

Review of the *Guardianship Act 1987*

Preliminary Submission

NSW Trustee and Guardian

The NSW Trustee and Guardian (NSWTG) was established on 1 July 2009 by the NSW Trustee and Guardian Act 2009 merging the former Office of the Protective Commissioner and the Public Trustee NSW. The position of Public Guardian (PG) continues and remains separate in its functions but reports administratively to the Chief Executive Officer of NSWTG. The NSWTG operates pursuant to the NSW Trustee and Guardian Act 2009 and the NSW Trustee and Guardian Regulation 2008

NSWTG provides personal trustee, financial management and substitute decision-making services.

NSWTG welcomes the opportunity to provide its views on supported decision making and the shift from a "best interests" model to a "person-centered" approach which is occurring at International, Commonwealth and State levels. NSWTG promotes a decision making framework that supports and builds the capacity of people to make decisions and centered around the human rights principles. The review further provides an opportunity to refresh our enabling Act in so far as it relates to financial management. We recommend legislative reform that supports our strategic direction to make NSWTG truly the last resort financial manager and to embed supported decision making into legislation and practice.

United Nations Convention on the Rights of Persons with Disabilities

Australia ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in 2008 making it one of the first western countries to do so.¹ The purpose of the UNCRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for all people with disability, and to promote respect for their inherent dignity. It seeks to redress the physical and social barriers, discrimination and disadvantages confronting people with disability throughout the world and to promote their full participation and recognition in civil, political, economic, social and cultural life.

Adults with impaired capacity have the right to the greatest possible degree of personal decision making and autonomy. Some of the UNCRPD's Articles that bear on the fundamental principles of autonomy, personal decision making and self-determination include:

- Non-discrimination (Art 4)
- Equal protection before the law (Art 5)
- The right to equal recognition before the law (Art 12)
- Access to justice on an equal basis with others (Art 13)
- Freedom from exploitation, violence and abuse (Art 16)
- Protecting the integrity of the person (Art 17)
- Freedom of expression and opinion, and access to information (Art 21)

¹ http://www.idrs.org.au/pdf/Guardianship_and_administration_laws_across_Australia_by_Ben_Fogarty.pdf

The model or models of decision making that should be employed for persons who cannot make decisions for themselves

NSWTG supports the principle of “will and preference”.² A person should be free to make their own decisions with regard to their finances and lifestyle. They may do this via a power of attorney and enduring guardianship instruments.

Whilst supported decision-making should be the default position in all areas, there is still a need for substitute decision-making. Substitute decision-making may arise as a result of a power of attorney or enduring guardianship needing to be used if a person is unable to make informed decisions due to a lack of capacity. A competent person may make provision for their financial future by appointing someone they trust like a relative or a friend as their attorney pursuant to a power of attorney instrument as governed by the *Power of Attorney Act 2003*. They may wish to choose a private organisation like NSW Trustee and Guardian if there is no one they trust or wish to burden with this role.

The power of attorney may be limited or enduring, the latter capable of being utilised should the client lose their decision making capacity at some point in the future.

A person may also appoint an “Enduring Guardian” under the *Guardianship Act 1987 (NSW)* while they still have legal capacity. This might be a relative or friend or some other person e.g. a medical practitioner willing and able to make decisions about their health and lifestyle if the person has lost their decision making capacity to make such decisions for themselves. Such pre-planning tools empower the person to choose who they would like to make decisions for them with regard to their finances and lifestyle. This encompasses the principles of freedom and choice.

Apart from the pre-planning documents mentioned above, the following are models of decision making:

1. **Autonomous decision-making** - this model respects legal capacity. A person will make a decision on their own or after informal advice from others.
2. **Shared decision-making** - this involves shared decision and responsibility between the adult and another person.
3. **Supported decision-making** - this presumes that the adult has the ability to make decisions but requires help in making and executing decisions; and
4. **Substitute decision-making** - this is where the state vests another person with substitute decision-making authority for the adult. Failing and such person, NSW TG is appointed as the manager of last resort.

