

## Civil Litigation, Human Rights and Public Law and Government Committees

### Preliminary Submission to the NSW Law Reform Commission Review of the Guardianship Act

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The NSW Young Lawyers Civil Litigation, Human Rights and Public Law and Government Committees (**the Committees**) make the following preliminary submission in response to the NSW Law Reform Commission's review of the *Guardianship Act 1987* (NSW) (**the Act**). The Committees identify below, under the Summary of Recommendations, issues considered highly relevant to the terms of the reference of the review.

## NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committees are together comprised of a group of approximately 2000 members interested in increasing awareness of human rights, public law, civil litigation and dispute resolution, promoting the administration of justice, and supporting the interests and professional development of lawyers across those disciplines.

## Summary of Recommendations

The Committees endorse the general principles in section 4 of the Act which align with Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**), and make the following recommendations:

1. That the principle of supported decision-making be enshrined in the guardianship and financial management regimes in NSW.
2. That the Act provide that in the exercise of authority to make an order, NCAT is to presume that the subject of the prospective order has legal capacity unless proven otherwise.
3. That a Public Advocate be introduced in NSW to promote and protect the rights of protected persons and oversee the effectiveness of services provided to such persons.
4. That a Code of Conduct be added to the schedule of the Act enshrining the role and obligations of a guardian.

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5. That the requirements for making a guardianship order and financial management order be considered in the final terms of reference for this review.
6. That a review clause be added to the Act so that all financial management orders are issued with an automatic review period.
7. That a review of medical authorisation procedures be included in the final terms of reference for this review.
8. That the NSW Law Reform Commission ensures that its review of the Act assesses the funding arrangements in place for the proper functioning of the guardianship regime.

Noting the NSW Law Reform Commission's review is at its preliminary stages and the breadth of the terms of reference, this submission is structured to align with the general structure of the Act itself.

## 1. General Principles

With regard to Part 1 of the Act concerning preliminary matters and the general principles of the legislation, the Committees make the following comments and recommendations.

### 1.1 Endorsing the general principles of the Act

The Committees are of the view that the general principles outlined in section 4 of the Act adequately encapsulate the international human rights principles included in the UNCRPD. The Act itself, however, deviates from those principles, which is the subject of the remainder of this submission.

*The Committees endorse the general principles in section 4 of the Act which align with Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities.*

### 1.2 The principle of supported decision-making

The principle of substituted decision-making has long been prioritised in the Act's regulatory model. However, the Committees submit that this is an outdated model for approaching guardianship and financial management. There are a variety of situations where the Act fails to take into account the individual circumstances of a person and instead imposes a somewhat inflexible approach. The financial management regime is

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similarly lacking. For example, the NCAT is not required to consider existing support structures. Instances such as these are inconsistent with Article 12 of the UNCRPD that states that persons with disabilities have a right to legal capacity.

The Committees submit that a transition to a model that emphasises supported decision-making will realign the Act with the UNCRPD and empower those who are subjected to guardianship and financial management orders. Supported decision-making is a process that recognises existing support networks and utilises collaboration and relationship-building to achieve individual autonomy.<sup>1</sup> Ultimately it aims to include the protected person and their close family and friends in the decisions made about their lives. The remaining recommendations in this submission are made with this new framework in mind.

***Recommendation 1: The Committees recommend that the principle of supported decision-making be enshrined in the guardianship and financial management regimes in NSW.***

### **1.3 Enshrining the presumption of legal capacity**

Australian common law has long upheld a presumption of legal capacity.<sup>2</sup> As held by his Honour Justice Palmer of the Supreme Court of NSW ‘the liberty of the subject is not to be interfered with and restricted...unless there is a strong and cogent reason for doing so’.<sup>3</sup> However, the Committees do not consider that this common law presumption is adequately reflected in the current Act. In fact, statutory provisions at times directly contradict it. The Committees are of the view that a specific provision should be inserted into the Act to codify the well-established common law doctrine and ensure that, except by express words to the contrary, in any exercise of authority to make an order by NCAT, NCAT is to presume that the subject of a prospective order has legal capacity unless proven otherwise.

***Recommendation 2: The Committees recommend that the Act provide that in the exercise of authority to make an order, NCAT is to presume that the subject of the prospective order has legal capacity unless proven otherwise.***

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<sup>1</sup> Advocacy for Inclusion, ‘Supported Decision-Making, Legal Capacity and Guardianship: Implementing Article 12 of the Convention on the Rights of Persons with Disabilities in the Australian Capital Territory’, August 2012, 21.

