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New South Wales
Law Reform Commission

Review of the Guardianship Act 1987

Question Paper 4

Safeguards and procedures

February 2017
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About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

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.
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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).
- Australian Capital Territory Law Reform Advisory Council, *Guardianship Report* (2016).
- Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016).

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1. Introduction

In brief

In this Question Paper, we seek your views on the safeguards and procedures that should apply to guardianship, financial management and supported decision-making arrangements.

1.1 The NSW Attorney General has asked us to review the *Guardianship Act 1987* (NSW) ("*Guardianship Act*"). This document (Question Paper 4) is part of a series of question papers in which we ask if aspects of the *Guardianship Act* need to change.

1.2 In this Question Paper, we invite you to comment on the safeguards and procedures that should exist within the NSW guardianship system. We also seek your views on the safeguards and procedures that should apply to a system of supported decision-making.

Guardianship and financial management in NSW

1.3 NSW law 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.

1.4 The NSW Civil and Administrative Tribunal ("Tribunal") can also appoint a "guardian" or a "financial manager" for someone with impaired decision-making capacity.[2]

1.5 Guardians and financial managers are 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.[3]

1.6 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.[4]

1. *Guardianship Act 1987* (NSW) s 6, s 6A(2).
2. *Guardianship Act 1987* (NSW) s 14, s 25E.
3. 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].
4. See, eg, 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].

1.7 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 asked (in Question Paper 2) whether substitute decision-making should still exist in NSW.[5]

1.8 In case guardians and financial managers remain part of the NSW system, we think it is important to examine the safeguards and procedures that apply to these roles. We also think it is important to consider the safeguards and procedures that should apply if NSW adopts a formal supported decision-making system.

The need for safeguards

1.9 The United Nations *Convention on the Rights of Persons with Disabilities* ("UN *Convention*") emphasises that any laws, policies and practices that deal with a person's legal ability to make decisions must include "appropriate and effective safeguards to prevent abuse".[6]

1.10 The UN *Convention* also says that:

> Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.[7]

1.11 The NSW guardianship and financial management system already contains some features designed to prevent abuse, conflicts of interest and undue influence. These include, for example:

- rules that limit when the Tribunal can make a guardianship or financial management order
- eligibility criteria that potential guardians and financial managers must meet before the Tribunal can appoint them, and
- principles that guardians and financial managers must follow when they make decisions or take action.

1.12 We previously asked if these aspects of guardianship and financial management could be improved.[8] In this Question Paper, we look at other safeguards and procedures that may be necessary within NSW law.

5. NSW Law Reform Commission, *Decision-Making Models*, Review of the Guardianship Act 1987 Question Paper 2 (2016) ch 5.
6. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(4).
7. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(4).
8. NSW Law Reform Commission, *The Role of Guardians and Financial Managers*, Review of the Guardianship Act 1987 Question Paper 3 (2016).

Contents of this Question Paper

1.13 The Question Paper addresses the following topics:

- **Chapter 2**: Safeguards and procedures that apply to enduring guardianship appointments
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- **Chapter 4**: Whether there is a need for a register of appointments and orders
- **Chapter 5**: Mechanisms to monitor and hold guardians and financial managers to account
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- **Chapter 7:** Whether there is a need to confer additional advocacy and investigative functions on a public officer (such as the Public Guardian or a public advocate)
- **Chapter 8:** Procedures that apply in the Guardianship Division of the NSW Civil and Administrative Tribunal.

2. Enduring guardianship

In brief

In NSW, adults can appoint an enduring guardian to make personal decisions for them if they later lose the capacity to do so. The *Guardianship Act 1987* (NSW) sets out the appointment process, when an appointment takes effect, the review process and when enduring guardianship ends.

2.1 The *Guardianship Act 1987* (NSW) ("*Guardianship Act*") allows adults to appoint an enduring guardian to make personal decisions for them if they later lose the capacity to do so. In this Chapter, we consider the safeguards and procedures that apply to these arrangements.

