part of the NDIS.

- 3.51 The Commonwealth Government is still considering whether to adopt the suite of NDIS-related recommendations the ALRC made in its 2014 report. If adopted these recommendations may change what recommendations we need to make.

The case for uniformity

- 3.52 In its report the ALRC recommended that Australian states and territories, when reviewing their guardianship laws, should have regard to:

- § interaction with any supporter and representative schemes under Commonwealth legislation
- § consistency between jurisdictions, including in terminology
- § maximising cross-jurisdictional recognition of arrangements, and
- § mechanisms for consistent and national data collection.⁶³

- 3.53 Given our increasingly mobile population, and the introduction of national schemes like the NDIS, our guardianship laws need to interact meaningfully with laws in other parts of the country. It is also important that appropriate reciprocal arrangements are in place so that appointments are valid across borders. The way our guardianship laws interact with those in other jurisdictions will therefore be a key part of our considerations.

K Chandler & Professors White and Willmott - Australian Centre for Health Law Research, *Submission PGA48*, 1; NSW Trustee & Guardian, *Submission PGA50*, 11.

63. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report 124 (2014) Rec 10-1.

Appendix A

Preliminary submissions

PGA1	Maxwell Watts and Mareea Watts (15 February 2016)
PGA2	Lise Barry (23 February 2016)
PGA3	Dr John Carter (9 March 2016)
PGA4	Lina Sultana (10 March 2016)
PGA5	NSW Disability Network Forum (18 March 2016)
PGA6	[Confidential] (18 March 2016)
PGA7	Senior Rights Service (18 March 2016)
PGA8	Mental Health Coordinating Council (18 March 2016)
PGA9	Bridgette Pace (19 March 2016)
PGA10	Council on the Ageing NSW (19 March 2016)
PGA11	Michael & Hilda Cochran (20 March 2016)
PGA12	Kellie Jefferson (20 March 2016)
PGA13	Legal Aid NSW (21 March 2016)
PGA14	Alzheimer's Australia NSW (21 March 2016)
PGA15	Supreme Court of NSW (21 March 2016)
PGA16	Medical Insurance Group Australia (MIGA) (21 March 2016)
PGA17	Carers NSW (21 March 2016)
PGA18	NSW Council for Intellectual Disability (21 March 2016)
PGA19	NSW Council for Civil Liberties (21 March 2016)
PGA20	Avant Mutual Group Limited (21 March 2016)
PGA21	Mental Health Review Tribunal (21 March 2016)
PGA22	BEING (21 March 2016)
PGA23	People With Disability Australia (21 March 2016)
PGA24	National Disability Services (21 March 2016)
PGA25	Peter Deane (21 March 2016)
PGA26	Disability Council NSW (21 March 2016)
PGA27	Jan Barham (21 March 2016)
PGA28	Department of Rehabilitation Medicine St Vincent's Hospital (21 March 2016)
PGA29	Vanessa Browne (21 March 2016)
PGA30	June Walker (21 March 2016)
PGA31	Bernhard Ripperger and Laura Joseph (28 March 2016)
PGA32	NSW Young Lawyers (29 March 2016)
PGA33	[Confidential] (29 March 2016)
PGA34	John Friedman (30 March 2016)
PGA35	Institute of Legal Executives (31 March 2016)
PGA36	[Confidential] (31 March 2016)
PGA37	Mary Lou Carter (1 April 2016)
PGA38	Our Voice Australia (1 April 2016)
PGA39	NSW Mental Health Commission (1 April 2016)
PGA40	The South Eastern Sydney Local Health District (SESLHD) Human Research Ethics Committee (HREC) (1 April 2016)

