

The Law Reform Commission of NSW
GPO Box 31
Sydney NSW 2001

8 April 2016

By Email to: nsw_lrc@agd.nsw.gov.au

Dear NSW Law Reform Commission,

GUARDIANSHIP ACT REVIEW

The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide input into the NSW Law Reform Commission's review of the *Guardianship Act 1987*.

About the Australian Lawyers Alliance

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The Australian Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

We are represented in every state and territory in Australia. More information about us is available on our website.¹

The tension between rights and protections

The ALA is a strong supporter of the rights of people with disabilities.

Our personal injury members, every day, support people with disabilities to pursue their legal rights to compensation.

Our members act for clients with and without decision-making capacity (the latter primarily being children and those with brain injuries)..

¹ www.lawyersalliance.com.au

We are aware of the tension that exists between supporting the rights of people without decision-making capacity and protecting those same people.

Should people without decision-making capacity be free to act in a way that is not in their best interests?

Conflict of laws and policy?

We understand that the UN Convention on the Rights of Persons with Disabilities may conflict with State laws which provide for substitute decision-making.

The UNCRPD was ratified by the Australian government in 2008. The Convention promotes the concept of supported decision-making whereby in the end the decision will be that of the person with the disability.

The Convention may conflict with current NSW laws. We note that currently in NSW the law is fairly settled and clear regarding those with impaired decision-making capacity:

- There are tests for knowing who has legal and financial capacity.
- If a client does **not** have legal and/or financial decision-making capacity, then a substitute decision-maker needs to be appointed.
- If a client **does** have financial capacity and will receive lump sum compensation, then their lawyer should encourage independent financial advice.

We note that the Law Society of NSW has published a helpful practical guide for lawyers called "When a client's capacity is in doubt".² This guide helps lawyers to understand the current law and best practice application of the law.

Commonwealth vs State perspectives

The Commonwealth government provides income support in Australia. Centrelink has strict rules regarding eligibility for income support.

Centrelink also has specific rules which provide that if a person has received compensation for economic loss then they will be precluded from receiving Centrelink income support for a certain length of time (the preclusion period).

If a person prematurely dissipates their compensation payment, they cannot receive Centrelink income support.

State laws provide for the appointment of substitute decision-makers. These laws provide protections.

If State laws are changed to move from substitute to supported decision-making, who will pay if a person prematurely dissipates their compensation payment?

² <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf>

Will the Commonwealth government amend its Centrelink rules to allow people to have the dignity of risk? Will taxpayers be happy to foot the bill if people dissipate their compensation money? Who will be to blame?

ALA support for substituted decision-making

The ALA supports the continuation of substitute decision-making where clients do not have decision-making capacity.

We see the role of a litigation guardian as vital to protect the processes of the Court and to ensure that the interests of a litigant who has impaired capacity are protected against the disadvantage that the litigant would otherwise be under.

We also see the role of financial manager as vital to ensure the prudent and careful use of personal injury compensation proceeds to ensure that they can support a plaintiff for as long as possible (to deliver choice, control and flexibility).

The original reasons for introducing protections still apply

Historically the young and those with disabilities had few legal rights and most were not in a position to pursue them. The young and those with disabilities were often taken advantage of by others.

The legal and financial worlds have not become any easier to navigate. Fraudsters and scammers abound and are happy to help relieve a vulnerable person of their money.

Our most vulnerable citizens continue to need protection.

Some suggestions

There are some things that the NSW government could do to improve existing systems for litigation guardians and financial managers.

1. Where no litigation guardian can be found

One problem that is often encountered by ALA members is the situation that occurs if their client does not have a family member or other suitable person in their life who is willing and able to take on the role of litigation guardian.

A litigation guardian is at risk of an adverse costs order if the litigation is not successful. Many people do not have someone in their life who can take such a financial risk.

The NSW Trustee & Guardian will sometimes take on the role of litigation guardian, but arranging this is difficult and time-consuming. Also, in the experience of our members they will usually refuse if it puts them at risk of an adverse costs order.

A good legal case sometimes cannot be pursued because a suitable litigation guardian cannot be found. This means that people in NSW, particularly those that are financial disadvantaged, are unable to pursue their legal rights.

This is not only unfair, but it may result in severe personal and financial hardship, as compensation cannot be pursued.

A solution is required.

2. *Where there is no compensation for the cost of funds management*

The ALA is concerned that in some contexts it is not possible for a person who is entitled to receive compensation but who does not have financial decision-making capacity to recover any compensation for the cost of funds management.