2.2 In NSW, an adult can also appoint an "attorney" to make financial decisions for them. Another piece of legislation, the *Powers of Attorney Act 2003* (NSW) ("*Powers of Attorney Act*"), deals with issues relating to powers of attorney.

2.3 Our review focuses on the *Guardianship Act*. Because of this, we will not consider powers of attorney in detail in this Chapter. However, we highlight differences between the law on enduring guardianship and enduring powers of attorney where relevant. We also consider safeguards and procedures that exist in the laws of some other states and territories.[1]

Safeguards in the appointment process

2.4 In NSW, an adult can appoint one or more enduring guardians. They can also appoint a substitute enduring guardian. The substitute takes on the role of enduring guardian if the original enduring guardian dies, resigns or becomes incapacitated.[2] The *Guardianship Act* sets out the appointment processes that must be followed.

1. Legislation in other states and territories (and the *Powers of Attorney Act 2003* (NSW)) uses the term "principal" to refer to the person who appoints an enduring guardian or attorney. For simplicity, we use the term found in the *Guardianship Act 1987* (NSW) (the "appointor") in this Chapter when referring to these other laws.
2. *Guardianship Act 1987* (NSW) s 6DA.

Overview of the appointment process

2.5 A person who wants to appoint an enduring guardian (known as the "appointor") must complete and sign a form.[3] This form is contained in the *Guardianship Regulation 2016* (NSW).[4]

2.6 The appointor must sign the appointment document or they may allow someone to sign on their behalf.[5] This other person must be at least 18, not also act as a witness and not be appointed as an enduring guardian or a substitute.[6] The enduring guardian(s) must sign the form to show they accept their appointment.[7]

2.7 At least one eligible person must witness the signatures of the appointor and the enduring guardian.[8] The signatures do not have to be witnessed at the same time or by the same person.[9]

2.8 The NSW Civil and Administrative Tribunal ("Tribunal") can confirm an appointment even if:

- the correct procedures were not followed in completing the appointment form, or
- someone announced their intention to appoint an enduring guardian but became incapacitated before they could complete the correct procedures.[10]

2.9 The Tribunal must be satisfied that the confirmation "reflects the appointment that the person making the appointment intended to make at the time".[11]

Witnessing requirements

Eligibility to be a witness

2.10 In NSW, the following people can be a witness:

- an Australian legal practitioner
- a registrar of the Local Court
- a foreign lawyer, or
- an employee of either the NSW Trustee and Guardian ("NSW Trustee") or Service NSW who has completed an approved course of study and who has been approved by the Chief Executive Officer of the NSW Trustee.[12]

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3. *Guardianship Act 1987* (NSW) s 6, s 6C(1)(a).
4. *Guardianship Regulation 2016* (NSW) sch 1 (Form 1).
5. *Guardianship Act 1987* (NSW) s 6C(1)(b), s 6C(1)(b).
6. *Guardianship Act 1987* (NSW) s 6C(1)(b)(ii), s 5 definition of "eligible signer".
7. *Guardianship Act 1987* (NSW) s 6C(1)(c).
8. *Guardianship Act 1987* (NSW) s 6C(1)(d).
9. *Guardianship Act 1987* (NSW) s 6C(4).
10. *Guardianship Act 1987* (NSW) s 6K(4).
11. *Guardianship Act 1987* (NSW) s 6K(4).
12. *Guardianship Act 1987* (NSW) s 5 definition of "eligible witness"; *Guardianship Regulation 2016* (NSW) cl 4.

2.11 The appointor's enduring guardian or substitute enduring guardian cannot be a witness.[13] One issue is whether the *Guardianship Act* should exclude additional categories of people from acting as witnesses. For instance, the following people cannot witness a power of attorney appointment in Queensland:

- someone related to the appointor or the appointor's attorney, and
- a paid carer or health provider of the appointor (if the document gives power over a personal matter).[14]

2.12 These exclusions could reduce conflicts of interest. However, reducing the pool of potential witnesses could also make it harder to appoint an enduring guardian.