International Trends

The paradigm shift towards supported decision making can be seen throughout the world.³

² <http://www.tag.nsw.gov.au/about-us-2.html>

³ For a summary of decision making models around the world see:
http://www.publichealthreviews.eu/upload/pdf_files/12/00_Pathare.pdf

Canada has a range of supported decision-making, both formal and semi-formal arrangements.⁴ It has been labelled the 'best practice' model in the eyes of the United Nations.⁵

British Columbia has pioneered representation agreements which are made and directed by individuals needing support and which cover personal, health and financial affairs. The representative helps the person make his/her own decisions or makes substituted decisions. An emphasis is based on proving that a trustful relationship exists rather than proving capacity.⁶ Representation agreements presume everybody has capacity until proven otherwise.⁷

In Edmonton and Calgary, a variety of decision making models exist (many of these were recommended by the Victorian Law Reform Commission) including co-decision making, supported decision making and substitute decision making, all recognising presumed capacity and respect for individual autonomy.⁸

England has adopted the *Mental Capacity Act 2005* which is a statutory framework on capacity and decision making. The legislation starts with a presumption of capacity, and specifies that individuals must be given support to maximise their decision making autonomy. A person cannot be found to be incapable of making autonomous decisions until all practical steps have been undertaken to demonstrate this. Incapacity in one area does not mean that the person is incapable in all areas.⁹

Of significance, making unwise or 'bad' decisions is not considered indicative of an inability to make decisions - a principle of supported decision making. We all make bad decisions from time to time and this on its own is not indicative of incapacity.

In England and Wales capacity assessments are made on a decision specific basis and are not applied globally to all decisions.

Schedule 1, part 1 of the Queensland *Guardianship and Administration Act 2000* includes principles that presume capacity, basic human rights, individual value, value as a member of society and community life and maximising participation in decisions.

South Australia: The South Australian trial model is a non-statutory trial where no legislative recognition is given to the arrangement, but where the supported person appoints a supporter, rather than a tribunal appointing a guardian.

In potential models of supported decision making, the relationships should be trust based; abuse would be met with legal consequence, and though supporters would not be liable for decisions, they should be held accountable where they demonstrate negligence, criminality or failure to comply with obligations.

⁴ Supported decision-making Background and discussion paper November 2009, Barbara Carter
The Office of the Public Advocate

⁵ https://www.alrc.gov.au/sites/default/files/subs/135._org_nsw_government_submission_.pdf

⁶ Browning, M., 2010, To Investigate New Models of Guardianship & the Emerging Practice of Supported Decision Making, Winston Churchill Memorial Trust of Australia

⁷ http://www.publichealthreviews.eu/upload/pdf_files/12/00_Pathare.pdf

⁸ Browning, M., 2010, To Investigate New Models of Guardianship & the Emerging Practice of Supported Decision Making, Winston Churchill Memorial Trust of Australia

⁹ http://www.publichealthreviews.eu/upload/pdf_files/12/00_Pathare.pdf

Some countries have a system called “circles of support” where there is more than one person covering a wide range of interests or areas of expertise who act together to support decision making.¹⁰ Such Circles of support provide for diversity of influence and support for decision making with more people involved; greater accountability and safeguarding against coercion or substitute decision making; less need for a formal monitor (relevant to budget considerations). There is potential for supported people to develop their own decision making skills and for those who do not have family or friends, a network could band together using volunteers.

In short, decision making is not a “one size fits all” situation. NSWTG recommends that the Law Reform Commission consider that the legislation should provide for the least restrictive model to be applied to any particular case. NSWTG should be chosen as the manager of last resort.

The experience of NSWTG demonstrates that any model should reflect the fact that decision-making capacity covers the “spectrum” varying from domain to domain and from time to time. At any point in time, capacity can be impaired for a set of circumstances but not others. A person may make a decision on areas of day to day life however they may not be able to make a decision on their own on more complex areas of their life. The *Guardianship Act 1987* presently does not allow an order to be made that requires substitute decision making in relation to part of a person’s assets, but not others. Perhaps this should be considered in any legislative reform.