- PGA41** NSW Ombudsman Office (1 April 2016)
- PGA42** Nell Brown (3 April 2016)
- PGA43** Law Society of NSW (4 April 2016)
- PGA44** Intellectual Disability Rights Service (4 April 2016)
- PGA45** Craig Ward (1 April 2016)
- PGA46** [Confidential] (30 March 2016)
- PGA47** Australian Centre for Health Law Research (4 April 2016)
- PGA48** [Confidential] (4 April 2016)
- PGA49** NSW Health Commission (4 April 2016)
- PGA50** NSW Trustee & Guardian Submission (7 April 2016)
- PGA51** Michael Murray (6 April 2016)
- PGA52** Australian Lawyers Alliance (8 April 2016)
- PGA53** Mental Health Carers Arafmi NSW Inc.(18 April 2016)
- PGA54** NSW Family & Community Services (27 April 2016)

Appendix B

Preliminary consultations

NSW Trustee and Guardian (PCGA1)

8 February 2016

Imelda Dodds – Chief Executive Officer
Ruth Pollard – Director Legal

NSW Public Guardian (PCGA2)

9 February 2016

Graeme Smith – Public Guardian
Justine O’Neill – Assistant Public Guardian, Advocacy & Policy

Rodney Lewis (PCGA3)

15 February 2016

Rodney Lewis – Solicitor

NSW Civil and Administrative Tribunal (PCGA4)

19 February 2016

The Hon Justice Wright – President
Malcom Schyvens – Deputy President and head of Guardianship Division
Cathy Szczygielksi – Principal Registrar
Kelly Roberts – Justice Strategy & Policy, NSW Department of Justice

Law Society of NSW, Elder Law and Succession Committee (PCGA5)

8 March 2016

Michael Tidball - Chair, Elder Law and Succession Committee
Pam Suttor - Member, Elder Law and Succession Committee
Emma Liddle - Policy Lawyer, Law Society of NSW
Daryl Browne - Deputy Chair, Elder Law and Succession Committee

Australian Law Reform Commission (PCGA6)

21 March 2016

Rosalind Croucher - President

Bruce Alston - Principal Legal Officer
Sabina Wynn - Executive Director

Nick O'Neill (PCGA7)

5 April 2016

Nick O'Neill - President NSW Guardianship Tribunal (1994-2004)

Roger West (PCGA8)

11 April 2016

Roger West - President, NSW Guardianship Tribunal (1989-1994)

Carers Advisory Council (PCGA9)

6 June 2016

Deborah Bewick
Jonothan Bewick
Catherine Bourke
Philip Coller
Rose Cox
Michael Fine
Maria Heaton
Elizabeth Ingram
Cheryl Koenig
Yvonne Quadros
Elizabeth Wall
Prue Warrilow
Pam Webster

Helen Rogers - Executive Director, Participation and Inclusion, FACS
Claire Edmonds - Project Officer, Carers, Ageing and Disability Council, FACS
Alison Parkinson - Project Officer, Carers, Ageing and Disability Council, FACS
Anne Marie Dwyer - Director, Carers, Ageing and Disability Council, FACS
Helen McFarlane - Manager, Carers, Ageing and Disability Council, FACS

Consultative Forum of Guardianship Division of NCAT (PCGA10)

17 June 2016

Malcolm Schyvens - Deputy President and Division Head, Guardianship Division
Anne Britton - Principal Member, Guardianship Division
Pauline Green - Acting Divisional Registrar, Guardianship Division
Nicole D'Souza - Acting Legal Officer, Guardianship Division

Graeme Smith - Public Guardian

Viet Hoang Nguyen - General Litigation and Dispute Resolution, FACS Legal

Stein Boddington - Disability Council

Annabelle Bains - Department of Health, Whole of Health Program

Rosanne Walters - Geriatric Medicine Department, Westmead Hospital

Maria Bisogni - Deputy President, Mental Health Review Tribunal

Nihal Danis - Mental Health Advocacy Service, Legal Aid NSW

Melissa Chaperlin - Solicitor, Seniors Rights Service

Dennis Bryant - NSW Council for Intellectual Disability