The number of witnesses

2.13 Another issue is whether the *Guardianship Act* should require more than one witness. In Victoria, for instance, two people must witness a document creating a power of attorney being signed.[15] One must be authorised to witness affidavits or be a medical practitioner.[16] The Institute of Legal Executives submits that the addition of medical practitioners to the Victorian legislation "is of great benefit".[17]

2.14 The Australian Law Reform Commission has proposed that two people should witness enduring documents. One would need to be a legal or medical practitioner, justice of the peace, registrar of the Local / Magistrates Court or a police officer with the rank of sergeant or above.[18]

2.15 Having more than one witness could provide an extra safeguard against abuse. However, it could be difficult in some places (such as remote areas) to find enough eligible witnesses. Costs may also increase if one witness has to be a professional.

The role of a witness

2.16 In NSW, witnesses must certify that both the appointor and the enduring guardian:

- executed the document voluntarily in their presence, and
- appeared to understand the effect of the appointment document.[19]

2.17 If someone else signs on behalf of the appointor, a witness must certify that the appointor (in the presence of the witness) instructed this other person to do so.[20]

2.18 These rules are meant to prevent someone from appointing an enduring guardian when they do not have the capacity to make decisions or when they are being pressured to make an appointment. However, there may be ways to strengthen these safeguards.

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13. *Guardianship Act 1987* (NSW) s 5 definition of "eligible witness".
14. *Powers of Attorney Act 1998* (Qld) s 31(1). In Queensland, an enduring attorney can make personal decisions as well as financial decisions: *Powers of Attorney Act 1998* (Qld) s 32(1)(a).
15. *Powers of Attorney Act 2014* (Vic) s 33(b).
16. *Powers of Attorney Act 2014* (Vic) s 35(1)(b). For details on who is authorised to witness affidavits, see *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 123C(1).
17. Institute of Legal Executives, *Preliminary Submission PGA35*, 2.
18. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper (2016) proposal 5-4.
19. *Guardianship Act 1987* (NSW) s 6C(1)(e).
20. *Guardianship Act 1987* (NSW) s 6C(1)(f).

2.19 For instance, the *Guardianship Act* could require a witness to take certain steps to ensure that both the appointor and the enduring guardian understand what they are doing. In NSW, the *Powers of Attorney Act* requires witnesses to certify they explained the effect of a power of attorney document.[21] The *Guardianship Act* might similarly require witnesses to explain to a potential guardian "the powers and responsibilities that go with that appointment".[22]

2.20 The standard appointment form includes "important information" that appointors should know.[23] The *Guardianship Act* could include a similar list. Under the Queensland legislation, appointors must understand:

- that they may specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power
- when the power begins
- the extent of the attorney's powers under the document
- that they may revoke the enduring power of attorney at any time they have the capacity to do so
- that at any time the appointor is not capable of revoking the enduring power of attorney, the appointor is unable to effectively oversee the use of the power.[24]

2.21 Another issue is whether a witness should be satisfied of the appointor's identity. The Victorian Law Reform Commission ("VLRC") recommended that witnesses should certify they have seen appropriate identification documents.[25]

2.22 However, these additional responsibilities might discourage some people from acting as witnesses. Depending on their qualifications and experience, some potential witnesses may be unable to explain the effect of the appointment accurately or be satisfied that the person has the required level of understanding.

Question 2.1: Witnessing an enduring guardianship appointment

What changes, if any, should be made to the *Guardianship Act 1987* (NSW) concerning:

(a) the eligibility requirements for witnesses

(b) the number of witnesses required, and

(c) the role of a witness?