Case study – Maha’s story

Maha has an intellectual disability. However she is perfectly competent to manage the income that comes to her as a fortnightly pension, and has done so successfully for many years. However, recently Maha received a testamentary legacy of \$1.3 million. She does not have the capacity to make investment decisions and to manage this large sum of money. A financial management order presently covers the whole of Maha’s money, including her pension.

The present situation does not support the equal enjoyment of human rights or respect the dignity of Maha to make the day to day financial decisions she has been managing successfully for many years, sometimes relying on the advice and support of her family and friends.

NSWTG is of the view that the starting point should be one of decision specific capacity and this should be written into any model. A bad decision or a decision others do not agree with does not necessarily mean that a person does not have capacity.

Whatever models are adopted people should have the freedom to make good and bad decisions. They should be encouraged to make their own decisions and be supported in their decision-making by their chosen person/s. Their support may be made up of family and friends with whom they have a close relationship, who know their likes and dislikes, their ideas and ideals.

¹⁰ *Community Living Project. 129 New South Wales – Resourcing, Families, 130 Toronto (informal); http://www.advocacyforinclusion.org/publications/supported_decision_making_legal_capacity_and_guardianship2012final.pdf; http://www.justice.qld.gov.au/__data/assets/pdf_file/0005/249404/Decision-making-support-for-Queenslanders-with-impaired-capacity-A-review-of-literature-March-2014.pdf*

Importantly, people can learn skills to make decisions and to express their will and preference. Decision making is a social and personal skill that can be taught and learnt.¹¹

The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.

Whilst other less restrictive approaches of decision-making should be explored first, some people with impaired decision making capacity are not able to make some or all of their decisions and in such situations, the person lacking decision making capacity may require some degree of substitute decision-making.

If a person lacks decision making capacity to make decisions regarding their affairs, the substitute decision making model would apply. Whilst NSWTCG is of the view that the supported decision-making model is the best model above any other restrictive model, there are occasions when a private person or Public Guardian needs to be appointed to look after the person's interests.¹²

Substitute decision-making may be required in the following circumstances:

Where:

- a person is at risk and is unable to make decisions of a personal or lifestyle nature;
- a person cannot manage their own financial and legal affairs; and/or
- a decision needs to be made on their behalf
- a person is being exploited or defrauded

There needs to be a shift away from the "best interests" approach, to an approach where the representative will give effect to the persons will and preference or likely will preference after discussing their needs with significant people in their life.

The support and/or significant people should be aware of article 12 of UNCRPD. There should be training on human rights principles and how this merges with substitute decision making.

Section 39 of the *NSW Guardianship Act 1987* outlines that the welfare and interests of the person must be given paramount consideration, however the general principles also recognise that: a person's freedom of decision and action should be restricted as little as possible; their view should be taken into consideration in the exercise of any functions under the Act and they should be encouraged to be as self-reliant as possible.

A guardian is only appointed by the Guardianship Tribunal of NSW if a person with a disability is totally or partially incapable of managing his or her person. The Tribunal must have regard to the views of the person, their spouse and carers, the preservation of existing family relationships and the practicality of services being provided without the need for a Guardianship Order.

¹¹ Advocacy for Inclusion , August 2012 Implementing Article 12 of the Convention on the Rights of Persons with Disabilities in the Australian Capital Territory, p22

¹² Supported decision-making Department of Human Services Victoria January 2012 p 27

The substitute decision maker is responsible for:

1. protecting the person from abuse, exploitation and neglect;
2. making decisions which are in the best interests of the person;
3. considering the person's wishes
4. encouraging the person to make their own decisions where ever possible.

