NSW Law Reform Commission - review of the *Guardianship Act 1987*
Submission from the NSW Minister for Aboriginal Affairs
March 2016

The following comments are submitted to the review from the NSW Department of Education's Aboriginal Affairs portfolio:

1. The Law Reform Commission has been asked to consider options for a possible change from a representative (or substituted) decision-making model toward a supported decision-making model. Aboriginal Affairs supports the move to a model which enables the individual to retain primary agency in decision-making, while ensuring that they receive the support they need to make informed decisions.

   However, research focused on Indigenous Australians and impaired decision-making capacity suggests that Aboriginal people confront reduced access to the guardianship and administration systems in Australia due to a range of factors, including the inappropriateness of taking decision-making outside of the family, the view that decision-making is a communal responsibility, language barriers and a simple lack of information about legal and civil justice remedies.

   The *Guardianship Act* should acknowledge that an individual may be situated within a social and cultural milieu that presumes a more collective approach to decision-making. In an Aboriginal context, decisions are often made with reference to, if not direct consultation with, family members. In this regard a supported decision-making approach more closely reflects Aboriginal decision-making models but it still presupposes an individual making decisions for and by themselves.

   The *Guardianship Act* should enable a decision-making model most appropriate to the circumstances of the individual concerned, such that an individual's family members can be recognised as integral to the decision-making of the person with an assumed impairment. It may be that the Civil and Administrative Tribunal retains the authority to adjudicate which model should be applied in any particular case, if required, and this may mean consultation with the Aboriginal community as to what decision-making processes are to be seen as legitimate.

   Overall, the *Guardianship Act* should incorporate the sentiments reflected in Section 4(e) of the current Act which recognises the importance of family relationships and cultural and linguistic environments of the person in question. These provisions should be retained and/or strengthened in the Act.

   In general terms, the operation and enforcement of the Act should be undertaken in a manner that is respectful of the cultural differences inherent in the New South Wales community, particularly with regard to Aboriginal people and their culture and traditions. In this regard the *Guardianship Act* should presume in favour of co-decision making and supported decision-making, as have been recommended recently by the Victorian Law Reform Commission, and internationally in some jurisdictions in Canada.

2. The issue of elder abuse needs to be considered when instituting decision-making for those who may be cognitively or otherwise impaired. There is evidence to suggest that the incidence of elderly people being taken advantage of by those who have power of attorney or other decision-making authority over them, is increasing. While this is not merely a product of the legal frameworks under which guardianship arrangements operate, consideration needs to be given to monitoring guardianship arrangements to ensure abuse does not occur.