A notification requirement

2.23 One preliminary submission suggests that next of kin should be notified when an enduring guardian is appointed and any changes are made to this appointment.[26]

21. *Powers of Attorney Act 2003* (NSW) s 19(1)(c).
22. L Barry, *Preliminary Submission PGA02*, 4.
23. *Guardianship Regulation 2016* (NSW) sch 1 (Form 1).
24. *Powers of Attorney Act 1998* (Qld) s 41(2). The Victorian legislation contains a similar list of issues: *Powers of Attorney Act 2014* (Vic) s 23(2).
25. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 17.

2.24 Notification requirements could provide an additional safeguard against abuse. However, it is unclear who would be responsible for locating and notifying next of kin. The effect of a failure to notify also needs careful consideration.

2.25 The Queensland Law Reform Commission ("QLRC") did not support mandatory notification. In the QLRC's view, such a requirement could "increase the level of complexity of the scheme for enduring powers of attorney, which may make enduring powers less attractive as an advance planning tool".[27]

When an appointment takes effect

2.26 The appointment of an enduring guardian takes effect when the appointor is "a person in need of a guardian".[28] That is, "because of a disability" they are "totally or partially incapable of managing his or her person".[29] In other words, the person loses capacity. Once this occurs, the enduring guardian can exercise the functions set out in the appointment document.

2.27 This is an automatic process. The Tribunal does not need to confirm that an appointment is in effect. A medical practitioner's certificate can be used as evidence of the person's capacity if the issue arises in a legal proceeding.[30]

2.28 However, an enduring guardian can apply to the Tribunal for an order declaring the appointment is in effect. The Tribunal can issue the order if satisfied the appointor "is a person in need of a guardian" and they have appointed the enduring guardian.[31] The Tribunal can revoke the order at any time, either on its own initiative or at the request of someone with "a genuine concern" for the appointor's welfare.[32]

2.29 There may be a need for further safeguards to prevent abuse. One preliminary submission comments that the *Guardianship Act* should state more clearly when appointments take effect.[33] The Mental Health Coordinating Council raises the issue of whether an appointor should be able to access an appeal mechanism if they do not believe the appointment should take effect.[34]

2.30 If NSW introduces a registration system (see Chapter 4), one option could be to require appointors to register their appointment documents. Enduring guardians might then be required to notify a registrar if they believe the appointor has lost capacity and they intend to start using their powers. A registrar could note this on the registration system. The VLRC recommended this approach.[35]

2.31 Another option could be to require enduring guardians to either notify or obtain a declaration from the Tribunal before they can exercise their powers. While this could

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26. Confidential, *Preliminary Submission PGA36*, 2.
27. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [16.281].
28. *Guardianship Act 1987* (NSW) s 6A(1)(a).
29. *Guardianship Act 1987* (NSW) s 3 definition of "person in need of a guardian".
30. *Guardianship Act 1987* (NSW) s 6N.
31. *Guardianship Act 1987* (NSW) s 6M(1)–(2).
32. *Guardianship Act 1987* (NSW) s 6M(4).
33. Confidential, *Preliminary Submission PGA36*, 2.
34. Mental Health Coordinating Council, *Preliminary Submission PGA08*, 7.
35. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 264, 271–272.

provide a formal safeguard, any additional role for the Tribunal will have resource implications and could complicate the personal appointment process.

Question 2.2: When enduring guardianship takes effect

Should the *Guardianship Act 1987* (NSW) contain a procedure that must be followed before an enduring guardianship appointment can come into effect? If so, what should this process be?

Reviewing an enduring guardianship appointment

2.32 Under the *Guardianship Act*, both the Supreme Court of NSW and the Tribunal have the power to review the appointment of an enduring guardian.[36] The Tribunal can do this either at the request of a person with a "genuine concern" for the appointor's welfare or on its own initiative.[37]

2.33 After conducting a review, the Tribunal can confirm the appointment. If so, the Tribunal might decide to vary the enduring guardian's functions or leave them the same. Alternatively, the Tribunal can revoke the appointment.[38] The Supreme Court can "make such orders as it thinks appropriate".[39]