Capacity

Underpinning substitute decision-making is the definition of capacity. There is no single definition of capacity in New South Wales. The definition of capacity depends in each case on the type of decision which is being made or the type of transaction involved.¹³ The Law Society capacity guidelines provides a good basis for determining capacity and also confirms that as a starting point, capacity must be presumed, it is decision specific and is fluid in nature.¹⁴

The Attorney General's Department of NSW has produced a *Capacity Toolkit* which is a guide created in response to requests from lawyers, medical professionals, health workers, carers and advocates to assist with assessing a person's capacity to make legal, medical, financial and personal decisions.¹⁵ The *Capacity Toolkit* is a valuable resource designed to assist a better understanding of the principles of capacity and capacity assessments.

Capacity is at the heart of discussion about decision making. In NSW, the law presumes that everyone aged 18 years and over has the capacity to make decisions. Article 12 of the UNCRPD highlights that people with disability should enjoy legal capacity on an equal basis with others.¹⁶

The issue of capacity arises in both the *New South Wales Trustee and Guardian Act 2009* and the *Guardianship Act 1987*. An order cannot be made under either Act unless a person is deemed incapable of managing his/her affairs. Any legislative changes should make it clear that capacity is not lacking simply if a person has a disability. They may not have the capacity to communicate their wishes but still have capacity to make decisions with the appropriate support. The definition of capacity should acknowledge the fact that capacity is decision specific and may diminish or improve over time.

In their final report, the Victorian Law Reform Commission recommended that new guardianship legislation should contain the following capacity assessment principles:¹⁷

- a) A person's capacity is specific to the decision to be made.
- b) Impaired decision making capacity may be temporary or permanent and can fluctuate over time.
- c) An adult's incapacity to make a decision should not be assumed based on their age, appearance, condition, or an aspect of their behaviour.
- d) A person should not be considered to lack the capacity to make a decision merely because they make a decision that others consider to be unwise.

¹³ When a client's capacity is in doubt A Practical Guide for Solicitors
<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf>

¹⁴ Ibid p2-3

¹⁵ http://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx

¹⁶ https://www.adhc.nsw.gov.au/_data/assets/file/0008/346193/SDM_Policy_Framework.pdf

¹⁷ http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_FinalReport_Full%20text.pdf,p xxxvi

- e) A person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support.
- f) When assessing a person's capacity, every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed.

These principles show that capacity is not static, it is ever changing.

Also in Victoria, the *Guardianship and Administration Bill 2014* defined decision-making capacity as having capacity to make a decision in relation to a matter if the person is able:

- a) to *understand* the information relevant to the decision and the *effect* of the decision; and
- b) to *retain* that information to the extent necessary to make the decision; and
- c) to *use or weigh* that information as part of the process of making the decision; and
- d) to *communicate* the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.¹⁸

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.

Section s14 (2) (a) of the *Guardianship Act 1987* outlines that in considering if an order is warranted, the views of the person in question must be sought however it does expand on this. Perhaps consideration should be given to the following principles and how this could be written into the Act:

- substitute decision makers should have an overarching responsibility to act in a way that promotes the personal and social wellbeing of the represented person;
- the principle of substituted judgment which involves attempting to make the decisions the person would make themselves if able to do so, should be the paramount guiding principle;
- substitute decision makers must retain a degree of flexibility when determining how they fulfil their responsibilities;
- the overarching goal of substitute decision making should be promote the personal and social wellbeing of the person;
- making a decision the person would make themselves;
- considering the expressed wishes of the person, both past and present and to place these wishes in the context of the person's current circumstances and the decision that needs to be made;
- - sufficient flexibility to allow substitute decision makers to consider what would be the most desirable outcome for the person in the circumstances bearing in mind, whenever possible, what the represented person would do in the circumstances.

The substitute decision maker would have to consider the following issues:

- the benefit or burden to the person
- the risks and consequences of the alternatives
- what would others of similar age background usually do in this situation
- what do others believe is the best course of action.¹⁹

¹⁸ Article: Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?

¹⁹ Making Decisions for Others- Substitute Decision Making
http://www.opa.sa.gov.au/making_decisions_for_others/substitute_decision_making

In supported decision-making, the individual is always the primary decision maker, but it is acknowledged that autonomy can be communicated in a number of ways, thus provision of support in different forms and intervals can assist in the expression of autonomous decisions.

