



**New South Wales
Law Reform Commission**

Review of the Guardianship Act 1987

Question Paper 3

The role of guardians and financial managers

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



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Make a submission

We seek your responses to this question paper. To tell us your views you can send your submission by:

Email: nsw_lrc@justice.nsw.gov.au

Post: GPO Box 31, Sydney NSW 2001

It would assist us if you could provide an electronic version of your submission.

If you have questions about the process please email or call 02 8346 1284.

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For more information about us, and our processes, see our website:
www.lawreform.justice.nsw.gov.au.

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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.

[Reference received 22 December 2015]

Recent Australian reviews of guardianship laws

In this Question Paper, we refer extensively to a number of recent Australian reviews:

- NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010).
- Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010).
- Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) – reflected in part in the Guardianship and Administration Bill 2014 (Vic) which the Victorian Parliament did not pass.
- Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014).
- ACT Law Reform Advisory Council, *Guardianship Report* (2016).

Questions

2. Who can be a guardian or a financial manager?

Question 2.1: Who can be an enduring guardian?

- (1) Who should be eligible to be appointed as an enduring guardian?
- (2) Who should be ineligible to be appointed as an enduring guardian?

Question 2.2: Who can be a tribunal-appointed guardian?

- (1) What should the Tribunal consider when deciding whether to appoint a particular person as a guardian?
- (2) Who should be ineligible to act as a guardian?

Question 2.3: When should the Public Guardian be appointed?

- (1) Should the Tribunal be able to appoint the Public Guardian as a guardian? If so, when should this occur?
- (2) Should there be any limits to the Tribunal's ability to appoint the Public Guardian? If so, what should these limits be?

Question 2.4: Should community volunteers be able to act as guardians?

- (1) What could be the benefits and disadvantages of a community guardianship program?
- (2) Should NSW introduce a community guardianship program?
- (3) If NSW does introduce a community guardianship program:
 - (a) who should be able to be a community guardian?
 - (b) how should community guardians be appointed?
 - (c) who should recruit, train and supervise the community guardians?

Question 2.5: Who can be a private manager?

- (1) What should the Tribunal consider when deciding whether to appoint a particular person as a private manager?
- (2) Should the *Guardianship Act* include detailed eligibility criteria for private managers or is the current "suitable person" test sufficient?
- (3) Should the same eligibility criteria apply to private guardians and private managers? If so, what should these common criteria be?
- (4) What are the benefits and disadvantages of appointing private corporations to act as financial managers?
- (5) Should the Tribunal be able to appoint a corporation to be a private manager? If so, under what circumstances should this occur?

Question 2.6: Should the NSW Trustee be appointed only as a last resort?

- (1) Should the *Guardianship Act* state explicitly that the Tribunal can only appoint the NSW Trustee as a last resort?
- (2) If so, how should this principle be expressed in the Act?

Question 2.7: Should the Act include a succession planning mechanism?

- (1) Should the *Guardianship Act* allow relatives, friends and others to express their views on who should be a person's guardian or financial manager in the future?
- (2) What could be the benefits and disadvantages of such a succession planning mechanism?
- (3) When deciding who to appoint, should the Tribunal be required to give effect to the wishes expressed in a succession planning statement?

3. What powers and functions should guardians and financial managers have?

Question 3.1: What powers and functions should enduring guardians have?

- (1) Should the *Guardianship Act* contain a more detailed list of the powers and functions that an adult can grant to an enduring guardian? If so, what should be included on this list?
- (2) Should the *Guardianship Act* contain a list of the powers and functions that an adult cannot grant to an enduring guardian? If so, what should be included on this list?

Question 3.2: Should the Tribunal be able to make plenary orders?

- (1) What are the benefits and disadvantages of allowing the Tribunal to make plenary orders?
- (2) Should the *Guardianship Act*:
 - (a) continue to enable the Tribunal to make plenary orders
 - (b) require the Tribunal to specify a guardian's powers and functions in each guardianship order, or
 - (c) include some other arrangement for granting powers?

Question 3.3: What powers and functions should tribunal-appointed guardians have?

- (1) Should the *Guardianship Act* list the powers and functions that the Tribunal can grant to a guardian? If so, what should be included in this list?
- (2) Should such a list:
 - (a) set out all the powers that a guardian can exercise, or
 - (b) should it simply contain examples?

Question 3.4: Are there any powers and functions that guardians should not be able to have?

- (1) Should the *Guardianship Act* contain a list of powers and functions that the Tribunal cannot grant to a guardian?
- (2) If so, what should be included in this list?

Question 3.5: What powers and functions should financial managers have?

- (1) What powers and functions should be available to a private manager?
- (2) What powers and functions should the NSW Trustee have when acting as a financial manager?
- (3) Are the current arrangements for granting powers to private managers adequate? If not, how should powers be granted to private managers?
- (4) Should the legislation list the powers that a financial manager cannot exercise? If so, what should be on this list?

Question 3.6: Should the roles of guardians and financial managers remain separate?

- (1) What are the benefits and disadvantages of keeping the roles of guardians and financial managers separate?
- (2) What are the benefits and disadvantages of combining the roles of guardians and financial managers?
- (3) Should the roles of tribunal-appointed guardians and financial managers remain separate?

4. What decision-making principles should guardians and financial managers observe?

Question 4.1: What decision-making principles should guardians and financial managers observe?

What principles should guardians and financial managers observe when they make decisions on behalf of another person?

Question 4.2: Should guardians and financial managers be required to give effect to a person's "will and preferences"?

- (1) What are the advantages and disadvantages of the current emphasis on "welfare and interests" in the *Guardianship Act's* general principles?
- (2) Should "welfare and interests" continue to be the "paramount consideration" for guardians and financial managers?
- (3) What could be the benefits and disadvantages of requiring guardians and financial managers to give effect to a person's will and preferences?
- (4) Should guardians and financial managers be required to give effect to a person's will and preferences?

Question 4.3: Should NSW adopt a “substituted judgment” model?

- (1) What could be the benefits and disadvantages of a “substituted judgment” approach to decision-making?
- (2) Should the *Guardianship Act* require guardians and financial managers to give effect to the decision the person would have made if they had decision-making capacity (that is, a “substituted judgment” approach)?
- (3) If so, how would guardians and financial managers work out what the person would have wanted? Should the legislation set out the steps they should take?

Question 4.4: Should NSW adopt a “structured will and preferences” model?

- (1) What could be the benefits and disadvantages of a “structured will and preferences” approach to decision-making?
- (2) Should guardians and financial managers be required to make decisions based upon a person’s will and preferences?
- (3) If so, how would guardians and financial managers work out a person’s will and preferences? Should the legislation set out the steps they should take?
- (4) What should a guardian or financial manager be required to do if they cannot determine a person’s will and preferences?
- (5) Should a guardian or financial manager ever be able to override a person’s will and preferences? If so, when should they be allowed to do this?

QP 3 The role of guardians and financial managers

1. Introduction

In brief

In NSW, guardians and financial managers can be appointed to make decisions on behalf of somebody else. We seek your views about the role of guardians and financial managers in NSW law.

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- 1.1 The NSW Attorney General has asked us to review the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”). This document (Question Paper 3) is part of a series of papers in which we seek your views on whether aspects of the *Guardianship Act* need to change.
- 1.2 Currently, the law in NSW recognises that some people may become incapable of making decisions about important issues in their life. The *Guardianship Act* allows an adult to plan for this possibility by appointing an “enduring guardian”.¹ If the adult later loses the ability to make their own decisions, the enduring guardian can act on their behalf.
- 1.3 The *Guardianship Act* also authorises the NSW Civil and Administrative Tribunal (“Tribunal”) to appoint a “guardian” or a “financial manager” for someone with impaired decision-making capacity. In Question Paper 1, we considered when the Tribunal can take this step.²
- 1.4 We now invite you to comment on the roles of guardians and financial managers under NSW law. In particular, we consider:
- who should be able to act in these roles
 - what their powers and functions powers should be, and
 - what they should consider when they make decisions on behalf of another person.

1. *Guardianship Act 1987* (NSW) s 6, s 6A(2).

2. NSW Law Reform Commission, *Preconditions for Alternative Decision-Making Arrangements*, Review of the *Guardianship Act 1987* Question Paper 1 (2016).

Why we are reviewing the *Guardianship Act*

- 1.5 When the *Guardianship Act* became law almost 30 years ago, it reflected new ideas about the different needs of people with disability. There was also a growing awareness of the rights of people with disability to live in the community rather than in an institution.³
- 1.6 Since then, the way people think about disability has shifted again. This is partly due to developments in human rights law, in particular the United Nations *Convention on the Rights of Persons with Disabilities* (“UN Convention”).⁴ The principles of the UN *Convention* include the right of people with disability to dignity, autonomy, full and active participation in society and equal recognition before the law.
- 1.7 Like many of the guardianship laws in other places, the *Guardianship Act* could better reflect these developments. Many places have recently reviewed their guardianship laws, just as we are doing now.
- 1.8 Another reason we are reviewing the *Guardianship Act* is that the profile of people in the guardianship system has changed a lot. At first, the largest group affected was people with intellectual disability. Now cases involving people with dementia are most common and the number of cases involving people with a mental illness or brain injury is significant.⁵

Our process

Background Paper

- 1.9 We released a Background Paper on 30 June 2016. The Background Paper outlines our approach to this review, describes what the *Guardianship Act 1987* (NSW) does, introduces some key concepts and provides an overview of the landscape in which our laws operate.

Question Papers

- 1.10 We are releasing a series of question papers to promote discussion and seek your ideas about guardianship law.
- 1.11 Each question paper will deal with different elements of guardianship:
 - **Question Paper 1:** Preconditions for alternative decision-making arrangements [released 22 August 2016]
 - **Question Paper 2:** Decision-making models [released 1 November 2016]

3. N O'Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [5.4.1].

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

5. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2014–2015* (2015) 41.

- **Question Paper 3:** The role of guardians and financial managers: who can act in these roles, their powers and functions, and decision-making principles they must observe [released 1 November 2016]
- **Question Paper 4:** Safeguards, procedures and the role of key agencies (including safeguards and procedures concerning orders, appointments and the actions of guardians and financial managers)
- **Question Paper 5:** Medical and dental treatment and restrictive practices
- **Question Paper 6:** Other issues, including:
 - interaction with other laws. For example: NSW power of attorney, trustee and guardian, mental health and criminal laws, Commonwealth aged care legislation and the National Disability Insurance Scheme, and the recognition of interstate and overseas equivalent orders
 - language of the *Guardianship Act*, and
 - the age at which people can come under the *Guardianship Act*.

Final report

- 1.12 Following these question papers and other forms of consultation, we will write a final report that contains our findings and recommendations for reform.
- 1.13 All publications for the guardianship review will be available on our website: www.lawreform.justice.nsw.gov.au. We will also publish easy read versions of all our publications for this review.

Should the roles of “guardian” and “financial manager” remain part of NSW law?

- 1.14 Guardians and financial managers are often known as “substitute decision-makers”. While substitute decision-making frameworks have many forms, a common characteristic is that a person has their legal decision-making capacity removed. Put another way, someone else makes decisions on their behalf.⁶
- 1.15 Many have questioned whether substitute decision-making can safeguard the rights of people with disability adequately. Internationally, there is a growing recognition that governments should instead provide people with the support they need to make their own decisions.⁷ In Question Paper 2, we considered the debates around supported decision-making and potential ways of implementing it in NSW.⁸
- 1.16 However, some people believe that the Tribunal should be able to appoint guardians and financial managers as a last resort. In light of this, we also asked (in

6. See United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition before the Law*, UN Doc CRPD/C/GC/1 (2014) [27].

7. See United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition before the Law*, UN Doc CRPD/C/GC/1 (2014) [26], [28]–[29].

8. NSW Law Reform Commission, *Decision-Making Models*, Review of the Guardianship Act 1987 Question Paper 2 (2016).

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Question Paper 2) whether substitute decision-making should still exist in NSW law.⁹

- 1.17 We do not wish to pre-empt the outcomes of that broader discussion. However, in case guardians and financial managers do remain part of the NSW system, we think it is important to examine the nature of these roles. This Question Paper aims to promote discussion on this topic.
- 1.18 Throughout this Question Paper, we use the titles “guardians” and “financial managers”. We recognise that some people might want to replace these titles – even if NSW retains broadly similar roles.¹⁰ We will consider issues relating to the language used in the *Guardianship Act* in a later question paper.

Outline of Question Paper 3

- 1.19 In **Chapter 2**, we review the criteria that a potential guardian or financial manager must meet under the *Guardianship Act* before the Tribunal can appoint them. We consider whether the existing criteria are sufficient. We also examine whether the same criteria should apply to both roles.
- 1.20 In **Chapter 3**, we focus on the powers of guardians and financial managers under the *Guardianship Act*. We ask if you think these powers are sufficient and if the Act expresses these powers clearly.
- 1.21 In **Chapter 4**, we reflect on the duties and principles that guardians should observe when they make decisions on behalf of somebody else. In particular, we discuss whether the *Guardianship Act* should require guardians and financial managers to make decisions based upon the will and preferences of the person concerned.

9. NSW Law Reform Commission, *Decision-Making Models*, Review of the Guardianship Act 1987 Question Paper 2 (2016) ch 5.

10. For example, the Australian Law Reform Commission used the term “representative”: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [2.72].