2.34 The Tribunal can treat the review as an application for a guardianship or financial management order (or both) if this is in the appointor's best interests.[40] This allows the Tribunal to make a guardianship or financial management order. The enduring guardian's authority is suspended while a guardianship order is in force.[41]

2.35 The Tribunal's powers to review an enduring power of attorney differ from its powers to review an enduring guardianship appointment. For instance, the Tribunal can review the "making, revocation or the operation and effect of a reviewable power of attorney".[42] However, it can only review the appointment or the purported appointment of an enduring guardian.[43]

2.36 The *Powers of Attorney Act* also allows the Tribunal to make "a very wide range of orders" following a review.[44] For example, the Tribunal can remove an attorney and appoint a replacement if satisfied this would be in the appointor's best interests or it would better reflect their wishes.[45]

2.37 However, the Tribunal cannot simply remove or replace an enduring guardian following a review. Instead, the Tribunal must revoke the enduring appointment "as a whole" and make a new guardianship order.[46] The Tribunal can only appoint a

36. *Guardianship Act 1987* (NSW) s 6L, s 6J.
37. *Guardianship Act 1987* (NSW) s 6J(1).
38. *Guardianship Act 1987* (NSW) s 6K(1).
39. *Guardianship Act 1987* (NSW) s 6L.
40. *Guardianship Act 1987* (NSW) s 6K(3).
41. *Guardianship Act 1987* (NSW) s 6I.
42. *Powers of Attorney Act 2003* (NSW) s 36(1).
43. *Guardianship Act 1987* (NSW) s 6J(1).
44. *NAU* [2014] NSWCATGD 16 [17].
45. *Powers of Attorney Act 2003* (NSW) s 36(4)(b)–(c).
46. *SNC (No 1)* [2014] NSWCATGD 17 [14]; *WBN* [2015] NSWCATGD 9 [30].

substitute enduring guardian if the original enduring guardian dies, resigns or becomes incapacitated.[47]

2.38 The NSW Council for Intellectual Disability suggests "[t]here should be greater consistency between the broad powers the Tribunal has when reviewing a power of attorney and the very narrow powers it currently has when reviewing an appointment of enduring guardian".[48]

Question 2.3: Reviewing an enduring guardian appointment

Are the powers of the NSW Civil and Administrative Tribunal to review an enduring guardian appointment sufficient? If not, what should change?

Ending an enduring arrangement

2.39 The *Guardianship Act* sets out when an enduring guardianship arrangement will end. There are two key processes: resignation and revocation.

Resignation by the enduring guardian

2.40 An enduring guardian (or substitute enduring guardian) can resign their appointment. Before the appointment takes effect, the enduring guardian can resign by giving written notice to the appointor.[49] The enduring guardian and an eligible witness must sign this notice.[50] After the appointment takes effect, the enduring guardian can only resign with the Tribunal's approval.[51]

Revocation processes

2.41 An enduring guardianship appointment can be revoked in one of three ways.

2.42 First, an appointor can revoke an enduring guardian's appointment before it takes effect.[52] They do this by completing and signing a form.[53] An eligible witness must witness their signature.[54] Written notice must be given to the enduring guardian.[55]

2.43 Second, the Tribunal can revoke an appointment after conducting a review. This revokes the appointment document "as a whole".[56] The Tribunal can do this if the

47. *Guardianship Act 1987* (NSW) s 6MA(1).
48. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 7.
49. *Guardianship Act 1987* (NSW) s 6HB(1)(a). The relevant form is contained in the *Guardianship Regulation 2016* (NSW) sch 1 (Form 3); *Guardianship Act 1987* (NSW) s 6HB(2)(a).
50. *Guardianship Act 1987* (NSW) s 6HB(2)(b)–(c), s 5 definition of "eligible witness".
51. *Guardianship Act 1987* (NSW) s 6HB(1)(b).
52. *Guardianship Act 1987* (NSW) s 6H(2)(a). For discussion of the concept of "legal capacity", see NSW Law Reform Commission, *Preconditions for Alternative Decision-Making Arrangements*, Review of the Guardianship Act 1987 Question Paper 1 (2016) ch 3.
53. *Guardianship Act 1987* (NSW) s 6H(1). The relevant form is contained in the *Guardianship Regulation 2016* (NSW) sch 1 (Form 2); *Guardianship Act 1987* (NSW) s 6H(2)(b).
54. *Guardianship Act 1987* (NSW) s 6H(2)(c1), s 5 definition of "eligible witness".
55. *Guardianship Act 1987* (NSW) s 6H(2)(d).
56. *SNC (No 1)* [2014] NSWCATGD 17 [14].