Such a person must have their money managed for them and must pay for this out of the compensation money.

For example, a child who receives a statutory payment in the event of the death of their parent must have their money managed by a trustee company (public or private), yet there are costs associated with financial management and these costs erode the compensation funds.

The ALA recommends that the NSW Government review those circumstances where people who don't have financial capacity cannot recover the cost of funds management and amends the law accordingly.

This will only impact a relatively small number of people, so will not be particularly expensive to implement, but it will ensure fair compensation.

3. *Funding cuts to the NSW Trustee & Guardian*

The ALA is aware of looming funding cuts to the NSW Trustee & Guardian. We have already communicated these concerns in a meeting with the NSW Government and also the NSW Trustee & Guardian.

In summary our concerns are as follows:

- Existing and future clients may suffer from reduced levels of service.
- The proposed fees are below market costs, so will risk driving out private sector competition and drive nearly all plaintiffs without capacity to the NSW Trustee & Guardian for direct management.
- Consumers benefit from private sector competition (on fees and service) on a level playing field.
- The private sector cannot compete with high government investment subsidies.
- If the proposed new low fees prove unsustainable, then plaintiffs who currently obtain damages for funds management based on these low fees will be undercompensated.
- In compensable situations the government subsidies to the cost of funds management are effectively subsidising private general insurance companies who will have to pay less for the cost of funds management.
- Why would the NSW government drive out fair competition and subsidise private insurance companies?

4. *Supported decision-making*

The need for plaintiffs with decision-making capacity to make sensible financial decisions with their compensation money can't be ignored.

The Federal Government does expect plaintiffs to live on their settlement money to some extent, and this is enforced by way of Centrelink preclusion period rules.

The National Disability Insurance Agency also expects a plaintiff to use that part of their settlement money paid for future care to pay for their own care supports, according to their published rules and guidelines.

In NSW, s.25 of the Civil Liability Act 2002 provides that the lawyer "*must advise, in writing...the desirability of the plaintiff obtaining independent financial advice about...lump sum settlements of the claim*".

The ALA works hard to remind members of this obligation and to inform them on how to act upon this obligation (who delivers trustee and financial advice services, how they can be accessed, etc.).

This law certainly helps plaintiffs, but as mentioned above, plaintiffs with financial decision-making capacity rarely access financial advice.

Financial advisers are well placed to provide support and guidance to people who have financial decision-making capacity. They have the necessary skills, qualifications, experience and expertise. They must hold appropriate licenses and insurances, and be registered on the Federal Government's new Financial Adviser Register. Membership of professional organisations also demands adherence to ethical obligations.

We note that Corporations Laws mean that in Australia only a licenced financial adviser can give financial *advice* to another person. So when considering support for people who need decision-making support this needs to be kept in mind.

The ALA recommends that financial advisers with appropriate qualifications and experience be considered as part of the solution for an effective system of supported financial decision-making.

Responding to the issues raised

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

We support the concepts of allowing both *substituted* and *supported* decision-making. We consider substituted decision-making appropriate in the context of lack of capacity.

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

We support the existing rules which reference a “best interests” duty and require the views of the protected person to be taken into account as much as possible.

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.*

We support encouraging the use of professional financial advice for those who have financial decision-making capacity but who would benefit from advice and support.

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.*

A substitute decision-maker appointed under State or Territory laws should have their role respected by new and emerging NDIS arrangements. We would encourage close dialogue between the relevant state and federal bodies to clarify roles and responsibilities.

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.*

We prefer the language of decision-making capacity.

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.*

No comment.

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.*

Regular reviews are appropriate depending on the nature, extent and likely duration of the decision-making incapacity. We believe that reviews of guardianship and financial management orders are possible now under existing rules.

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

No comment.

9. *Any other matters the NSW Law Reform Commission considers relevant to the Terms of Reference.*

We would like to highlight the need to balance freedom and self-determination with the dangers associated with vulnerable people making decisions about money.

2.

Should people have the freedom to spend their money too quickly and end up fully dependent upon the government (or in a position where they have run out of money before they are allowed to access government support)?

The law should seek to balance freedom with appropriate protection.

Please contact me if you have any queries or would like the ALA to meet with you to elaborate on any issues raised in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Roshana May', with a stylized flourish at the end.

Roshana May
NSW Branch President
Australian Lawyers Alliance