“Decision-making needs to be regarded as a spectrum, with complete autonomy on one end (the default) and, at the other, substitute decision-making. In between is a scale of informal support decision-making that varies from time to time and from decision to decision.”²⁰

Who should be the supporter? Ideally a person self-appoints his/her assistant which in most cases will be family members and/or friends. At the other end of the spectrum, volunteers and public advocates as well as those who have an interest in the person's individual care could be considered for appointment.

There are many informal supported decision making arrangements occurring daily. It is important to ensure that in such circumstances there is no over-regulating to the point that the process becomes cumbersome.

Of interest, in Victoria, seven decision-making principles are to be applied to each person with a disability²¹

These are:

- a. everyone has a right to make decisions which affect them;
- b. capacity to make decisions must be assumed;
- c. people should be supported to make their own decisions;
- d. capacity is decision specific;
- e. people have the right to learn from experience;
- f. people have the right to change their minds;
- g. people have the right to make decisions others do not agree with.

Education

If supported decision making is adopted, then in order to move supported decision-making from theory to practice, there needs to be an emphasis on education. Education programs will need to address the attitudes of the community and familial environments.

This work will include educational information on why the legislation has changed and self-advocacy training. Supported decision making training alongside self-advocacy training will be crucial in assisting our community to make the transition.

Ultimately the principles in any legislative reform cannot be administered without government funding. Costs would include setting up pilot support teams to test how well the support persons may work in practice.

One such pilot took place in 2015. The pilot was a joint initiative of Ageing, Disability and Home Care (ADHC), the NSW TG and the Public Guardian (PG) and was conducted in the then Cumberland Prospect area of the ADHC Metro North region of Sydney. The aim was to develop trial and evaluate a supported decision making framework, tools and training resources for people with disability, their families, carers, advocates and service providers.

²⁰ *Guardianship and administration laws across Australia – Ben Fogarty*

²¹ *Services Supporting decision making A guide to supporting people with a disability to make their own decisions Victoria p11*
http://www.dhs.vic.gov.au/__data/assets/pdf_file/0011/690680/dsd_cis_supporting_decision_making_0212.pdf

The overall signs were positive. With support “Individuals showed increases in confidence and sense of control in their own lives and were making decisions in areas where they had not made decisions before.”²²

Legislation needs to be changed to recognise the appointment of the supporter and to recognise any decisions made with the help of the support person. This is particularly important for people who do not have a close friend or relative to support them and they must rely on the appointment of formal supporters. Such supporters must be given authority to access and obtain information. This authority would need to be specified in the appointment or order.

To avoid any doubt, the law should specify that the supporter is not authorised to make decisions on behalf of the supported person only to assist them in the decision making process.

The legislation would need to set out the responsibilities of the supporter namely: to assist the person to make decisions specified in an order, to act honestly diligently and in good faith, to act within the limits of the appointment, to identify and respond to conflict of interest and to ensure that the supported person’s interests are given paramount consideration, to seek external advice where necessary, to respect the confidentiality and privacy of the supported person by collecting and disclosing only relevant information.

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.

The National Disability Insurance Scheme represents a significant new area of Commonwealth responsibility and expenditure with respect to persons with disability in Australia.

The *National Disability Insurance Scheme* (NDIS) is based on a person centred approach to funding services that meet individual needs. The principles of NDIS include providing “people with a disability with better information and support to enable them to make informed choices and exercise control and choice over their care and support. The *National Disability Insurance Scheme Act 2013*

NDIS Act is a less restrictive option to guardianship through the nominee provisions. Nominees will have a duty to ascertain the wishes of the participant and make decisions that maximise the personal and social wellbeing of the participant.

The *NDIS Act* focuses on maximising choice and control of the participants and the *Guardianship Act 1987* should also reflect supporting people to make their own decisions, moving away from the best interests approach to “will and preference” of the person. The *Guardianship Act 1987* needs to reflect this by providing for supported decision making arrangements and overseeing such arrangements by regular review to prevent against abuse and exploitation.