2. Who can be a guardian or a financial manager?

In brief

The *Guardianship Act 1987* (NSW) sets out the criteria that potential enduring guardians, tribunal-appointed guardians and financial managers must meet. The NSW Civil and Administrative Tribunal can appoint the Public Guardian or the NSW Trustee and Guardian as a last resort.

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2.1 In this Chapter, we seek your views on who should be able to act as an enduring guardian, a tribunal-appointed guardian or a financial manager in NSW. The Chapter:

- outlines what the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) says about who can be an enduring guardian or a tribunal-appointed guardian
- considers whether community volunteers should be able to act as guardians
- reviews the process for appointing a financial manager
- asks whether the appointment criteria for financial managers and tribunal-appointed guardians should be the same, and
- asks whether the *Guardianship Act* should allow relatives, friends and others to express their opinion on who should act as a person’s guardian or financial manager in the future.

Who can be a guardian?

2.2 The *Guardianship Act* sets out the conditions that a private individual must meet before they can act as either an enduring guardian or a tribunal-appointed guardian. The Act also explains when the NSW Civil and Administrative Tribunal (“Tribunal”)

can appoint a government office-holder (the Public Guardian) to act as guardian. In this section, we outline these eligibility criteria and conditions.

Enduring guardians

- 2.3 The *Guardianship Act* contains few eligibility criteria for enduring guardians. This perhaps reflects the personal nature of the appointment. However, an enduring guardian must be at least 18 years old.¹
- 2.4 Somebody paid to provide medical services, accommodation or any other support services to a person cannot be their enduring guardian. The spouse, parents, children and siblings of service providers are also ineligible for appointment.²
- 2.5 It is possible to appoint two or more enduring guardians.³ The person may also appoint a substitute to step in if the original enduring guardian dies, resigns or becomes incapable of undertaking this role.⁴

Question 2.1: Who can be an enduring guardian?

- (1) Who should be eligible to be appointed as an enduring guardian?
- (2) Who should be ineligible to be appointed as an enduring guardian?

Tribunal appointments

- 2.6 In contrast, the *Guardianship Act* details who the Tribunal can appoint as a guardian. Depending on the type of guardianship order, and the circumstances of the case, the guardian might be either a private individual or the Public Guardian.
- 2.7 The Tribunal must appoint a guardian when it makes a guardianship order.⁵ The following factors influence the appointment process:
- the type of order
 - the Act's general principles
 - the eligibility criteria that private individuals must meet, and
 - whether, as a last resort, the Public Guardian should be appointed.

Different types of guardianship orders

- 2.8 Guardianship orders can be “temporary” or “continuing”;⁶ “plenary” or “limited”.⁷

1. *Guardianship Act 1987* (NSW) s 6B(1).
2. *Guardianship Act 1987* (NSW) s 6B(2). Note that the appointment does not lapse even if the enduring guardian becomes a paid service provider for the person after the appointment has been made: s 6B(3).
3. *Guardianship Act 1987* (NSW) s 6D.
4. *Guardianship Act 1987* (NSW) s 6DA.
5. *Guardianship Act 1987* (NSW) s 16(1)(a).
6. *Guardianship Act 1987* (NSW) s 16(1)(b).
7. *Guardianship Act 1987* (NSW) s 16(1)(c).

- 2.9 A temporary order is initially in force for no more than 30 days, but the Tribunal may renew it once for an extra 30 days.⁸ Generally, continuing orders apply initially for no longer than a year. However, the Tribunal may order a longer term (up to 3 years) if the person has significant disabilities, is unlikely to regain capacity, and there is a need for a longer order. Continuing orders may also be renewed.⁹
- 2.10 As we will discuss in Chapter 3, a plenary order confers wide, extensive powers upon a guardian. In contrast, a limited guardianship order specifies (and confines) the guardian's powers and functions.¹⁰
- 2.11 The type of guardianship order affects the appointment process in two ways. First, the type of order influences who the Tribunal can appoint. Only the Public Guardian can act as guardian under a temporary guardianship order.¹¹ However, the position is different for continuing orders. The Tribunal can appoint eligible private people to act as guardians under a continuing order. While the Tribunal can also appoint the Public Guardian under a continuing order, this is a measure of last resort.¹²
- 2.12 Secondly, the type of order affects how many guardians the Tribunal can appoint. If the Tribunal issues a limited guardianship order, it can appoint two or more guardians. These guardians might have the same functions as each other (that is, they act jointly). Alternatively, the guardians might have different functions (that is, they act separately).¹³ Multiple guardians can only be appointed under limited orders.
- 2.13 The Tribunal cannot appoint the Public Guardian to act jointly with a private guardian.¹⁴ However, the Tribunal can appoint the Public Guardian and a private guardian to exercise separate functions. This might occur if a private individual cannot carry out the functions of a guardian in relation to a specific issue.¹⁵ The Tribunal might appoint the Public Guardian to deal with that issue, but allow the private guardian to deal with other issues.

The general principles

- 2.14 The Tribunal must also consider the general principles set out in s 4 of the *Guardianship Act*. Everyone exercising functions under the Act with respect to people with disability must observe the following general 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,

8. *Guardianship Act 1987* (NSW) s 18(2), s 18(3).

9. *Guardianship Act 1987* (NSW) s 18(1), s 18(1A), s 18(1B).

10. *Guardianship Act 1987* (NSW) s 21(1), s 21(2).

11. *Guardianship Act 1987* (NSW) s 17(4).

12. *Guardianship Act 1987* (NSW) s 15(3), s 17(3).

13. *Guardianship Act 1987* (NSW) s 16(3).

14. *Guardianship Act 1987* (NSW) s 16(3).

15. See, eg, *KJC* [2016] NSWCATGD 9 [2], [68]–[69].

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- (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.¹⁶
- 2.15 Under these principles, the Tribunal must give “paramount consideration” to the person’s “welfare and interests” when it decides who to appoint as their guardian.¹⁷

Eligibility criteria for private guardians

- 2.16 Often, the proposed guardian is a relative or a friend of the person under guardianship. That is, they are a “private” person.
- 2.17 The *Guardianship Act* contains criteria that the Tribunal must apply when deciding whether to appoint a proposed private guardian. A guardian must be at least 18 years old.¹⁸ In addition, the Tribunal must be satisfied that:
- (a) the personality of the proposed guardian is generally compatible with that of the person under guardianship,
 - (b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and
 - (c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.¹⁹
- 2.18 The Tribunal also considers whether the proposed guardian would be able to exercise their functions in accordance with the *Guardianship Act*. This includes their obligation to observe the general principles contained in s 4.²⁰
- 2.19 These criteria can act as important safeguards against conflicts of interest and abuse. In a recent decision, for instance, the Tribunal declined to appoint a family member who (according to the evidence) was motivated by a desire for financial gain.²¹ In another example, the Tribunal refused to appoint someone who “demonstrated no insight” into the needs of the person under guardianship.²²
- 2.20 The laws of other States and Territories set out similar eligibility criteria. Some laws require tribunals to also consider whether the proposed guardian:

16. *Guardianship Act 1987* (NSW) s 4.

17. *Guardianship Act 1987* (NSW) s 4(a); *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 5(1).

18. *Guardianship Act 1987* (NSW) s 16(1)(a).

19. *Guardianship Act 1987* (NSW) s 17(1).

20. See, eg, *NXC* [2016] NSWCATGD 13 [77], [83].

21. *ZAU v Public Guardian* [2016] NSWCATAP 53 [2], referring to the findings of the Tribunal.

22. *P v D1* [2011] NSWSC 257 [32], [104], [105], [106], referring to the findings of the Tribunal.

- is compatible with any other representative of the adult²³
 - is accessible and available,²⁴ or
 - has a history of criminal activities or problems in past decision-making roles.²⁵
- 2.21 The Queensland legislation specifically provides that a person's paid carer or health provider cannot act as their guardian.²⁶ The Queensland Law Reform Commission ("QLRC") recommended that the Queensland tribunal should also consider whether the proposed guardian was previously the person's paid carer.²⁷
- 2.22 In the Northern Territory, the tribunal must consider whether the proposed guardian has (or has had) a professional relationship with the person concerned. If so, the tribunal must further consider "the nature of that relationship and whether it is appropriate for an individual with that relationship to be the adult's guardian".²⁸

Question 2.2: Who can be a tribunal-appointed guardian?

- (1) What should the Tribunal consider when deciding whether to appoint a particular person as a guardian?
- (2) Who should be ineligible to act as a guardian?

Appointing the Public Guardian as a last resort

- 2.23 The *Guardianship Act* reflects a clear policy preference for appointing a private person to the role of guardian. The Tribunal cannot appoint the Public Guardian under a continuing order if it can appoint someone else.²⁹
- 2.24 However, there are many reasons why the Tribunal might not be able to appoint a private guardian. For instance, the person might not have a relative or friend who is willing to be their guardian.³⁰
- 2.25 Alternatively, a relative or friend may want to act as the person's guardian. However, the Tribunal might find that the relative or friend is not "able" to exercise the functions of a guardian.³¹ This has occurred, for example, in situations involving serious family conflict.³²

23. See, eg, *Guardianship of Adults Act* (NT) s 15(2)(e); *Guardianship and Administration Act 1995* (Tas) s 21(2)(c).

24. See, eg, *Guardianship and Management of Property Act 1991* (ACT) s 10(4)(d)–(e); *Guardianship and Administration Act 1986* (Vic) s 23(2)(d).

25. See, eg, *Guardianship of Adults Act* (NT) s 15(2)(i), s 15(2)(k); *Guardianship and Administration Act 2000* (Qld) s 15(4)(a), s 15(4)(b).

26. *Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(i).

27. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) rec 14-4.

28. *Guardianship of Adults Act* (NT) s 15(2)(g).

29. *Guardianship Act 1987* (NSW) s 15(3), s 17(3).

30. See generally *White v The Local Health Authority* [2015] NSWSC 417 [50]; *W v G* [2003] NSWSC 1170; 59 NSWLR 220 [25].

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

32. See, eg, *NXC* [2016] NSWCATGD 13 [77], [83].

QP3 The role of guardians and financial managers

- 2.26 It is not unusual for the Tribunal to appoint the Public Guardian. During 2014 – 2015, the Tribunal appointed the Public Guardian in 56% of the cases in which a guardian was appointed.³³
- 2.27 While the Tribunal must consider certain eligibility criteria before it appoints a private guardian, these criteria do not apply to the appointment of the Public Guardian.³⁴ However, one preliminary submission to our review suggests that the criteria of compatibility should apply to “whoever undertakes the role” of guardian.³⁵

Question 2.3: When should the Public Guardian be appointed?

- (1) Should the Tribunal be able to appoint the Public Guardian as a guardian? If so, when should this occur?
- (2) Should there be any limits to the Tribunal’s ability to appoint the Public Guardian? If so, what should these limits be?

Should community volunteers be able to act as guardians?

- 2.28 Some people in need of a guardian may not have anyone in their lives who can undertake this role. To address this, one option might be to encourage volunteers from the community to act as guardians. NSW could draw from the experience of Victoria and Western Australia to develop a community volunteer program.
- 2.29 The Victorian tribunal can appoint the Victorian Public Advocate as a guardian of last resort.³⁶ With the approval of the tribunal, the Public Advocate can delegate its powers and duties as guardian to a volunteer community guardian.³⁷ A community guardian must be 18 years old, complete background checks and meet other requirements (such as being prepared to commit to at least 2 years’ service).³⁸ The Office of the Public Advocate recruits the volunteers, trains them and provides ongoing mentoring and support.³⁹
- 2.30 Western Australia also runs a community guardian program. However, the Western Australian State Administrative Tribunal appoints the community guardians directly. The community guardians are accountable to this tribunal. The Western Australian Office of the Public Advocate recruits, trains and supports the community guardians.⁴⁰
- 2.31 In 2010, the NSW Legislative Council Standing Committee on Social Issues (“Standing Committee”) considered a proposal by the Public Guardian to establish a

33. NSW Trustee and Guardian, *Annual Report 2014–2015: Incorporating the Public Guardian Reporting Requirements* (2015) 48.

34. *Guardianship Act 1987* (NSW) s 17(2).

35. Mental Health Coordinating Council, *Preliminary Submission PGA08*, 7–8.

36. *Guardianship and Administration Act 1986* (Vic) s 23(4).

37. *Guardianship and Administration Act 1986* (Vic) s 18(2).

38. Victoria, Office of the Public Advocate, “Become a Volunteer” <www.publicadvocate.vic.gov.au/about-us/become-a-volunteer>.

39. Victoria, Office of the Public Advocate, “Volunteer Programs” <www.publicadvocate.vic.gov.au/our-services/volunteer-programs>.

40. S Whisson and L Jones, “Western Australia’s Community Guardianship Program” (Presentation to the Australian Guardianship and Administration Council Conference, Brisbane, March 2009) 3–9.

similar program in NSW. This program would involve “community members being delegated the authority to act as guardians for people in their community for whom the Guardianship Tribunal has made a guardianship order”.⁴¹ The Public Guardian would recruit the volunteers, train them, match them with people under guardianship and supervise them.⁴²

- 2.32 The Standing Committee did not reach a conclusion on the proposal. However, it recommended that the NSW Government should “prioritise assessment” of the proposed program.⁴³

Question 2.4: Should community volunteers be able to act as guardians?