<sup>2</sup> *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432, citing *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 3 All ER 162, 169.

<sup>3</sup> *FA v Protective Commissioner & Ors* [2009] NSWSC 415 at [11].

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## 2. Enduring Guardians and Guardianship

With regard to Parts 2 and 3 of the Act concerning enduring guardians and guardianship orders, the Committees make the following comments and recommendations.

### 2.1 A Public Advocate for New South Wales

Other states and territories in Australia have over the past decade introduced new measures to advance the rights of people in the community with impaired decision-making capacity. One method common across various states, and which has not been adopted in New South Wales, is the establishment of a Public Advocate to advocate on behalf of such persons who are subject to statutory orders substituting their decision-making abilities.<sup>4</sup> Such an idea is not novel in New South Wales. The Parliament of New South Wales' 2010 *Inquiry into Substitute Decision-Making for People Lacking Capacity* recommended that a Public Advocate be considered alongside any changes to guardianship legislation.<sup>5</sup> However, the recommendation has not been implemented to date.

The Committees submit that the appropriate function of a Public Advocate in NSW would be to act as an independent advocate in NCAT hearings as well as scrutinise service providers such as the Public Guardian and the NSW Trustee and Guardian. Such a body would not only assist those protected persons under guardianship or financial management orders, but would also increase the responsiveness and service quality of the Public Guardian and the NSW Trustee and Guardian by providing important feedback. Importantly, it would differ from the role of the Public Guardian in that it would take a more active approach to advocating for protected persons, in some cases making recommendations to the relevant Minister directly on key issues associated with the guardianship regime.

***Recommendation 3: The Committees recommend that a Public Advocate be introduced in New South Wales to promote and protect the rights of protected persons and oversee the effectiveness of services provided to such persons.***

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<sup>4</sup> See *Guardianship and Administration Act 1990* (WA), s 91; *Guardianship and Administration Act 1993* (SA), ss 18-24; *Guardianship and Administration Act 1986* (Vic), ss 14-18A; and *Guardianship and Administration Act 2000* (QLD), ss 208-221.

<sup>5</sup> Standing Committee on Social Issues, NSW Parliament, *Substitute Decision-Making for People Lacking Capacity* (2010).

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## 2.2 A statutory Code of Conduct for Guardians

Guardianship entails a responsibility unlike any other yet there remains little statutory guidance for a guardian once NCAT has handed down an order. The Committees are of the view that any changes to the Act should include the addition of a schedule providing a comprehensive Code of Conduct (**Code**) for future guardians. The Code would deal with the fundamental responsibilities involved in the role, including but not limited to:

- The relationship between the guardian and the protected person, including a requirement imposed on the guardian to be familiar with the personal circumstances of the protected person;
- The obligation placed on the guardian to consult with, and obtain instructions from, the protected person, where this is practical; and
- The obligation placed on the guardian to request a review of a guardianship order where they form the view that the protected person has legal capacity.

A statutory Code would formalise the responsibilities of a guardian and ensure that the rights and autonomy of the individual are maximised in the guardianship process. Importantly, it would provide clarity and a reference point for those acting as guardian.

***Recommendation 4: The Committees recommend that a Code of Conduct be added to the schedule of the Act enshrining the role and obligations of a guardian.***

## 3. Financial Management

With regard to Part 3A of the Act concerning financial management orders, the Committees make the following comments and recommendations.

### 3.1 Consistency in the requirements for making financial management and guardianship orders

The Committees submit that there remains a discrepancy in the requirements that must be met before NCAT can make a financial management order compared to a guardianship order. While both orders in effect may deal with identical life circumstances, the burden of satisfying NCAT of the need for a guardianship order is greater than that of a financial management order. Guardianship orders are considered a measure of last resort by NCAT, while financial management orders can be made after satisfying a

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needs-based test.<sup>6</sup> There is also no requirement to take into account alternative support arrangements or existing relationships when making a financial management order. The Committees submit that this internal inconsistency in the Act appears contrary to Australia's obligations under the UNCRPD to facilitate supported decision-making and the equally important personal circumstances in which financial management orders are made.