²² https://www.adhc.nsw.gov.au/__data/assets/file/0009/346194/sdm_pilot_project_evaluation_report.pdf p78

Section 4 of the *Guardianship Act 1987* imposes a duty to consider the views of the person with a disability. NSWTC recommends that the principles in section 4 should be expanded to include the concept of choice, supporting the person's decisions and building capacity in them to make decisions with the aid of supported decision making arrangements.

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.

Disability alone does not indicate a lack of capacity. A person with a disability may still be able to make his or her own decisions without assistance, or if required, with support.

People with decision-making disability are autonomous and independent human beings with wishes, hopes likes and dislikes. Just because a person has a decision-making disability does not mean that they cannot make decisions for themselves. There is no presumption that a person with decision-making disability does not have legal capacity to make decisions about their lives or to look after their own affairs.

The term disability gives an impression that the person is not able to make any decision. However, decision-making needs to be regarded as a spectrum with complete autonomy on one end and on the other substitute decision-making. In between is a scale of informal support decision-making that varies from time to time and from decision to decision.

With regard to psychological illness, when a person's illness is managed, they may be well enough to make their own decisions. Their decision making capacity will vary at different times.

NSWTC is of the opinion that "decision making capacity" is a more appropriate term than "disability" and more closely aligns to the principles of article 12 of UNCRPD.

Whether guardianship laws in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with decision making incapacity.

The *Guardianship Act 1987* is silent on the definition and use of restrictive powers.

Restrictive Powers when included in a guardian's brief, allows the guardian to physically restrain a client or limit their freedom of movement. The guardian can also restrict a client access to something e.g. access to a kitchen due to the available tools with which could be used for self-harm or the harming of others. Restraint can also be chemical, mechanical and physical, provided the methods are lawful.

NSWTC is of the view that restrictive practices, if required, should be exercised in exceptional circumstances, be short term and be justified as necessary to protect the safety and interests of the person with the disability.

To protect overuse of such practices or the use of prohibited practices, the use of restrictive practices should be addressed by a Tribunal when making their decision and to consider such factors as need, degree of risk if not imposed, how successful will the restrictive powers likely be, alternatives, conditions under which the restrictive powers might be exercised, Is the power supported by health professionals.

Practices that are experimental, cruel, inhumane, causing physical, emotional and/or psychological harm should be prohibited. NSW TG advocates that this area needs to be clarified in legislation and appropriate review of restrictive practices by an independent body needs to be considered.

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.

People for whom a financial management order is made should not be assumed to have lost capacity completely and forever, particularly in circumstances where the person's decision making capacity has improved. They should not be forced to be subjected to Orders that no longer apply.

Presently there are safeguards for orders continuing indefinitely in that they can be issued for a set period or a person can request they be reviewed as a result of a trigger by specific events or changes in the person's circumstances. However there is no procedure for automatic review of financial management orders in NSW.²³

Reviews

The Supreme Court and Guardianship Division NCAT have the authority to review, confirm, vary or terminate financial management orders.

NCAT is a specialist tribunal which considers application for a financial management order. Where it considers it warranted NCAT makes financial management orders with review dates at a specified time.

NCAT (Guardianship Division) has the power to order that a financial management order be reviewed within a specified time –.²⁴

Even where NCAT makes an order without a review date, the *Guardianship Act 1987* allows for applications to NCAT to revoke or vary the financial management order.²⁵ The persons who have standing to make an application to revoke or vary an order of the protected person is NSW TG, the manager of the estate of the protected person and "any other person who, in the opinion of the tribunal, has a genuine concern for the welfare of the protected person."²⁶ Such safeguards are within the spirit of UNCRPD.

The Mental Health Review Tribunal (MHRT) may revoke an order on applications provided it is satisfied that the person has regained capacity.²⁷

Part 4.6 Division 2 of *NSW Trustee and Guardian Act 2009* gives the CEO of NSW TG, in certain circumstances, the authority to review, confirm or terminate financial management orders. The CEO may only terminate management where there is clear evidence of regained capacity.