- (1) What could be the benefits and disadvantages of a community guardianship program?
- (2) Should NSW introduce a community guardianship program?
- (3) If NSW does introduce a community guardianship program:
 - (a) who should be able to be a community guardian?
 - (b) how should community guardians be appointed?
 - (c) who should recruit, train and supervise the community guardians?

Who can be a financial manager?

- 2.33 The *Guardianship Act* empowers the Tribunal to make a financial management order if the relevant preconditions are met.⁴⁴ Broadly speaking, a financial management order places a person’s property and affairs (that is, their “estate”) under management. The order can relate to all or part of the person’s estate.⁴⁵
- 2.34 If it makes a financial management order, the Tribunal may appoint a private person to manage the estate. Alternatively, the Tribunal may commit the estate to the NSW Trustee and Guardian (“NSW Trustee”).⁴⁶ In NSW, an appointee is known as a financial “manager”.⁴⁷ “Administrators” occupy similar roles in some other States and Territories.⁴⁸
- 2.35 In this section, we review the test that applies to potential private managers. We also consider when the Tribunal can appoint the NSW Trustee to manage the

41. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [10.35]. The *Guardianship Act 1987* (NSW) permits the Public Guardian to delegate its functions to “a person, of a class of persons” that are either approved by the Minister or prescribed in the regulations: s 77(4).

42. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [10.47]–[10.53].

43. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 29.

44. *Guardianship Act 1987* (NSW) s 25G. We considered these preconditions in Question Paper 1.

45. *Guardianship Act 1987* (NSW) s 3 definition of “estate”, s 25E; *NSW Trustee and Guardian Act 2009* (NSW) s 40.

46. *Guardianship Act 1987* (NSW) s 25M(1); *NSW Trustee and Guardian Act 2009* (NSW) s 41(1)(b).

47. See, eg, *Guardianship Act 1987* (NSW) s 25M(3).

48. See, eg, *Guardianship and Administration Act 1986* (Vic) pt 5 div 3, pt 5 div 3A; *Guardianship and Administration Act 2000* (Qld) s 33(2).

person's estate. Overall, the Act provides less detail on the process for appointing financial managers than it does on the process for appointing guardians.

Application of the general principles

- 2.36 As discussed above at [2.14]–[2.15], everyone exercising functions under the *Guardianship Act* with respect to “persons with disabilities” must observe the general principles contained in s 4. The Tribunal considers these principles when deciding who to appoint as guardian.
- 2.37 However, the Tribunal can make a financial management order in relation to a person's estate even though they do not have a disability (as defined in the *Guardianship Act*).⁴⁹ If the person does not have such a disability, it is not clear if the Tribunal must observe the general principles when deciding who to appoint as their financial manager.
- 2.38 The Supreme Court has recently stated that the Tribunal should consider the general principles when considering any application for a financial management order (even if it turns out that the person does not have a disability).⁵⁰ The Tribunal has also observed that:

In appointing a financial manager, as in making all other orders under the *Guardianship Act*, the Tribunal must act with the interests of the person concerned as the paramount consideration and in accordance with the other principles set out in s 4 of the *Guardianship Act*.⁵¹

- 2.39 From these observations, it appears that the general principles are relevant to the process of appointing a financial manager in practice.

Criteria relevant to private managers

- 2.40 Private guardians must satisfy criteria relating to their compatibility with the person under guardianship, the absence of undue conflicts of interest, and their willingness and ability to exercise guardianship functions.⁵² In contrast, the *Guardianship Act* provides few details on the criteria that private managers must meet.

The “suitable person” test

- 2.41 The *Guardianship Act* states that the Tribunal may “appoint a suitable person as manager”.⁵³ The *Trustee and Guardian Act* also provides that the Supreme Court

49. *Guardianship Act 1987* (NSW) s 3(2). For a review of this issue, see NSW Law Reform Commission, *Preconditions for Alternative Decision-Making Arrangements*, Review of the *Guardianship Act 1987* Question Paper 1 (2016) [2.21], [3.46].

50. *P v NSW Trustee and Guardian* [2015] NSWSC 579 [53]–[62].

51. *NSD* [2016] NSWCATGD 20 [38].

52. *Guardianship Act 1987* (NSW) s 17(1).

53. *Guardianship Act 1987* (NSW) s 25M(1)(a).

may “appoint a suitable person as manager” of an estate.⁵⁴ However, neither Act details what might make a person suitable (or unsuitable) for this role.⁵⁵

2.42 The Supreme Court has observed that it “would be unwise” to attempt to define the matters that can be considered when applying this test of suitability.⁵⁶ However, the Court has considered a range of factors when applying the suitable person test.

2.43 These include, for example:

- the nature of the relationship between the proposed private manager and the person⁵⁷
- whether there are any conflicts of interest and whether these can be managed⁵⁸
- the proposed private manager’s character and honesty⁵⁹
- the proposed private manager’s “ability to manage, diligently, the person’s property in the person’s best interests”⁶⁰
- whether the proposed private manager is “fit, proper and competent” to perform the tasks associated with management⁶¹
- whether the proposed private manager appreciates the need for a financial manager to act “protectively”⁶²
- the nature of the estate and the complexities involved in its management,⁶³ and
- if the proposed private manager claims to have financial expertise, whether they understand what is required of a financial manager and whether they can assist in the circumstances of the case.⁶⁴

2.44 Above all, the Supreme Court has emphasised that the welfare and best interests of the person is the “dominant consideration”.⁶⁵

54. *NSW Trustee and Guardian Act 2009* (NSW) s 41(1)(b).

55. *Application by AMAM; Re Sam* [2011] NSWSC 503 [33], commenting on the *NSW Trustee and Guardian Act 2009* (NSW). In relation to Court appointments, however, at least two persons must provide affidavits about the fitness of the proposed manager (unless the proposed manager is the NSW Trustee or a trustee company). There must also be evidence that the proposed manager consents to the appointment (unless the proposed manager is the NSW Trustee or the plaintiff): *Uniform Civil Procedure Rules 2005* (NSW) r 57.5(1)(c), r 57.5(1)(d).

56. *Application by AMAM; Re Sam* [2011] NSWSC 503 [34]. See also *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 241, 243.

57. See, eg, *P v Trustee and Guardian* [2015] NSWSC 579 [17].

58. See, eg, *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 242; *Re R* [2000] NSWSC 886 [49]; *IR v AR* [2015] NSWSC 1187 [12]; *Application of J & K* [2009] NSWSC 1453 [33]; *SAB v SEM* [2013] NSWSC 253 [60].

59. *Application by AMAM; Re Sam* [2011] NSWSC 503 [34].

60. *Application by AMAM; Re Sam* [2011] NSWSC 503 [34]; *EB v Guardianship Tribunal* [2011] NSWSC 767 [146].

61. *Application of J & K* [2009] NSWSC 1453 [24].

62. *EB v Guardianship Tribunal* [2011] NSWSC 767 [146].

63. *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 240.

64. *Re L* [2000] NSWSC 721 [12]; *Re R* [2000] NSWSC 886 [49].

65. *Collis* [2009] NSWSC 852 [19], citing *Holt v Protective Commissioner* (1993) 31 NSWLR 227 [238]–[239].

QP3 The role of guardians and financial managers

- 2.45 Provided they meet the test of suitability, a range of “persons” can potentially act as private managers. For instance, a private manager might be a relative or friend of the person whose estate is under management.
- 2.46 The Supreme Court has confirmed that the *Guardianship Act* also allows private corporations to act as private managers.⁶⁶ However, the Court emphasised that applications for the appointment of “private managers for reward, other than licensed trustee companies” should be heard by the Court (and not, presumably, by the Tribunal). The Court will only appoint such a person if certain safeguards are in place.⁶⁷
- 2.47 In summary, the current “suitable person” test enables the Court and the Tribunal to be flexible when assessing potential appointees. The Court and the Tribunal can consider whether, in light of the circumstances, the appointment of the proposed private manager would advance the welfare and interests of the person.

Recommendations of the Standing Committee

- 2.48 In 2010, the Standing Committee recommended changes to the “suitable person” test. The Standing Committee felt that the *Guardianship Act* should apply the same criteria to potential financial managers as it does to potential guardians.⁶⁸ That is, the Tribunal should be satisfied that:
- (a) the personality of the proposed financial manager is generally compatible with that of the person under the financial management order
 - (b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed financial manager and those of the person under the financial management order and
 - (c) the proposed financial manager is both willing and able to exercise the functions conferred or imposed by the proposed financial management order.⁶⁹
- 2.49 In response, the then NSW Government expressed concern that the “proposed amendment may result in a loss of some elements” contained in existing case law.⁷⁰

Other States and Territories

- 2.50 Legislation in some other States and Territories contains matters to be considered beyond those in the NSW *Guardianship Act*. For example, some laws require the relevant tribunal to consider factors such as:
- whether the proposed financial manager is “compatible” with the person⁷¹

66. *Ability One Financial Management Pty Ltd v JB* [2014] NSWSC 245 [122]. This is because the word “person” is defined in NSW to include “an individual, a corporation and a body corporate or politic”: *Interpretation Act 1987* (NSW) s 21(1) definition of “person”.

67. *Ability One Financial Management Pty Ltd v JB* [2014] NSWSC 245 [290].

68. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [6.106].

69. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 13.

70. NSW, *Legislative Council Standing Committee on Social Issues: Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 9.

71. See, eg, *Guardianship and Administration Act 1986* (Vic) s 47(2)(b).

- the competency of the proposed financial manager and their ability to properly exercise the functions of a manager⁷²
 - whether there are any conflicts of interest between the proposed financial manager and the person⁷³
 - whether the proposed financial manager has a history of criminal activities,⁷⁴ bankruptcy or insolvency,⁷⁵ or if they have acted in a managerial role within a company under administration⁷⁶
 - the history or experience of the proposed financial manager in similar roles⁷⁷
 - the availability and accessibility of the proposed financial manager⁷⁸
 - whether the proposed financial manager lives in the same State or Territory as the person concerned⁷⁹
 - the likelihood that the proposed financial manager will comply with the legislation,⁸⁰ and
 - whether the proposed financial manager has sufficient expertise to administer the estate or if there is a special reason why they should be appointed.⁸¹
- 2.51 In addition, a person's paid carers and health providers are ineligible to act as their administrator in Queensland.⁸² The QLRC recommended that the Queensland tribunal should also consider whether the proposed administrator was previously the person's paid carer.⁸³
- 2.52 The Victorian Law Reform Commission ("VLRC") emphasised that the Victorian tribunal should consider whether a proposed administrator has a personal relationship with the person. In the VLRC's view, this would reinforce the idea that the tribunal should appoint a public official only as a last resort.⁸⁴ The then Victorian Government included this factor in the Guardianship and Administration Bill 2014 (Vic) ("Victorian Bill").⁸⁵ However, the Victorian Parliament did not enact this Bill.

72. See, eg, *Guardianship and Management of Property Act 1991* (ACT) s 10(4)(f).

73. See, eg, *Guardianship and Administration Act 1993* (SA) s 50(1)(e).

74. See, eg, *Guardianship of Adults Act* (NT) s 15(2)(k).

75. See, eg, *Guardianship of Adults Act* (NT) s 15(2)(j); *Guardianship and Administration Act 2000* (Qld) s 15(4)(c)(i)-(ii).

76. *Guardianship and Administration Act 2000* (Qld) s 15(4)(c)(iii).

77. See, eg, *Guardianship of Adults Act* (NT) s 15(2)(i).

78. See, eg, *Guardianship and Administration Act 2000* (Qld) s 15(1)(f).

79. *Guardianship and Management of Property Act 1991* (ACT) s 10(4)(d).

80. *Guardianship of Adults Act* (NT) s 15(2)(a).

81. *Guardianship and Administration Act 1986* (Vic) s 47(1)(c)(iv).

82. *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(i).

83. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) rec 14-4.

84. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 179(b), [12.148].

85. *Guardianship and Administration Bill 2014* (Vic) cl 31(1)(d).

QP3 The role of guardians and financial managers

- 2.53 In addition, the Victorian Bill proposed to confirm that corporations are eligible to be administrators. The Bill stated that the tribunal could appoint “any body corporate that consents to act”.⁸⁶
- 2.54 Legislation in the Australian Capital Territory also specifically provides for the appointment of trustee companies. However, a private trustee company cannot be appointed if a suitable individual has agreed to act in the role.⁸⁷

Question 2.5: Who can be a private manager?

- (1) What should the Tribunal consider when deciding whether to appoint a particular person as a private manager?
- (2) Should the *Guardianship Act* include detailed eligibility criteria for private managers or is the current “suitable person” test sufficient?
- (3) Should the same eligibility criteria apply to private guardians and private managers? If so, what should these common criteria be?
- (4) What are the benefits and disadvantages of appointing private corporations to act as financial managers?
- (5) Should the Tribunal be able to appoint a corporation to be a private manager? If so, under what circumstances should this occur?

Appointing the NSW Trustee and Guardian

- 2.55 The *Guardianship Act* states that the Tribunal cannot appoint the Public Guardian as a guardian if it can appoint some other person.⁸⁸ The Act does not include an equivalent statement in relation to the appointment of the NSW Trustee as a financial manager.
- 2.56 Instead, the *Guardianship Act* states only that the Tribunal may either:
- (a) appoint a suitable person as manager of that estate, or
 - (b) commit the management of that estate to the NSW Trustee.⁸⁹
- 2.57 However, the order of this section is significant. The section first refers to the appointment of a “suitable person” and only secondly to the appointment of the NSW Trustee. The Supreme Court interpreted an equivalent section in an older law⁹⁰ as expressing a “sensible hierarchy of choices”.⁹¹ This reflects the modern preference, in law and policy, for appointing suitable private managers instead of a government agency where possible.⁹² In other words, this hierarchy gives effect to a principle of last resort.