enduring guardian has requested it or if the Tribunal is satisfied that revocation is in the appointor's best interests.[57]

2.44 Third, an appointment is revoked automatically if, after the appointment is made, the appointor marries or remarries someone other than the enduring guardian.[58] This happens even if the appointor wants the enduring arrangement to continue.

2.45 It is arguable that this automatic revocation procedure clashes with the purpose of enduring guardianship – to give "people the dignity to decide who will make personal decisions for them".[59] Queensland provides an alternative approach that NSW could consider. While marriage automatically revokes an enduring power of attorney appointment in Queensland, an appointor can state in their appointment document that they want the arrangement to continue if they marry. If so, the automatic revocation procedure will not apply.[60] The QLRC believed this gives "maximum effect" to the appointor's wishes.[61]

Question 2.4: Ending an enduring arrangement

What changes, if any, should be made to the *Guardianship Act 1987* (NSW) concerning:

(a) the resignation of an enduring guardian, and

(b) the revocation of an enduring guardianship arrangement?

Question 2.5: Other issues

Would you like to raise any other issues about enduring guardianship procedures?

57. *Guardianship Act 1987* (NSW) s 6K(2).
58. *Guardianship Act 1987* (NSW) s 6HA.
59. Second reading speech for the Guardianship Amendment Bill 1997 (NSW): NSW, *Parliamentary Debates*, Legislative Council, 7 May 1997, 8135.
60. *Powers of Attorney Act 1998* (Qld) s 52.
61. Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability*, Report 49 (1996) 135.

3. Guardianship orders and financial management orders

In brief

The *Guardianship Act 1987* (NSW) includes safeguards and procedures that apply to guardianship orders and financial management orders. These include procedures for applying for an order, potential limits to the scope of an order, the process for reviewing an order and procedures that apply when a guardian or financial manager dies.

3.1 In this Chapter, we seek your views on the safeguards and procedures that should apply to guardianship orders and financial management orders. The Chapter considers:

- the process of applying for an order
- potential limits to the scope of an order
- the process for reviewing an order, and
- procedures that apply when a guardian or a financial manager dies.

Applying for a guardianship or financial management order

3.2 The NSW Civil and Administrative Tribunal ("Tribunal") can consider making a guardianship or financial management order if it receives an application.[1] An application can be made by:

- the person who is the subject of the application

1. For other situations in which the Tribunal can make a financial management order, see *Guardianship Act 1987* (NSW) s 6K(3), s 25F.

- the Public Guardian (in the case of guardianship orders) or the NSW Trustee and Guardian ("NSW Trustee") (in the case of financial management orders), or
- anyone who, in the Tribunal's view, "has a genuine concern for the welfare" of the person who is the subject of the application.[2]

3.3 The applicant must state why they believe the Tribunal should make the order.[3] A penalty can apply if they make false and misleading statements.[4]

3.4 The Tribunal conducts a hearing to determine if it should make the order.[5] We consider the Tribunal's procedures in Chapter 8.

Question 3.1: Applying for a guardianship or financial management order

What are your views on the process for applying for a guardianship or a financial management order?