²³ http://www.idrs.org.au/pdf/Guardianship_and_administration_laws_across_Australia_by_Ben_Fogarty.pdf

²⁴ section 25N (1) of the *Guardianship Act 1987*

²⁵ section 25R of the *Guardianship Act 1987*

²⁶ section 25S of the *Guardianship Act 1987*

²⁷ <http://www.mhrt.nsw.gov.au/the-tribunal/>

Section 39 of the *NSW Trustee and Guardian Act 2009* sets out the principles by which NSW TG implements financial management orders. Section 39(b) requires that our actions should be least restrictive as possible. *The freedom of decision and freedom of action of such person should be restricted as little as possible.*

The presence of a financial management order is a significant restriction in a person's life and should only be in place when absolutely necessary. Section 90 of the Act allows the CEO of NSW TG to consider whether management should continue.

Section 71 (2) of the Act allows the CEO of NSW TG to authorise a client to deal with part of their estate.

NSW TG aims to be proactive in its review of client files to determine whether management should continue or be terminated.

NSW TG is of the opinion that the legislation already provides appropriate vehicles for review. There are many arguments put forward that regular reviews should be automatic however NSW TG regards such reviews may be counter-productive and they may hinder the progress of matters in the interests of the person. Mandatory regular reviews will also have the potential to create a resource problem and therefore the potential to diminish already limited resources.

The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.

45AA of the *Guardianship Act 1987* allows for the Tribunal to approve clinical trials

While all Australian States have legislation which provides for the giving of consent for medical treatment which is necessary or in the person's 'best interests', the position is less straight forward where the proposed treatment is not 'necessary'.

In NSW, the Guardianship Board can approve a clinical trial, and then consent must be obtained for each participant. It is relatively straightforward to obtain consent for participation in clinical trials, as a specific application can be made to the relevant board.²⁸

Clinical Trials are not an area relevant to NSW TG in its capacity of financial manager and is best addressed by others.

Other Matters – Psychological Condition

There are situations where a person may have a psychological condition controlled by medication which inherently affects their ability to make informed decisions.

During periods where the person is compliant with the aid of medication, there may not be the need for a substitute decision maker however when the person is non-compliant the person may become vulnerable and exposed to adverse risk if allowed to give effect to their own decisions.

Perhaps the Act should be varied to allow the person to choose in advance who they would like to be their support and/or substitute decision maker to make decisions in the periods when their illness is not controlled and their decision making capacity is compromised.

Other Matters – Advocacy

This review provides an opportunity to refresh our enabling Act in so far as it relates to financial management. It provides NSW TG with the opportunity to recommend legislative reform that supports our strategic direction to make NSW TG truly the last resort financial manager and to embed assisted decision making into legislation and practice. In doing so NSW TG will also advocate for the Public Guardian's role to be made a Public Advocate with associated investigative and advocacy powers. Much like in Queensland, the public advocacy role would be to promote the protection of adults with impaired capacity from neglect, exploitation or abuse, and monitoring and reviewing the delivery of services and facilities to adults with impaired capacity.

A Public Advocate is a "human-rights focussed and independent body, able to scrutinise and take action against other government agencies to promote and protect the rights of persons subject to financial management and guardianship orders."²⁹

In other jurisdictions in Australia³⁰ the role and powers of the Public Advocate also investigates any complaint or allegation that a person is in need of a guardian or financial manager or is under an inappropriate guardianship or financial management order. This role also serves to provide information and advice on guardianship and financial management and the protection of the rights of persons under financial management and/or guardianship and the protection of them from abuse and exploitation.

*"People with intellectual disability are some of the most vulnerable and voiceless people in our society. The need for a robust, well-resourced and fiercely independent public advocate in New South Wales ... has never been so paramount."*³¹



Imelda Dodds
Chief Executive Officer
NSW Trustee and Guardian

6 April, 2016

²⁹ http://www.idrs.org.au/pdf/Guardianship_and_administration_laws_across_Australia_by_Ben_Fogarty.pdf

³⁰ Ibid at p37

³¹ Ibid at p38