86. Guardianship and Administration Bill 2014 (Vic) cl 30(1)(b)(ii).

87. *Guardianship and Management of Property Act 1991* (ACT) s 9(2), s 9(5).

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

89. *Guardianship Act 1987* (NSW) s 25M(1).

90. *Protected Estates Act 1983* (NSW) s 22, as repealed by *NSW Trustee and Guardian Act 2009* (NSW) s 4.

91. *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 238; *Re R* [2000] NSWSC 886 [48].

92. *M v M* [2013] NSWSC 1495 [24]–[48].

- 2.58 The Standing Committee concluded that the *Guardianship Act* should express this preference more clearly. The Committee recommended amendments to the Act “to clarify that the NSW Trustee and Guardian is to be considered the financial manager of last resort”.⁹³ Under the Committee’s proposal, the Tribunal could appoint the NSW Trustee “only after consideration of the availability and suitability of a private manager”.⁹⁴
- 2.59 In response, the then NSW Government stated that existing law and practice already prioritises the appointment of family and friends. The Government was also concerned that the Standing Committee’s recommendation could “amount to a proposal that commercial trustee corporations be preferred to the NSW Trustee and Guardian”.⁹⁵
- 2.60 In the Government’s view, this proposal could potentially expose a person to two sets of fees.⁹⁶ We assume that this is because the person would pay management fees to the corporation. The NSW Trustee can also charge fees for supervising the management of the estate by a private manager.⁹⁷
- 2.61 Guardianship legislation in the Australian Capital Territory, the Northern Territory and Western Australia already states that tribunals may appoint government agencies only as a last resort.⁹⁸
- 2.62 In contrast, the Queensland legislation does not include a clear statement of the last resort principle. However, the QLRC recommended that the Queensland tribunal should only be able to appoint the Public Trustee if no other person is appropriate and available.⁹⁹
- 2.63 On one hand, the Supreme Court’s understanding of the legislative “hierarchy” might make such an amendment unnecessary in NSW. On the other hand, there may be value in ensuring consistency across the guardianship and financial management appointment processes. In addition, a clear legislative statement might assist all who engage with the *Guardianship Act* to understand who is eligible to act in this important role.

93. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 14.

94. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 14.

95. NSW, *Legislative Council Standing Committee on Social Issues: Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 9.

96. NSW, *Legislative Council Standing Committee on Social Issues: Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 9–10.

97. *NSW Trustee and Guardian Act 2009* (NSW) s 113(1); *NSW Trustee and Guardian Regulation 2008* (NSW) cl 38B.

98. *Guardianship and Management of Property Act 1991* (ACT) s 9(5); *Guardianship of Adults Act* (NT) s 13(3); *Guardianship and Administration Act 1990* (WA) s 68(5). Under the Western Australian Act, this rule does not apply if the Public Advocate is appointed to act jointly with another person.

99. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) [14.231]–[14.232].

Question 2.6: Should the NSW Trustee be appointed only as a last resort?

- (1) Should the *Guardianship Act* state explicitly that the Tribunal can only appoint the NSW Trustee as a last resort?
- (2) If so, how should this principle be expressed in the Act?

Identifying future guardians and financial managers

- 2.64 Currently, many relatives and friends provide informal support to people who require decision-making assistance. Others act as formal guardians or financial managers. They may understandably have concerns about who will take on these roles if they are unable to do so in the future. As the VLRC observed, “[t]his matter is of particular concern to ageing parents and carers of people with lifetime disabilities”.¹⁰⁰
- 2.65 The *Guardianship Act* already allows for some forms of succession planning. The Tribunal can appoint a person to act as an alternative guardian under a continuing guardianship order.¹⁰¹ The alternative guardian takes on the guardianship role if the original guardian is absent or becomes incapacitated.¹⁰² The alternative guardian also acts as a person’s guardian if the original guardian dies and there is no surviving joint guardian to take over the original guardian’s functions.¹⁰³
- 2.66 The VLRC recommended that the Victorian guardianship legislation should contain another form of succession planning. Under the VLRC’s proposal, family members, carers and decision-makers for a person with “ongoing impaired decision-making capacity” could file a “succession document” with the Victorian tribunal. In this document, they could state their wishes about what the person’s future decision-making arrangements should be.¹⁰⁴
- 2.67 However, the VLRC believed that the legislation should not require the Victorian tribunal to give effect to these wishes. Instead, the VLRC recommended that the tribunal should simply be required to consider them.¹⁰⁵ This is because the tribunal’s “decisions must be made in the light of current circumstances”.¹⁰⁶
- 2.68 The Victorian Bill proposed a similar arrangement. This would have allowed relatives, primary carers, guardians and administrators (among others) to state who should be appointed as a guardian or administrator in the future.¹⁰⁷
- 2.69 The Bill proposed to require the Victorian tribunal to consider such a statement when deciding if a person is suitable to act as a guardian or an administrator.¹⁰⁸ In

100. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [12.6].

101. This does not apply when the Public Guardian is appointed as a guardian: *Guardianship Act 1987* (NSW) s 20(1).

102. *Guardianship Act 1987* (NSW) s 20(2).

103. *Guardianship Act 1987* (NSW) s 22A(1)(b).

104. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 197.

105. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 198.

106. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [12.196].

107. Guardianship and Administration Bill 2014 (Vic) cl 33.

108. Guardianship and Administration Bill 2014 (Vic) cl 31(b).

contrast to the VLRC's proposal, the Victorian Bill stated that the Victorian tribunal would have to appoint the nominated person if:

- the statement was made by the current guardian or administrator
- the nominated person is over 18 and consents to act as guardian or administrator, and
- the nominated person meets other applicable eligibility criteria.¹⁰⁹

Question 2.7: Should the Act include a succession planning mechanism?

- (1) Should the *Guardianship Act* allow relatives, friends and others to express their views on who should be a person's guardian or financial manager in the future?
- (2) What could be the benefits and disadvantages of such a succession planning mechanism?
- (3) When deciding who to appoint, should the Tribunal be required to give effect to the wishes expressed in a succession planning statement?

109. Guardianship and Administration Bill 2014 (Vic) cl 30(3).

3. What powers and functions should guardians and financial managers have?

In brief

The *Guardianship Act 1987* (NSW) sets out the functions that a person can authorise their enduring guardian to exercise. However, the Act does not list the powers and functions that can be given to tribunal-appointed guardians. The *NSW Trustee and Guardian Act 2009* (NSW) explains the powers that the NSW Trustee can exercise when acting as a financial manager. This Act also allows the NSW Trustee and the Supreme Court to authorise private managers to undertake certain management functions.

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3.1 While guardians and financial managers act on behalf of other people, they do so for different types of issues. In general, financial managers make decisions about a person’s property or financial affairs. Guardians make decisions about lifestyle or health issues.

3.2 In this Chapter, we review the powers and functions of enduring guardians, tribunal-appointed guardians and financial managers. We invite you to comment on what their powers and functions should be. We also consider whether the roles of tribunal-appointed guardians and financial managers should remain separate.

3.3 While this Chapter outlines the general powers and functions of guardians, we recognise that making medical decisions can be a particularly important part of a guardian’s role. We will review this complex issue in a later question paper.

- 3.4 We will also consider the mechanisms for holding guardians and financial managers to account for the exercise of their powers and functions in a later question paper.¹

What are the powers and functions of an enduring guardian?

- 3.5 An adult (the “appointor”) may appoint an enduring guardian by completing a formal document of appointment.² This document sets out the scope of the enduring guardian’s authority.
- 3.6 The *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) lists the functions that an appointor can grant to an enduring guardian. An appointor can authorise their enduring guardian to:
- decide where they will live
 - decide the health care they are to receive
 - decide the other kinds of personal services they are to receive
 - consent to dental or medical treatment on their behalf, and
 - exercise any other function relating to the “appointor’s person”.³
- 3.7 An appointor can grant all or only some of these functions to their enduring guardian. They can also limit the enduring guardian’s authority in relation to any of these functions.⁴ The enduring guardian must exercise their functions in accordance with “any lawful directions” contained in the appointment document (unless the Tribunal directs otherwise).⁵
- 3.8 The *Guardianship Act* also specifies other powers that enduring guardians can exercise. An enduring guardian can do everything necessary to give effect to any of their functions. Among other things, an enduring guardian can sign documents on behalf of the person who appoints them.⁶ An enduring guardian also has rights to access information about the person.⁷
- 3.9 Any decision or action taken, or any consent granted, by the enduring guardian takes effect as if:
- it were done by the appointor, and
 - the appointor had the legal capacity to do it.⁸

1. For details on our process for the Guardianship Review, see Chapter 1.
2. *Guardianship Act 1987* (NSW) s 6, s 6C.
3. *Guardianship Act 1987* (NSW) s 6E(1)–(2).
4. *Guardianship Act 1987* (NSW) s 6E(2).
5. *Guardianship Act 1987* (NSW) s 6E(3).
6. *Guardianship Act 1987* (NSW) s 6F.
7. *Guardianship Act 1987* (NSW) s 6E(2A).
8. *Guardianship Act 1987* (NSW) s 6G.

- 3.10 The enduring guardian can exercise these functions once the appointer becomes “a person in need of a guardian”.⁹ That is, they become a “person who, because of a disability, is totally or partially incapable of managing his or her person”.¹⁰
- 3.11 Although the *Guardianship Act* lists a wide range of functions, it may be desirable to add other functions to this list. For example, the Victorian Law Reform Commission (“VLRC”) recommended that new legislation should include a non-exhaustive list of powers that can be granted to “enduring personal guardians”.¹¹
- 3.12 The VLRC recommended that an adult could grant an enduring personal guardian the power to make decisions about certain “personal matters”.¹² These matters include, but are not limited to:
- (a) where and with whom the person lives and decisions about restrictions upon liberty ...
 - (b) with whom the person associates
 - (c) whether the person works and, if so, the kind and place of work and the employer
 - (d) decisions about health care, including refusal of life-sustaining medical treatment if the conditions for refusal of medical treatment are fulfilled, and consent to forensic examinations ...
 - (e) what education or training the person undertakes and the place where this occurs
 - (f) daily living issues, including, for example, diet and dress
 - (g) any legal matters not relating to the person’s financial or property matters.¹³
- 3.13 The VLRC also recommended a non-exhaustive list of powers that enduring personal guardians cannot exercise. This list includes powers relating to:
- (a) making or revoking the person’s will
 - (b) making or revoking an appointment, enduring appointment or common law advance directive, or refusal of treatment certificates or instructional directives
 - (c) voting on the person’s behalf in a Commonwealth, state or local election or referendum
 - (d) entering into or dissolution of a marriage or sexual relationship
 - (e) decisions about the care and wellbeing of any children of the person, including a decision in relation to adoption
 - (f) a decision to detain or compulsorily treat the person for reasons other than the personal and social wellbeing of the person

9. *Guardianship Act 1987* (NSW) s 6A.

10. *Guardianship Act 1987* (NSW) s 3(1) definition of “person in need of a guardian”.

11. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 104.

12. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 102, rec 103.

13. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 108.

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- (g) consenting to an unlawful act
- (h) a decision about a special procedure.¹⁴

3.14 The NSW *Guardianship Act* does not contain such a list of exclusions.

Question 3.1: What powers and functions should enduring guardians have?

- (1) Should the *Guardianship Act* contain a more detailed list of the powers and functions that an adult can grant to an enduring guardian? If so, what should be included on this list?
- (2) Should the *Guardianship Act* contain a list of the powers and functions that an adult cannot grant to an enduring guardian? If so, what should be included on this list?

What are the powers and functions of a tribunal-appointed guardian?

- 3.15 The NSW Civil and Administrative Tribunal (“Tribunal”) can also appoint a guardian to make decisions on behalf of a person. The Tribunal can make a guardianship order if the person is “in need of a guardian”.¹⁵
- 3.16 Under the *Guardianship Act*, a guardian can make decisions, act and give consent on behalf of the person under guardianship. A guardian has the exclusive power to make the same decisions, take the same action and give the same consents that the person would have been able to, if the law recognised their capacity to do so.¹⁶ The Tribunal can place conditions on the exercise of this power.¹⁷
- 3.17 The guardian may also do everything necessary to give effect to their functions.¹⁸ If the Tribunal authorises them, the guardian may even take steps to ensure that the person under guardianship complies with their guardian’s decisions.¹⁹
- 3.18 The Tribunal defines the scope of a guardian’s authority when it issues a guardianship order.²⁰ In this section, we consider:
 - the powers of a guardian under different kinds of guardianship orders
 - the types of decisions that a guardian can make, and
 - whether there are certain types of decisions that a guardian should not be allowed to make.

14. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 109.

15. *Guardianship Act 1987* (NSW) s 14(1).

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

17. *Guardianship Act 1987* (NSW) s 21(2A).

18. *Guardianship Act 1987* (NSW) s 21, s 21B, s 21C.

19. *Guardianship Act 1987* (NSW) s 21A.

20. *Guardianship Act 1987* (NSW) s 16.