Limits to guardianship orders and financial management orders

3.5 The United Nations *Convention on the Rights of Persons with Disabilities* ("UN *Convention*") emphasises that measures relating to legal capacity must be "proportional and tailored to the person's circumstances" and "apply for the shortest time possible".[6] This reflects the principle of least restriction. According to this principle, a person's autonomy should be limited as little as possible.[7]

3.6 In Question Paper 3, we considered how the authority of guardians and financial managers can be limited.[8] In this section, we consider other options for ensuring that guardianship orders and financial management orders respect the principle of least restriction.

Time limits

Guardianship orders

3.7 Guardianship orders are time limited in NSW. The time limits vary depending upon whether the Tribunal makes a "temporary" or a "continuing" order.

2. *Guardianship Act 1987* (NSW) s 9(1), s 25I(1). The Tribunal can also make a financial management order in connection with proceedings for making a guardianship order (whether or not one is made): s 25F(a), (b).
3. *Guardianship Act 1987* (NSW) s 9(3), s 25I(2).
4. *Guardianship Act 1987* (NSW) s 105.
5. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 6, cl 1(1) definition of "substantive Division function".
6. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(4).
7. For a discussion of this principle, see NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [5.53]–[5.61]; Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney*, Final Report (2010) 41. See also *Guardianship Act 1987* (NSW) s 4(b).
8. NSW Law Reform Commission, *The Role of Guardians and Financial Managers*, Review of the Guardianship Act 1987 Question Paper 3 (2016) ch 3.

3.8 A temporary guardianship order can be in force for no longer than 30 days initially. The Tribunal can renew a temporary order once for up to 30 days.[9] In its preliminary submission, the Mental Health Coordinating Council suggests that the limit on renewals could be reconsidered as "some people require longer stays in hospital".[10]

3.9 Continuing guardianship orders are also time limited. A continuing order is initially in force for no longer than one year. The Tribunal can renew a continuing order for up to three years from the renewal date.[11]

3.10 The Tribunal can make a longer order if satisfied the person has permanent disabilities, is unlikely to "become capable of managing his or her person", and there is a need for a longer order.[12] If so, the initial order can apply for no more than three years. The Tribunal can renew the order for up to five years from the date it was made originally.[13]

Financial management orders

3.11 The *Guardianship Act* does not set time limits for financial management orders. This has been described as a "major shortcoming in the legislation".[14]

3.12 However, the Tribunal can make an interim financial management order. The Tribunal can make an interim order for a person if they are under guardianship or the subject of an application for a guardianship or financial management order. Interim orders apply "pending the Tribunal's further consideration" of the person's capacity.[15] The Tribunal might make an interim order when it has been unable to reach a firm conclusion on the person's capacity and the situation is urgent.[16]

3.13 An interim order can be in force for up to six months, although the Tribunal can specify a shorter term. The order is regarded as revoked at the end of the period specified in the order.[17] However, the Tribunal can make a further interim order.[18]

3.14 Amending the *Guardianship Act* to place time limits on financial management orders would be consistent with the principle of least restriction. However, the Tribunal's workload may increase if this change leads to more applications and reviews.

Question 3.2: Time limits for orders

(1) Are the time limits that apply to guardianship orders appropriate? If not, what should change?

(2) Should time limits apply to financial management orders? If so, what should these time limits be?

9. *Guardianship Act 1987* (NSW) s 18(2)–(3).
10. Mental Health Coordinating Council, *Preliminary Submission PGA08*, 8.
11. *Guardianship Act 1987* (NSW) s 18(1).
12. *Guardianship Act 1987* (NSW) s 18(1B).
13. *Guardianship Act 1987* (NSW) s 18(1A).
14. T Epstein, "Financial Management and the Rights of People with Disability: A Fine Balance" (2011) 34 *University of New South Wales Law Journal* 835, 840.
15. *Guardianship Act 1987* (NSW) s 25H(1)–(2).
16. N O'Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [8.3.7.2].
17. *Guardianship Act 1987* (NSW) s 25H(1), s 25H(3).
18. *Re Stefania* [2011] NSWSC 1603 [22].

Limits to the scope of financial management orders

3.15 Under the *Guardianship Act*, the Tribunal can exclude a specified part of the person's estate from the scope of a financial management order.[19] This allows the Tribunal to tailor an order to the person's needs.