***Recommendation 5: The Committees recommend that the requirements for making a guardianship order and financial management order be considered in the final terms of reference for this review.***

### **3.2 Automatic review of financial management orders**

At present, there is no procedure for automatic review of financial management orders in NSW.<sup>7</sup> This means that a financial management order either needs to be issued for a set period, or a review must be specifically requested. An application can be made by another person requesting a review, however it is not always the case that a protected person will have an advocate acting on their behalf that will take this initiative. While in NSW private financial managers are answerable to the NSW Trustee and Guardian, the Committees submit that individuals should have a guaranteed right to automatic review if the legislation is to appropriately reflect the principles enshrined in Article 12 of the UNCRPD.

***Recommendation 6: The Committees recommend that a review clause be added to the Act so that all financial management orders are issued with an automatic review period.***

## **4. Medical and Dental Treatment**

With regard to Part 5 of the Act concerning authorisation for medical and dental treatment, the Committees make the following comments and recommendations.

### **4.1 Authorisation of special medical procedures**

The Committees submit that the current regimes surrounding authorisation of medical procedures on persons without legal capacity are inconsistent. For example, in the case

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<sup>6</sup> *Guardianship Act 1987* (NSW), s 25G.

<sup>7</sup> Ben Fogarty, 'Guardianship and Administration Laws Across Australia' (2009) *Intellectual Disability Rights Service*, 31.



of special medical treatment (including sterilisation), different authorisation regimes exist at state and federal levels for children. Currently, the power of the Family Court of Australia to authorise a procedure such as sterilisation operates concurrently with NSW legislation, leaving the option open for parents to apply through NCAT or through the Family Court of Australia.<sup>8</sup> NCAT is empowered as a consent authority in NSW to authorise the sterilisation of adults who have no capacity to do so for themselves under the Act, and as the consent authority to authorise sterilisation of children under the *Children and Young Persons (Care and Protection) Act 1998*.<sup>9</sup> NCAT employs a stricter test for authorising a therapeutic sterilisation than its Family Court of Australia counterpart, requiring that the treatment be both the "most appropriate treatment" and "necessary to save life or prevent serious damage to health".<sup>10</sup> This state-federal inconsistency results in individuals being treated differently across two jurisdictions. This has led to, amongst other things, greatly deviating rates of authorisation for invasive procedures such as sterilisation.<sup>11</sup>

The Committees believe that any review of the guardianship regime in NSW should necessarily entail consideration of the regimes for authorisation of special medical procedures as the current inconsistencies across jurisdictions are unsatisfactory.

***Recommendation 7: The Committees recommend that a review of medical authorisation procedures be included in the final terms of reference for this review.***

## 5. Funding for Implementation

Ultimately, the principles enshrined in legislation cannot be administered without appropriate levels of government funding. We reiterate statements made by groups such as the Intellectual Disability Rights Service (**IDRS**) who have previously raised concern with the level of funding for the NSW Trustee and Guardian. This lack of funding, as IDRS have noted, has meant that the principles enshrined in the Act cannot be practically implemented.<sup>12</sup> The materialisation of this problem takes many faces, one of which can be lack of oversight over the guardianship and financial management process that can play a part in deteriorating the life of individuals subject to NCAT orders even further.

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<sup>8</sup> *P v P* (1994) 181 CLR 583.

<sup>9</sup> See *Guardianship Act 1987* (NSW), Part 5; *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 175; and Nick O'Neill and Carmelle Peisah, 'Capacity and the Law' (Sydney, Sydney University Press, 2011).

<sup>10</sup> *Guardianship Act 1987* (NSW), s 31.

<sup>11</sup> See Susan Brady, John Britton and Sonia Grover, 'The Sterilisation of Girls and Young Women in Australia: issues and progress' (2001), Chapter 3.

<sup>12</sup> Ben Fogarty, 'Guardianship and Administration Laws Across Australia' (2009) *Intellectual Disability Rights Service*, 6.

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Guardianship and financial management is not an area where administrative delay is acceptable; decisions are being made on behalf of others, often without their direct input, and any delay or lack of consultation greatly diminishes Australia's capacity to meet its international human rights obligations under the UNCRPD.

***Recommendation 8: The Committees recommend that the NSW Law Reform Commission ensures that its review of the Act assesses the funding arrangements in place for the proper functioning of the guardianship regime.***

## 6. Concluding Comments

NSW Young Lawyers and the Committees thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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