“Plenary” and “limited” orders

- 3.19 When the Tribunal makes a guardianship order, it must specify whether the order is “plenary” or “limited”.²¹ This is an important distinction.

Differences between plenary and limited orders

- 3.20 If it makes a limited order, the Tribunal must set out the guardian’s specific functions and powers. The Tribunal must also state the extent to which the guardian is to have custody of the person under guardianship (if at all).²²
- 3.21 Plenary guardianship orders grant powers that are more extensive than limited orders. A plenary order gives the guardian:
- exclusive custody of the person under guardianship, and
 - “all the functions of a guardian ... that a guardian has at law or in equity”.²³
- 3.22 The Tribunal may make the order subject to conditions.²⁴ Beyond this, however, a plenary guardianship order grants “very broad” powers.²⁵
- 3.23 The *Guardianship Act* expresses a preference for limited orders. In particular, s 15(4) of the *Guardianship Act* states that a “plenary guardianship order shall not be made” if “a limited guardianship order would suffice”. As such, it is “extremely rare” for the Tribunal to make a plenary order.²⁶ Despite this, it may be desirable to amend (or even remove) the Tribunal’s power to grant plenary orders.

Potential problems with plenary orders

- 3.24 The VLRC felt that guardianship legislation should provide guardians “with clear and accessible guidance about their powers”.²⁷ Arguably, the *Guardianship Act* does not provide such guidance in relation to plenary orders.
- 3.25 In NSW, guardians appointed under plenary orders have all the functions “that a guardian has at law or in equity”.²⁸ The VLRC considered this expression unhelpful.²⁹
- 3.26 The *Guardianship Act* does not clarify what this expression means. Nor does the *Guardianship Act* explain what it means to grant a guardian “custody of the person to the exclusion of any other person”.³⁰
- 3.27 To understand the powers of a guardian under a plenary order, we must consider case law. However, Justice Hodgson of the Supreme Court has observed that the

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

22. *Guardianship Act 1987* (NSW) s 21(2).

23. See *Guardianship Act 1987* (NSW) s 21(1)(b).

24. *Guardianship Act 1987* (NSW) s 16(1)(d).

25. *HH v HI* [2009] NSWADTAP 41 [32].

26. *Re TPJ* [2015] NSWCATGD 15 [36].

27. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [12.149].

28. See *Guardianship Act 1987* (NSW) s 21(1)(b).

29. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [12.154].

30. *Guardianship Act 1987* (NSW) s 21(1)(a).

extent of a guardian's functions at common law is unclear.³¹ In addition, Senior Member Currie of the Tribunal has stated that plenary orders "are potentially limitless and have not been exhaustively defined by the Supreme Court or the ... Tribunal".³²

- 3.28 It may be difficult for a guardian, the person under guardianship, or a third party to understand what a plenary order involves. In light of this, it may be preferable to require the Tribunal to specify the precise scope of a guardian's authority in each order.

An option for consideration

- 3.29 The VLRC recommended that Victorian guardianship legislation "should not provide for the appointment of a plenary guardian".³³ Instead, the VLRC proposed a list of personal decision-making powers that the Victorian tribunal could give to a guardian.³⁴ When making a guardianship order, the Victorian tribunal would give the guardian specific powers from this list. The order would also include any restrictions on the exercise of those powers.³⁵
- 3.30 This list would be non-exhaustive,³⁶ which suggests that the tribunal could potentially grant other personal decision-making powers. However, the VLRC recommended that the Victorian tribunal should grant "only those powers that are necessary to promote the personal and social wellbeing" of the person concerned.³⁷
- 3.31 The VLRC considered that it may be appropriate, in rare cases, for the Victorian tribunal to grant all the powers in the list. The VLRC acknowledged that this "would in effect be similar to a current plenary order".³⁸ However, the order would set out the scope of the guardian's powers clearly.
- 3.32 The Australian Capital Territory has had a similar model since 1991.³⁹ The Northern Territory also largely followed this approach in its 2016 guardianship legislation.⁴⁰

31. *Public Guardian v Guardianship Board [No 11 of 1997]* (1997) 42 NSWLR 201, 206–207.

32. *Re TPJ* [2015] NSWCATGD 15 [35].

33. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 182. The VLRC was especially concerned about the paternalism reflected in the current Victorian approach to plenary powers (see *Guardianship and Administration Act 1986* (Vic) s 24(1)). However, the VLRC recommended that the power be removed and not simply redefined: [12.153]–[12.155].

34. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 108.

35. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 183, rec 184.

36. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 183.

37. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 185.

38. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [12.156].

39. *Guardianship and Management of Property Act 1991* (ACT) s 7(2), s 7(3).

40. *Guardianship of Adults Act* (NT) s 16.

Question 3.2: Should the Tribunal be able to make plenary orders?

- (1) What are the benefits and disadvantages of allowing the Tribunal to make plenary orders?
- (2) Should the *Guardianship Act*:
 - (a) continue to enable the Tribunal to make plenary orders
 - (b) require the Tribunal to specify a guardian's powers and functions in each guardianship order, or
 - (c) include some other arrangement for granting powers?

What types of decisions should guardians be able to make?

- 3.33 In NSW, the functions granted to a guardian “typically ... relate to accommodation (for example, where the person will live), health care, medical and dental consent and the services the person will receive”.⁴¹ In other words, guardians generally make decisions about lifestyle and health issues.
- 3.34 The *Guardianship Act* lists the type of functions that a person can grant to an enduring guardian.⁴² However, it does not define the types of decisions that the Tribunal can allow a guardian to make. While the *Guardianship Act* “contains detailed provisions concerning the role of guardians in relation to consents to medical treatment”, it provides “no other indication as to what the powers of a guardian are”.⁴³
- 3.35 To clarify this, the *Guardianship Act* could list the powers and functions that the Tribunal can grant to a guardian. As discussed above at [3.29], the VLRC took this approach. The VLRC recommended a non-exhaustive list of the types of personal decisions that the Victorian tribunal could allow a guardian to make.⁴⁴ The same list of “personal matters” would apply to both enduring personal guardians and tribunal-appointed personal guardians (set out above at [3.12]).⁴⁵
- 3.36 The then Victorian Government largely adopted this approach in the *Guardianship and Administration Bill 2014 (Vic)* (“Victorian Bill”). The Victorian Bill stated that guardians could be given powers in relation to “personal matters”.⁴⁶ That is, the person’s “personal or lifestyle affairs” and any legal matter that relates to these affairs.⁴⁷ The Bill also included examples of such personal matters.⁴⁸ However, the Victorian Parliament did not enact this Bill.

41. *HH v HI* [2009] NSWADTAP 41 [29].

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

43. *Public Guardian v Guardianship Board [No 11 of 1997]* (1997) 42 NSWLR 201, 204.

44. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 180, rec 183.

45. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 108.

46. *Guardianship and Administration Bill (2014) (Vic)* cl 50(1)(a).

47. *Guardianship and Administration Bill (2014) (Vic)* cl 3(1) definition of “personal matter”.

48. *Guardianship and Administration Bill (2014) (Vic)* cl 3(1) definition of “personal matter”.

- 3.37 Legislation in some other States and Territories already defines (or includes examples of) the types of decisions that guardians can be allowed to make.⁴⁹ In addition to the matters identified by the VLRC, some of these lists include powers in relation to providing services to the person⁵⁰ and whether the person can apply for a licence or permit.⁵¹
- 3.38 In 2010, the Queensland Law Reform Commission (“QLRC”) recommended that Queensland’s list of powers be expanded to allow guardians to:
- decide who can contact or visit the person, and
 - conduct advocacy about the person’s care and welfare.⁵²

Question 3.3: What powers and functions should tribunal-appointed guardians have?

- (1) Should the *Guardianship Act* list the powers and functions that the Tribunal can grant to a guardian? If so, what should be included in this list?
- (2) Should such a list:
 - (a) set out all the powers that a guardian can exercise, or
 - (b) should it simply contain examples?

What should guardians not be allowed to do?

- 3.39 While the powers of a guardian can be far-reaching, there are certain things that a guardian generally cannot do. In its 1996 review of Queensland’s guardianship legislation, the QLRC explained that:

Some decisions are of such a personal nature that, if a person lacks the capacity to make the decision on his or her own behalf, it should not be possible for someone else to make a substituted decision for the person.⁵³

- 3.40 Laws in some States and Territories say that guardians cannot make decisions about certain matters.⁵⁴ For example, guardians in Queensland cannot do the following on behalf of the person under guardianship:

49. *Guardianship and Management of Property Act 1991* (ACT) s 7(3); *Guardianship of Adults Act* (NT) s 3 definition of “personal matter”, s 16; *Guardianship and Administration Act 2000* (Qld) sch 2 cl 2 definition of “personal matter”; *Guardianship and Administration Act 1995* (Tas) s 25(2); *Guardianship and Administration Act 1990* (WA) s 45(2).

50. See, eg, *Guardianship of Adults Act* (NT) s 3 definition of “personal matter”; *Guardianship and Administration Act 2000* (Qld) sch 2 cl 2(ba) definition of “personal matter”.

51. See, eg, *Guardianship and Administration Act 2000* (Qld) sch 2 cl 2(e) definition of “personal matter”.

52. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) rec 6-2.

53. Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability*, Report 49 (1996) 46. See also Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) [6.21].

54. See *Guardianship and Management of Property Act 1991* (ACT) s 7B; *Guardianship of Adults Act* (NT) s 24; *Guardianship and Administration Act 2000* (Qld) sch 2 cl 3 definition of “special personal matter”; *Guardianship and Administration Act 1990* (WA) s 45(3), s 45(4A), s 45(4).

- make or revoke a will
 - make or revoke a power of attorney, enduring power of attorney or advanced health care directive
 - vote
 - consent to an adoption
 - enter into or terminate a civil partnership
 - enter into a surrogacy arrangement, or
 - consent to the making or discharge of a parentage order.⁵⁵
- 3.41 Other States and Territories also exclude guardians from:
- exercising the rights of an accused person in a criminal investigation or criminal proceedings,⁵⁶ and
 - chastising or punishing the person under guardianship.⁵⁷
- 3.42 As noted above at [3.13], the VLRC listed the powers that enduring guardians should not be able to exercise. The VLRC recommended that the same list of exclusions should apply to tribunal-appointed guardians.⁵⁸
- 3.43 The Victorian Government proposed a similar list of exclusions in the Victorian Bill.⁵⁹ In addition, the Bill proposed that a guardian would not be able to:
- enter into surrogacy arrangements
 - consent to making or discharging a substitute parentage order, or
 - manage the estate of the represented person when they die.⁶⁰
- 3.44 In contrast, the NSW *Guardianship Act* does not list the powers that a guardian cannot exercise. However, any limits to the functions of a guardian recognised “at law or in equity” would seem to apply to plenary orders.⁶¹

Question 3.4: Are there any powers and functions that guardians should not be able to have?

- (1) Should the *Guardianship Act* contain a list of powers and functions that the Tribunal cannot grant to a guardian?
- (2) If so, what should be included in this list?

55. *Guardianship and Administration Act 2000* (Qld) s 14(3), sch 2 cl 3.

56. *Guardianship of Adults Act* (NT) s 24(e).

57. *Guardianship and Administration Act 1990* (WA) s 45(1).

58. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 109, [12.157].

59. *Guardianship and Administration Bill 2014* (Vic) cl 57.

60. *Guardianship and Administration Bill 2014* (Vic) cl 57(f)–(h).

61. *Guardianship Act 1987* (NSW) s 21(1)(b). For discussion of one possible limitation, see *Public Guardian v Guardianship Board [No 11 of 1997]* (1997) 42 NSWLR 201, 206–208 (regarding whether guardians can make decisions on behalf of a person that relate to criminal proceedings).

What are the powers and functions of a financial manager?

- 3.45 As discussed in Chapter 2, the Tribunal can appoint either a private person or the NSW Trustee and Guardian (“NSW Trustee”) to manage all or part of a person’s property or financial affairs (that is, their “estate”).⁶²
- 3.46 In this section, we consider the powers and functions of:
- private managers, and
 - the NSW Trustee, when it acts as a financial manager.
- 3.47 These powers and functions are detailed in numerous sections of the *NSW Trustee and Guardianship Act 2009* (NSW) (“*Trustee and Guardian Act*”). Rather than explain all of these powers and functions, we will outline some of the key features of this complex law.
- 3.48 We also consider how the laws in some other States and Territories set out the powers of people who act as financial managers. In some places, these people are known as “administrators”.
- 3.49 While this Chapter focuses on the powers of the NSW Trustee when it is appointed as a manager, we note that the NSW Trustee also oversees the actions of private managers. We will review the role of the NSW Trustee as a monitor of private managers in a later question paper.⁶³

What powers and functions can be given to private managers?

- 3.50 Private managers do not automatically obtain the power to “interfere” with (or manage) the person’s estate upon their appointment. They can only exercise this power if:
- they have obtained a direction from the Supreme Court, or
 - the NSW Trustee has authorised them to exercise functions relating to the estate.⁶⁴
- 3.51 However, a private manager can act to preserve the person’s estate while waiting to obtain authorisation.⁶⁵ In addition, the NSW Trustee may authorise funds to be taken from the estate to pay for the maintenance of the person or their family as a temporary measure before further orders are issued.⁶⁶
- 3.52 Under the *Trustee and Guardian Act*, the Supreme Court or the NSW Trustee may:
- make such orders in relation to the management of the person’s estate as it thinks fit, and

62. *Guardianship Act 1987* (NSW) s 25M(1), s 25E, s 3(1) definition of “estate”. See also *NSW Trustee and Guardian Act 2009* (NSW) s 11(2).

63. For details on our process for the Guardianship Review, see Chapter 1.

64. *Guardianship Act 1987* (NSW) s 25M(2).

65. *Guardianship Act 1987* (NSW) s 25M(3).

66. *NSW Trustee and Guardian Act 2009* (NSW) s 73.

- make orders authorising, directing or enforcing the exercise of a manager's functions under the Act.⁶⁷
- 3.53 More specifically, the Supreme Court and the NSW Trustee can grant private managers the power to undertake a range of functions relating to the person's estate. This includes, for example, functions relating to paying debts, selling the person's property, making investments on behalf of the person, and preserving or improving the person's estate.⁶⁸
- 3.54 In addition, the NSW Trustee can authorise a private manager to undertake other functions, including those that are "necessary and incidental to the management and care of an estate".⁶⁹ The NSW Trustee may grant a private manager any of the powers that are available to the NSW Trustee when it acts as a manager.⁷⁰ We consider these powers at [3.59], below. The NSW Trustee can also issue directions to a private manager relating to the exercise of their authority.⁷¹
- 3.55 In accordance with an order or direction of the Court, the NSW Trustee or the Tribunal, a manager may "execute and sign any document and do any other thing in the name of and on behalf of the managed person".⁷² This action is as effective as if it was done by the person and the person had the capacity to do so.⁷³
- 3.56 A private manager may also invest estate funds in accordance with the *Trustee Act 1925* (NSW). This gives a financial manager a broad power of investment subject to any express prohibitions and prudent management.⁷⁴

What powers and functions can the NSW Trustee exercise?

- 3.57 The *Trustee and Guardian Act* grants the NSW Trustee extensive powers and functions. The NSW Trustee can exercise all the functions that the person would have been able to exercise, if the law recognised the person had the capacity to do so.⁷⁵
- 3.58 When the NSW Trustee manages a person's estate, it can exercise "all functions necessary and incidental to its management and care".⁷⁶ The Supreme Court may also direct or authorise the NSW Trustee to exercise specific functions. The Tribunal may do the same if the person is under guardianship.⁷⁷
- 3.59 The *Trustee and Guardian Act* contains a long list of powers and functions that the NSW Trustee can generally exercise. The NSW Trustee may, for example, receive rent, grant leases of less than 10 years, buy and sell property, carry on a business, bring and defend legal actions or make payments.⁷⁸ The NSW Trustee "may do all

67. *NSW Trustee and Guardian Act 2009* (NSW) s 64(1)–(2).

68. *NSW Trustee and Guardian Act 2009* (NSW) s 65.

69. *NSW Trustee and Guardian Act 2009* (NSW) s 66(1)(a).

70. *NSW Trustee and Guardian Act 2009* (NSW) s 66(2), s 16.

71. *NSW Trustee and Guardian Act 2009* (NSW) s 66(1)(b).

72. *NSW Trustee and Guardian Act 2009* (NSW) s 67(1).

73. *NSW Trustee and Guardian Act 2009* (NSW) s 67(2).

74. *NSW Trustee and Guardian Act 2009* (NSW) s 101; *Trustee Act 1925* (NSW) s 14, s 14A.

75. *NSW Trustee and Guardian Act 2009* (NSW) s 57(1).

76. *NSW Trustee and Guardian Act 2009* (NSW) s 56(a).

77. *NSW Trustee and Guardian Act 2009* (NSW) s 56(b).

78. *NSW Trustee and Guardian Act 2009* (NSW) s 16, s 56 (note).

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such supplemental, incidental or consequential acts as may be necessary or expedient for the exercise of its functions”.⁷⁹

3.60 The NSW Trustee can use money from the estate to pay for:

- the person's debts and expenses
- the person's funeral expenses, if they die
- maintenance of the person's spouse, child or other dependents
- the costs incurred in relation to actions such as selling the person's estate
- preserving and improving the estate
- certain actions relating to shareholding, and
- the maintenance, clothing, medicine and care of the person.⁸⁰

3.61 The NSW Trustee can execute and sign documents on behalf of, and in the name of, the person concerned.⁸¹ This action is as effective as if it was done by the person and the person had the capacity to do so.⁸² The NSW Trustee may also invest funds of the estate in accordance with the *Trustee Act 1925* (NSW).⁸³

Other general powers

3.62 The *Trustee and Guardian Act* sets out a range of other powers and functions that financial managers can exercise. We provide some examples of these powers and functions below.

Gifts and donations

3.63 A financial manager may use a person's property to make:

- seasonal or special event gifts to the person's relatives or close friends, and
- donations that the person would have made or might reasonably be expected to make.⁸⁴

Investments

3.64 Financial managers may also:

- purchase real estate to protect the person's estate, increase the value of other lands of the estate, or provide a home for the person or their dependants, and
- enter into the type of investments that the person prefers.⁸⁵

79. *NSW Trustee and Guardian Act 2009* (NSW) s 10(2).

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

81. *NSW Trustee and Guardian Act 2009* (NSW) s 58(1).

82. *NSW Trustee and Guardian Act 2009* (NSW) s 58(2).

83. *NSW Trustee and Guardian Act 2009* (NSW) s 101(1).

84. *NSW Trustee and Guardian Act 2009* (NSW) s 76. See *Woodward v Woodward* [2015] NSWSC 1793 [36].

Allowing the person to manage aspects of their estate

- 3.65 The *Trustee and Guardian Act* suspends a person's ability to deal with their estate while their estate is under management. If only part of that estate is under management, the person cannot deal with that part.⁸⁶
- 3.66 However, a manager may permit the person to deal with as much of the estate as the manager "considers appropriate".⁸⁷ The manager may give or withdraw an authorisation at any time.⁸⁸ However, the NSW Trustee must approve the authorisation.⁸⁹

What is the situation in other States and Territories?

- 3.67 The laws in some other States and Territories take a different approach to:
- the process for granting powers and functions to private managers, and
 - defining the powers and functions that private managers cannot exercise.

The process for granting powers and functions

- 3.68 In NSW, the usual practice is for the NSW Trustee to confer powers and functions upon a private manager. In some other States and Territories, the legislation either specifies the powers of private managers or enables tribunals to grant the powers directly.
- 3.69 In Victoria, for example, all administrators have the powers and duties that are listed in Part 5, Division 3 of the *Guardianship and Administration Act 1986* (Vic).⁹⁰ This Act also contains a separate list of optional powers. The Victorian tribunal can grant an administrator all or some of the powers and duties in this separate list.⁹¹ The Victorian State Trustee has no special status in this arrangement. It can accept and decline an appointment just like any other trustee company.⁹²
- 3.70 Drawing on these existing arrangements, the VLRC recommended that the Victorian legislation should contain a non-exhaustive list of powers in relation to "financial matters" that the Victorian tribunal could give to a financial administrator. The tribunal could give a financial administrator all or some of these powers.⁹³
- 3.71 In Queensland, an administrator is authorised, in accordance with the terms of the appointment, to do anything in relation to a financial matter that the person could have done if the person had capacity. This applies unless the tribunal orders otherwise.⁹⁴

85. *NSW Trustee and Guardian Act 2009* (NSW) s 102.

86. *NSW Trustee and Guardian Act 2009* (NSW) s 71(1).

87. *NSW Trustee and Guardian Act 2009* (NSW) s 71(2).

88. *NSW Trustee and Guardian Act 2009* (NSW) s 71(3).

89. *NSW Trustee and Guardian Act 2009* (NSW) s 71(5).

90. *Guardianship and Administration Act 1986* (Vic) s 48(1).

91. *Guardianship and Administration Act 1986* (Vic) s 48(1), pt 5 div 3A.

92. *Purves Clarke Richards (a firm) v State Trustees Limited* [2000] VSC 72 [56].

93. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 106, rec 180, rec 181.

94. *Guardianship and Administration Act 2000* (Qld) s 33(2).

QP3 The role of guardians and financial managers

3.72 In the Northern Territory, the tribunal may appoint either an individual (a guardian) or the Public Trustee to deal with a person's financial matters.⁹⁵ The tribunal must specify the financial matters over which the guardian has authority.⁹⁶ The legislation defines "financial matter" as "a matter relating to the adult's property or financial affairs" and provides examples of such matters.⁹⁷ The tribunal may also impose restrictions on the guardian's authority, require the guardian to comply with certain conditions, or give directions to the guardian about the exercise of their power.⁹⁸

Powers and functions that financial managers cannot exercise

3.73 The VLRC also recommended that the legislation should contain a non-exhaustive list of decision-making powers that the tribunal cannot give to a financial administrator.⁹⁹

3.74 This list should include the following powers:

- (a) making or revoking the person's will
- (b) managing the estate of the principal upon their death
- (c) consenting to an unlawful act
- (d) making decisions that restrict the person's personal decision-making autonomy, but cannot be reasonably justified in order to ensure proper management of their finances
- (e) a conflict transaction, unless the transaction has been specifically allowed in the order.¹⁰⁰

3.75 In the Northern Territory, a guardian (including one granted powers over financial matters) cannot exercise certain powers. For instance, the guardian cannot make, vary or revoke a will, a power of attorney or an advance personal plan.¹⁰¹

Question 3.5: What powers and functions should financial managers have?

- (1) What powers and functions should be available to a private manager?
- (2) What powers and functions should the NSW Trustee have when acting as a financial manager?
- (3) Are the current arrangements for granting powers to private managers adequate? If not, how should powers be granted to private managers?
- (4) Should the legislation list the powers that a financial manager cannot exercise? If so, what should be on this list?

95. *Guardianship of Adults Act* (NT) s 13.

96. *Guardianship of Adults Act* (NT) s 16.

97. *Guardianship of Adults Act* (NT) s 3 definition of "financial matter".

98. *Guardianship of Adults Act* (NT) s 17, s 33(2)(c).

99. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 107.

100. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 107. For information on conflict transactions see: rec 120, rec 121, rec 122, rec 123.

101. *Guardianship of Adults Act* (NT) s 24.

Should the roles of tribunal-appointed guardians and financial managers remain separate?

- 3.76 As discussed in this Question Paper, the *Guardianship Act* provides for two main roles: guardian and financial manager. There are considerable differences between the guardianship and the financial management regimes.
- 3.77 While these roles both involve substitute decision-making, guardians and financial managers have different functions. The Tribunal appoints people to these roles under distinct orders. As we considered in Question Paper 1, the preconditions for making guardianship orders and financial management orders differ.¹⁰² In addition, as discussed in Chapter 2 of this Question Paper, the *Guardianship Act* expresses the eligibility criteria for guardians and financial managers in different ways.
- 3.78 Over the course of our review, we have heard about the stress faced by private guardians and financial managers as they seek to understand (and exercise) their powers and responsibilities. In light of this, one submission favours a single order that sets out all the obligations of the appointee.¹⁰³ Among other things, this issue raises the question of whether the roles of guardian and financial manager should remain separate.
- 3.79 The VLRC considered this issue in its review of the Victorian guardianship system. In its final report, the VLRC recognised that “the reality of most people’s lives is that lifestyle and financial decisions are seldom completely separate”.¹⁰⁴
- 3.80 However, the VLRC also observed that different skills are involved in making these two types of decisions.¹⁰⁵ Because of this, the VLRC recommended that Victoria should retain the distinction between guardians and financial administrators – even though one person may occupy both roles.¹⁰⁶ The then Victorian Government proposed to keep both “guardianship orders” and “administration orders” in the Victorian Bill.¹⁰⁷
- 3.81 In contrast, the Northern Territory legislation enables the tribunal to give a guardian powers in relation to personal matters, financial matters or both. The tribunal must specify the scope of the guardian’s authority in the guardianship order.¹⁰⁸

102. NSW Law Reform Commission, *Preconditions for Alternative Decision-Making Arrangements*, Review of the Guardianship Act 1987 Question Paper 1 (2016) ch 4.

103. Confidential, *Preliminary Submission PGA25*.

104. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [5.46].

105. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [5.47].

106. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [12.185]–[12.187].

107. Guardianship and Administration Bill 2014 (Vic) cl 20.

108. *Guardianship of Adults Act* (NT) s 16.

Question 3.6: Should the roles of guardians and financial managers remain separate?

- (1) What are the benefits and disadvantages of keeping the roles of guardians and financial managers separate?
- (2) What are the benefits and disadvantages of combining the roles of guardians and financial managers?
- (3) Should the roles of tribunal-appointed guardians and financial managers remain separate?

4. What decision-making principles should guardians and financial managers observe?

In brief

Under NSW law, guardians and financial managers must give “paramount consideration” to a person’s “welfare and interests” when they exercise their functions. This Chapter considers whether they should instead be required to give effect to the person’s “will and preferences”.

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- 4.1 In this Chapter, we focus on what guardians and financial managers should consider when they make decisions and act on behalf of somebody else.
- 4.2 The Chapter first considers the general principles that guardians and financial managers must observe in NSW law.¹ Currently, guardians and financial managers must give “paramount consideration” to the person’s “welfare and interests”.²
- 4.3 The Chapter next considers whether this needs to change. In particular, we seek your views on whether the law should require guardians and financial managers to give effect to the person’s rights, will and preferences. Finally, this Chapter considers two options for reforming the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) to achieve this.
- 4.4 As this Chapter focuses on general decision-making principles, we will review other specific duties and responsibilities of guardians and financial managers in a later question paper.³

1. *Guardianship Act 1987* (NSW) s 4; *NSW Trustee and Guardianship Act 2009* (NSW) s 39.

2. *Guardianship Act 1987* (NSW) s 4(a); *NSW Trustee and Guardianship Act 2009* (NSW) s 39(a).

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- 4.5 Some States and Territories (and other law reform bodies) use other terms to refer to people who perform roles similar to guardians and financial managers. Throughout this Chapter, we use the expression “decision-maker” to refer generally to anyone who is appointed to make a decision or act on someone else’s behalf.

What are the current decision-making principles?

- 4.6 In this section, we consider the decision-making principles that exist currently in the laws of NSW and some other States and Territories.

The general principles in NSW law

- 4.7 At present, everyone exercising functions under the *Guardianship Act* with respect to people with disability must observe the following general 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.⁴
- 4.8 The same principles are contained in s 39 of the *NSW Trustee and Guardian Act 2009* (NSW). As such, guardians and financial managers must apply these principles when they exercise their powers and functions.

Decision-making principles in other States and Territories

- 4.9 The laws in other States and Territories also contain various principles that decision-makers must take into account. For instance, the new Northern Territory legislation contains a non-exhaustive list of “relevant considerations”.⁵

3. For details on our process for the Guardianship Review, see Chapter 1 of this Question Paper.

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

5. *Guardianship of Adults Act* (NT) s 4(3)–(5).

4.10 A number of principles found in the laws of some other States and Territories (and in the recommendations of other law reform bodies) do not appear in the *Guardianship Act*.

4.11 For instance, some laws require decision-makers to:

- provide the person with support to make, or participate in, decisions that affect them⁶
- consider the importance of maintaining (or creating) support networks and supportive relationships⁷
- consult with the person,⁸ their carers and others (unless this would affect the person's interests adversely)⁹
- cooperate with the person's other agents¹⁰
- recognise, consider and promote the basic human rights of all adults¹¹
- consider the person's right to be treated with dignity and respect¹²
- consider the person's right to be a valued member of society and encourage them to undertake socially valued roles¹³
- consider the importance of maintaining the person's Aboriginal or Torres Strait Islander cultural and linguistic environment, values, traditions and customs (where relevant)¹⁴
- consider the person's right to confidentiality¹⁵ and privacy¹⁶
- exercise their powers in a way that is appropriate to the person's characteristics and needs¹⁷

6. See, eg, *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(3)(a); Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 285(c).

7. See, eg, *Guardianship of Adults Act* (NT) s 4(5)(l). See also Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) rec 4-3(4).

8. See, eg, *Guardianship and Administration Act 1990* (WA) s 51(2)(e), s 70(2)(e); Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 285(b).

9. *Guardianship and Management of Property Act 1991* (ACT) s 4(3), s 4(4); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 4-8(f).

10. *Guardianship of Adults Act* (NT) s 22(1)(c).

11. See, eg, *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 2. See also Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) rec 4-3.

12. *Guardianship of Adults Act* (NT) s 4(5)(j); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 3.

13. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 4; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) rec 4-3.

14. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 9(2). See also Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) rec 4-3.

15. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 11.

16. See Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) rec 4-3.

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- consider the importance of promoting the person’s happiness, enjoyment of life and wellbeing¹⁸
 - consider the ability of the person to maintain their preferred living environment and lifestyle¹⁹
 - consider issues relating to the provision of appropriate care, including health care,²⁰ and
 - act with honesty, care, skill and diligence.²¹
- 4.12 Currently, the Victorian legislation requires guardians and administrators to “act in the best interest” of the person they represent.²² The Victorian Law Reform Commission (“VLRC”) thought that this should change. The VLRC observed that the “best interest” test has been criticised for being unclear, paternalistic and for relying upon the values of the decision-maker.²³
- 4.13 Instead, the VLRC believed that “decision makers should have an overarching responsibility to act in a way that promotes the personal and social wellbeing of the represented person”.²⁴ The Victorian Public Advocate preferred this expression because it places “more emphasis on the person and the outcomes sought for that person” than the current standard.²⁵
- 4.14 In its preliminary submission to our review, the Mental Health Commission of NSW supports the VLRC’s proposal.²⁶

Question 4.1: What decision-making principles should guardians and financial managers observe?

What principles should guardians and financial managers observe when they make decisions on behalf of another person?

Should guardians and financial managers be required to give effect to a person’s “will and preferences”?

- 4.15 A significant issue is whether NSW law should require guardians and financial managers to give effect to a person’s will and preferences when they act on their behalf. In this section, we consider the background to this debate.

17. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 10.

18. *Guardianship of Adults Act* (NT) s 4(5)(g).

19. *Guardianship of Adults Act* (NT) s 4(5)(k).

20. *Guardianship of Adults Act* (NT) s 4(5)(f).

21. *Guardianship of Adults Act* (NT) s 22(1)(d). See also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 4-8(e).

22. *Guardianship and Administration Act 1986* (Vic) s 28(1), s 49(1).

23. Victorian Law Reform Commission, *Guardianship*, Report 24 (2012) [6.93]–[6.95].

24. Victorian Law Reform Commission, *Guardianship*, Report 24 (2012) [17.100], rec 284.

25. Victorian Law Reform Commission, *Guardianship*, Report 24 (2012) [17.122].

26. Mental Health Commission of NSW, *Preliminary Submission PGA39*, 7.

Significance of the UN *Convention*

- 4.16 There have been considerable developments concerning the rights of people with disability since the NSW Parliament enacted the *Guardianship Act*. Most significantly, the United Nations *Convention on the Rights of Persons with Disabilities* (“UN *Convention*”)²⁷ came into effect in 2008.
- 4.17 There is ongoing debate over whether laws that enable one person to make decisions on behalf of another are compatible with the UN *Convention*.²⁸ We considered this issue in Question Paper 2.²⁹
- 4.18 At the very least, the UN *Convention* signals that the way in which guardians and financial managers exercise their functions may need to change. Among other things, the *Convention* emphasises that the “rights, will and preferences” of people with disability must be respected.³⁰ This suggests that decision-makers should not make decisions based on their understanding of the person’s best interests.³¹ Instead, decision-makers should seek to give effect to the person’s rights, will and preferences.
- 4.19 The Australian Law Reform Commission (“ALRC”) adopted this position. In its report, the ALRC proposed a model of supported decision-making. Under this model, a “supporter” would assist a person “to express their will and preferences in making decisions”³² but would not make decisions on the person’s behalf.
- 4.20 The ALRC considered that law reform efforts must also focus on the standard by which “anyone appointed to act on behalf of another” is to act.³³ Accordingly, the ALRC recommended that decision-makers must give effect to the person’s will and preferences.³⁴ We discuss the ALRC’s model at [4.56]–[4.72] below.
- 4.21 The ACT Law Reform Advisory Council (“ACTLRAC”) adopted a similar approach in its recent report on guardianship. The ACTLRAC recommended that decisions made by a “representative” must reflect “the will and preferences of the person with impaired decision making ability, as well as being consistent with their rights”.³⁵

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

28. See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [2.73]–[2.90].

29. NSW Law Reform Commission, *Decision-Making Models*, Review of the Guardianship Act 1987 Question Paper 2 (2016) ch 4.

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

31. United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition before the Law*, UN Doc CRPD/C/GC/1 (2014) [21].

32. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 4-5(b).

33. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [2.90].

34. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-3(2)(a).

35. ACT Law Reform Advisory Council, *Guardianship Report* (2016) rec 8.

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4.22 In light of the principles of dignity, autonomy and equality that underpin the UN *Convention*,³⁶ it may be necessary to redesign the decision-making principles that guardians and financial managers must observe.

“Welfare and interests” or “will and preferences”?

4.23 Currently, guardians and financial managers must give “paramount consideration” to the person’s “welfare and interests”.³⁷ The general principles also require guardians and financial managers to consider the person’s views.³⁸

4.24 However, a guardian or manager is not required to give effect to these views. Indeed, as Justice Slattery of the Supreme Court has observed, the *Guardianship Act* “allows the guardian ... to override the wishes of the person under guardianship”.³⁹

4.25 In its preliminary submission, the Disability Council NSW states that the current standard is “fundamentally inconsistent” with the UN *Convention*. This is because the standard “does not respect the autonomy of the individual and places a responsibility on the guardian or administrator to act in a protective capacity”.⁴⁰

4.26 Several preliminary submissions also suggest that NSW should move away from the current standard. Instead, guardians and financial managers should give effect to a person’s actual or likely will and preferences.⁴¹

4.27 However, as we discussed in Question Paper 2, determining (and giving effect to) a person’s will and preferences may not always be easy.⁴² For instance, complications can arise if:

- the person’s will and preferences are difficult (or even impossible) to work out or understand
- the person’s current wishes do not reflect the views that they expressed before their decision-making capacity became impaired, or
- a decision based on the person’s will and preferences could harm them.

4.28 For instance, the NSW Council for Intellectual Disability (“NSWCID”) observes that some people may be under the influence of others, hold variable views, or have extremely limited abilities to communicate and understand “options and consequences”.⁴³

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

37. *Guardianship Act 1987* (NSW) s 4(a); *NSW Trustee and Guardianship Act 2009* (NSW) s 39(a).

38. *Guardianship Act 1987* (NSW) s 4(d); *NSW Trustee and Guardianship Act 2009* (NSW) s 39(d).

39. *White v Local Health Authority* [2015] NSWSC 417 [73], citing *Guardianship Act 1987* (NSW) s 21, s 21A, s 21B, s 21C.

40. Disability Council NSW, *Preliminary Submission PGA26*, 8.

41. See, eg, L Barry, *Preliminary Submission PGA02*, 1; NSW Disability Network Forum, *Preliminary Submission PGA05*, 3; NSW Trustee and Guardian, *Preliminary Submission PGA50*, 2.

42. NSW Law Reform Commission, *Decision-Making Models*, Review of the Guardianship Act 1987 Question Paper 2 (2016) [5.33]–[5.35].

43. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 3.

- 4.29 In another preliminary submission, the Australian Lawyers Alliance supports “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”.⁴⁴

Question 4.2: Should guardians and financial managers be required to give effect to a person’s “will and preferences”?

- (1) What are the advantages and disadvantages of the current emphasis on “welfare and interests” in the *Guardianship Act’s* general principles?
- (2) Should “welfare and interests” continue to be the “paramount consideration” for guardians and financial managers?
- (3) What could be the benefits and disadvantages of requiring guardians and financial managers to give effect to a person’s will and preferences?
- (4) Should guardians and financial managers be required to give effect to a person’s will and preferences?

How could the law be changed?

- 4.30 In this section, we highlight two possible options for introducing a new decision-making process into the *Guardianship Act*. The first applies a “substituted judgment” approach. The second is what we will call a “structured will and preferences” model.
- 4.31 Both models seek to promote the autonomy of people with impaired decision-making capacity.

A “substituted judgment” model

- 4.32 One option could be to implement a “substituted judgment” model. This would require decision-makers to implement the decision that the person “would have made if they did not have impaired capacity”.⁴⁵
- 4.33 Examples of substituted judgment models are contained in the South Australian⁴⁶ and Queensland⁴⁷ guardianship laws. The VLRC and the Queensland Law Reform Commission (“QLRC”) also endorsed a substituted judgment approach.⁴⁸

South Australia

- 4.34 In South Australia, decision-makers must give “paramount consideration” to “what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated”.⁴⁹ However, they are to do so

44. Australian Lawyers Alliance, *Preliminary Submission PGA52*, 2.

45. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.67].

46. *Guardianship and Administration Act 1993* (SA) s 5.

47. *Guardianship and Administration Act 2000* (Qld) s 34, sch 1 pt 1 cl 7(4).

48. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 285(a); Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) rec 4-4, rec 4-5.

49. *Guardianship and Administration Act 1993* (SA) s 5(a).

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only if “there is reasonably ascertainable evidence on which to base such an opinion”.⁵⁰

- 4.35 Decision-makers are also required to seek and consider the person’s present wishes “unless it is not possible or reasonably practicable to do so”.⁵¹ However, decision-makers do not have to give effect to these wishes.
- 4.36 Overall, the South Australian legislation requires decision-makers to ensure that their decision is “the one that is the least restrictive of the person’s rights and personal autonomy as is consistent with his or her proper care and protection”.⁵² In other words, substituted judgment is not the sole principle that decision-makers must apply.

Queensland

- 4.37 Queensland’s legislation also contains a “substituted judgment” model. This Act contains a list of general principles that decision-makers must observe.⁵³ Among other things, principle 7(4) states that:

[T]he principle of substituted judgment must be used so that if, from the adult’s previous actions, it is reasonably practicable to work out what the adult’s views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult’s views and wishes.⁵⁴

- 4.38 However, as a paramount consideration, principle 7(5) requires decision-makers to exercise their powers and functions “in a way consistent with the adult’s proper care and protection”.⁵⁵
- 4.39 The QLRC considered that the language of principle 7(5) was too paternalistic and allowed “an adult’s views and wishes to be readily overwritten”.⁵⁶ Accordingly, the QLRC proposed a new approach to decision-making.
- 4.40 The members of the QLRC expressed different views about the details of this new approach. In particular, they disagreed over whether substituted judgment should be the paramount consideration.
- 4.41 The majority of the QLRC recommended that decision-makers must:
- recognise and take into account the importance of preserving, to the greatest extent practicable, the person’s right to make their own decisions
 - use the principle of substituted judgment (based on the views and wishes expressed by the person when they had capacity)

50. *Guardianship and Administration Act 1993* (SA) s 5(a).

51. *Guardianship and Administration Act 1993* (SA) s 5(b).

52. *Guardianship and Administration Act 1993* (SA) s 5(d).

53. *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1.

54. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(4).

55. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(5).

56. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) [4.236].

- recognise and take into account any other views and wishes expressed by the adult, and
 - recognise and take into account any other consideration that the general principles require them to.⁵⁷
- 4.42 The members of the majority said that decision-makers should consider all of these factors. The majority did not believe “that the principle of substituted judgment should be given greater consideration than [the person’s] other views and wishes”.⁵⁸
- 4.43 One member of the QLRC proposed a different approach. That member said that decision-makers should use substituted judgment as the primary consideration. Decision-makers must “give effect to what the person or other entity considers the adult’s views and wishes would be”.⁵⁹ This applies if “it is reasonably practicable to work out what the adult’s views and wishes would be” based upon the views and wishes they expressed when they had capacity.⁶⁰
- 4.44 However, the minority member did not promote substituted judgment as the sole factor that decision-makers must consider. According to the minority member, the decision-maker must also recognise, and consider, any other views and wishes of the adult (along with other applicable decision-making principles).⁶¹

The VLRC

- 4.45 The VLRC also incorporated substituted judgment into its recommended list of decision-making principles. Above all, these principles would require decision-makers to “exercise their powers in a manner that promotes the personal and social wellbeing” of the person on whose behalf they act.⁶²
- 4.46 In its recommendations, the VLRC guided decision-makers on how to observe this overarching principle. Above all, the VLRC stated that decision-makers will promote the person’s wellbeing when they “have paramount regard to making the judgments and decisions that the person would make themselves after due consideration if able to do so”.⁶³
- 4.47 The VLRC took the position that decision-makers should not simply rely upon wishes that the person expressed in the past. Instead, as the VLRC explained:

Substituted judgment provides decision makers with a ... structured approach to carrying out the person’s wishes. It is not a simple matter of doing what the person did prior to losing capacity. Making the decision the person would make themselves requires substitute decision makers to consider the expressed wishes of the person—both past and present—and to place these wishes in the

57. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) rec 4-4.

58. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) [4.250], [4.253].

59. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) rec 4-5, rec 4-5.

60. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) rec 4-5, rec 4-5.

61. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) rec 4-5, rec 4-5.

62. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 284.

63. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 285(a).

context of the person's current circumstances and the decision that needs to be made.⁶⁴

- 4.48 Specifically, the VLRC recommended that decision-makers should consider the following factors when determining what the person would have wanted:
- (a) the wishes and preferences the person expresses at the time a decision needs to be made, in whatever form the person expresses them
 - (b) any wishes the person has previously expressed, in whatever form the person has expressed them
 - (c) any considerations the person was unaware of when expressing their wishes which are likely to have significantly affected those wishes
 - (d) any circumstances that have changed since the person expressed their wishes which would be likely to significantly affect those wishes
 - (e) the history of the person, including their views, beliefs, values and goals in life.⁶⁵
- 4.49 The VLRC recognised that, in some cases, a substituted judgment approach could expose a person to an unacceptable risk of harm.⁶⁶ In such a case, the decision-maker would need to bear in mind the overarching goal of promoting the person's personal and social wellbeing.⁶⁷
- 4.50 In its preliminary submission, the NSWCID supports the VLRC's decision-making principles.⁶⁸ The NSW Trustee and Guardian also suggests a set of principles like those proposed by the VLRC.⁶⁹

Considerations relating to "substituted judgment"

- 4.51 Some have argued that a substituted judgment approach has advantages over a best interest standard. The VLRC considered that substituted judgment preserves a person's autonomy. It does this by attempting to place the person "in the same position they would have been if they had the capacity to make the decision themselves".⁷⁰ In the VLRC's view, their model would assist to align Victoria's guardianship legislation with the UN *Convention*.⁷¹
- 4.52 However, a substituted judgment model can have disadvantages. There is a risk that decision-makers may impose their own views or values when deciding what the

64. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.105].

65. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 286.

66. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.117]–[17.119].

67. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.122].

68. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 4.

69. NSW Trustee and Guardian, *Preliminary Submission PGA50*, 7.

70. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.106]. See also Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [4.260].

71. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.107].

person would have wanted.⁷² The decision-maker's own judgment might take the place of the views that the person currently holds.

- 4.53 Substituted judgment also raises the issue of how a decision-maker should balance the person's current will and preferences alongside other factors – including views that they held in the past. People's views often change over time. It can be difficult to determine what a person would have done, had things been different.
- 4.54 In addition, a decision-maker may not be able to work out a person's past views and wishes. This could arise, for instance, where the person has a long-term condition or where no one is available to help the decision-maker understand what the person was once like.⁷³
- 4.55 Perhaps because of these issues, none of the examples discussed above make substituted judgment the only principle that decision-makers must observe. For instance, the VLRC model requires decision-makers to promote the person's personal and social wellbeing.

Question 4.3: Should NSW adopt a “substituted judgment” model?

- (1) What could be the benefits and disadvantages of a “substituted judgment” approach to decision-making?
- (2) Should the *Guardianship Act* require guardians and financial managers to give effect to the decision the person would have made if they had decision-making capacity (that is, a “substituted judgment” approach)?
- (3) If so, how would guardians and financial managers work out what the person would have wanted? Should the legislation set out the steps they should take?

A “structured will and preferences” model

- 4.56 Another option could be to implement what we call a “structured will and preferences” model. Aspects of this model resemble substituted judgment. However, a structured will and preferences model emphasises that decision-makers must first seek to give effect to a person's actual will and preferences.
- 4.57 The *My Health Records Act 2012* (Cth) (“*My Health Records Act*”) and the ALRC's recommendations provide examples of this approach. Although the details vary, both:
- require decision-makers to give effect to a person's will and preferences
 - explain what should happen if a person's actual will and preferences cannot be determined

72. S M Callaghan and C Ryan, “Is There a Future for Involuntary Treatment in Rights-Based Mental Health Law?” (2014) 21 *Psychiatry, Psychology and Law* 747, 758–759; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.112].

73. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.109]; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [4.267].

- explain what should happen if a person's likely will and preferences cannot be determined, and
- allow a decision-maker to override a person's will and preferences in exceptional circumstances.

4.58 This step-by-step approach could help to address some of the difficulties associated with determining, and giving effect to, a person's will and preferences. We discuss the key features of this approach below. We also set out some ideas for refining this approach, taken from preliminary submissions to our review.

A general rule: give effect to will and preferences

4.59 Under the ALRC's model, decision-makers "must" give effect to the person's "will and preferences".⁷⁴ Similarly, the *My Health Records Act* requires decision-makers to "make reasonable efforts to ascertain" a person's will and preferences.⁷⁵ If they can do this, the decision-maker must then give effect to the person's will and preferences.⁷⁶

What if a person's will and preferences cannot be determined?

4.60 The UN Committee on the Rights of Persons with Disabilities has noted that it may not always be possible to determine a person's will and preferences. This might arise even "after significant efforts have been made". The Committee considered that the "best interpretation" of the person's will and preferences should be used in this situation.⁷⁷

4.61 Similarly, the *My Health Records Act* and the ALRC's model anticipate that it may be difficult or impossible to determine a person's will and preferences. When this happens, decision-makers must attempt to ascertain the person's *likely* will and preferences⁷⁸ or "what the person would likely want".⁷⁹ The decision-makers should then give effect to this.⁸⁰

4.62 Both the *My Health Records Act* and the ALRC's model guide decision-makers on how to determine a person's "likely" wishes. The *My Health Records Act* states that decision-makers may consult other people who may be aware of the person's will and preferences.⁸¹ According to the ALRC, decision-makers should base their assessment on all available information, including the views expressed by family members, carers and other significant people in the person's life.⁸²

74. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-3.

75. *My Health Records Act 2012* (Cth) s 7A(1).

76. *My Health Records Act 2012* (Cth) s 7A(4).

77. United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition before the Law*, UN Doc CRPD/C/GC/1 (2014) [21].

78. *My Health Records Act 2012* (Cth) s 7A(2).

79. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-3(2)(b).

80. *My Health Records Act 2012* (Cth) s 7A(4).

81. *My Health Records Act 2012* (Cth) s 7A(3).

82. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-3(2)(b).

- 4.63 In its preliminary submission, the Intellectual Disability Rights Service (“IDRS”) “supports an approach which not only tries to ascertain the person’s likely will and preferences but looks more broadly at the personal and social wellbeing of the supported person”.⁸³ In its view, these broader considerations are important because the “person’s environment may be limited in some way, the person may rely completely on the views of one person or may be unaware of opportunities available to them”.⁸⁴

What if a person’s “likely” will and preferences cannot be determined?

- 4.64 There may be times when a decision-maker cannot work out what the person would likely want. It may be necessary for the legislation to specify a standard that decision-makers must observe when this occurs.
- 4.65 The ALRC recommended that a decision-maker in this situation “must act to promote and uphold the person’s human rights and act in the way least restrictive of those rights”.⁸⁵ The ACTLRAC agreed that decisions “must be based on the person’s rights” when their will and preferences “are unknown and unknowable”.⁸⁶
- 4.66 The federal Parliament adopted a different standard in the *My Health Records Act*. That is, decision-makers must “act in a manner that promotes the personal and social wellbeing” of the person concerned.⁸⁷
- 4.67 In its preliminary submission to our review, the NSWCID questions whether a human rights standard adopted by the ALRC provides “a sufficient basis for decisions”.⁸⁸ In its view, it may be difficult for decision-makers to understand how to make decisions based on this standard.⁸⁹ The Council considers the focus on personal and social wellbeing found in the *My Health Records Act* provides a better “basis for decisions rather than human rights”.⁹⁰

When, if ever, can a decision-maker override a person’s will and preferences?

- 4.68 It may not always be easy to implement the person’s will and preferences. Difficult questions can arise if, for instance, the person is at risk of serious harm.
- 4.69 The *My Health Records Act* and the ALRC’s model both recognise that a decision-maker can override a person’s will and preferences in exceptional circumstances. Under the ALRC’s model, decision-makers may override the person’s will and preferences “only where necessary to prevent harm”.⁹¹
- 4.70 The *My Health Records Act* uses a different expression. If giving effect to the person’s will and preferences would “pose a serious risk” to their “personal and

83. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 6.

84. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 6–7.

85. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-3(2)(c).

86. ACT Law Reform Advisory Council, *Guardianship Report* (2016) [7.3.1].

87. *My Health Records Act 2012* (Cth) s 7A(6).

88. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 4.

89. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 4.

90. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 5.

91. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-3.

social wellbeing”, a decision-maker must instead “act in a manner that promotes” the person’s “personal and social wellbeing”.⁹²

- 4.71 In its preliminary submission, the IDRS suggests “any decision should promote the option which is least restrictive of the supported person’s rights but must also consider likely harm to the person”.⁹³ The IDRS also notes that the ALRC does not define harm in its recommendation. According to the IDRS:

The parameters of harm should not be left open to interpretation and should be defined. Physical, emotional and psychological harm must be considered. For example, a financial decision maker should not be able to determine that the preservation of a person’s assets is the overriding factor in determining harm.⁹⁴

- 4.72 The NSWCID observes that the ALRC’s recommendation would cover situations in which “a person is clearly placing themselves or others at great risk”. However, the NSWCID suggests that the word “harm” may also need to cover people at risk of “missing out on access to opportunities to live a rich and varied lifestyle and develop skills”.⁹⁵ The Council considers that the reference to “personal and social wellbeing” in the *My Health Records Act* might address this concern.

Question 4.4: Should NSW adopt a “structured will and preferences” model?

- (1) What could be the benefits and disadvantages of a “structured will and preferences” approach to decision-making?
- (2) Should guardians and financial managers be required to make decisions based upon a person’s will and preferences?
- (3) If so, how would guardians and financial managers work out a person’s will and preferences? Should the legislation set out the steps they should take?
- (4) What should a guardian or financial manager be required to do if they cannot determine a person’s will and preferences?
- (5) Should a guardian or financial manager ever be able to override a person’s will and preferences? If so, when should they be allowed to do this?

92. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 5.

93. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 7.

94. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 7.

95. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 3.

Appendix A

Preliminary submissions

PGA01	Maxwell Watts and Mareea Watts (15 February 2016)
PGA02	Lise Barry (23 February 2016)
PGA03	Dr John Carter (9 March 2016)
PGA04	Lina Sultana (10 March 2016)
PGA05	NSW Disability Network Forum (18 March 2016)
PGA06	[Confidential] (18 March 2016)
PGA07	Seniors Rights Service (18 March 2016)
PGA08	Mental Health Coordinating Council (18 March 2016)
PGA09	Bridgette Pace (19 March 2016)
PGA10	Council on the Ageing NSW (19 March 2016)
PGA11	Michael Cochran and 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)

QP3 The role of guardians and financial managers

- PGA40** The South Eastern Sydney Local Health District Human Research Ethics Committee (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 and Guardian (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 and Community Services (27 April 2016)



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