3.16 The *NSW Trustee and Guardian Act 2009* (NSW) ("*Trustee and Guardian Act*") uses a different expression. Under that Act, the Supreme Court of NSW and the Mental Health Review Tribunal can make financial management orders for "the whole or part of the estate of a person".[20]

3.17 The NSW Legislative Council Standing Committee on Social Issues ("Standing Committee") believed that the expression used in the *Guardianship Act* "is more liable to result in parts of an estate being placed under management unnecessarily".[21] This is because the *Trustee and Guardian Act* requires the Court and the Mental Health Review Tribunal to consider which parts of the estate should be managed. The *Guardianship Act* requires the Tribunal to consider which parts of the estate should *not* be managed.[22]

3.18 The Standing Committee concluded that the *Guardianship Act* should "mirror" the *Trustee and Guardian Act*.[23] The then NSW Government supported this proposal[24] but later governments have not implemented it.

Question 3.3: Limits to the scope of financial management orders

Should the *Guardianship Act 1987* (NSW) require the NSW Civil and Administrative Tribunal to consider which parts of a person's estate should be managed?

Reviewing guardianship orders and financial management orders

3.19 The UN *Convention* states that measures relating to the exercise of legal capacity should be "subject to regular review by a competent, independent and impartial authority or judicial body".[25]

3.20 Inadequate opportunities for review may mean that orders remain in force longer than they should. However, frequent reviews could strain the Tribunal's resources. Reviews can also be time consuming and emotionally draining for participants. In this section, we ask if the *Guardianship Act* strikes the right balance.

19. *Guardianship Act 1987* (NSW) s 25E(2).
20. *NSW Trustee and Guardian Act 2009* (NSW) s 40.
21. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [7.41].
22. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [7.40].
23. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 19.
24. NSW Government, *Legislative Council Standing Committee on Social Issues Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 11.
25. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(4). See also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-4.

When orders can be reviewed by the Tribunal

3.21 The Tribunal must review guardianship orders and financial management orders if someone requests it to. The Tribunal can also choose to conduct a review on its own initiative. However, the *Guardianship Act* takes a different approach to guardianship orders and financial management orders when it comes to periodic reviews.

Reviews upon request or application

3.22 The Tribunal must review a guardianship order at the request of:

- the guardian
- the person under guardianship
- the Public Guardian, or
- any other person who, in the Tribunal's opinion, "has a genuine concern for the welfare of the person under guardianship".[26]

3.23 Similarly, the Tribunal must review a financial management order if it receives an application to revoke or vary the order.[27] An application can be made by:

- the person whose estate is being managed
- the NSW Trustee
- the manager of the estate (or part of the estate), or
- anyone else who, in the Tribunal's opinion, has "a genuine concern" for the person's welfare.[28]

3.24 The Tribunal may refuse to review a guardianship or financial management order if the request or application does not disclose reasons that warrant a review or if the Tribunal has reviewed the order before.[29]

3.25 The *Guardianship Act* does not indicate what might "warrant a review" of a guardianship or financial management order. However, the Tribunal considers that its power to refuse to conduct a review is meant "to deter the making of frivolous or vexatious applications which effectively request the Tribunal to reconsider matters which were previously before the Tribunal, and which do not raise fresh issues".[30]

3.26 A review of a guardianship or financial management order might be appropriate where the person's circumstances have changed, but not when someone simply disagrees with the Tribunal's decision to make an order.[31] Someone in this position should instead appeal the decision.[32] We discuss appeal processes in Chapter 8.

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26. *Guardianship Act 1987* (NSW) s 25(2)(a), s 25B.
27. *Guardianship Act 1987* (NSW) s 25N(4)(b).
28. *Guardianship Act 1987* (NSW) s 25R.
29. *Guardianship Act 1987* (NSW) s 25A, s 25O.
30. *BFT* [2014] NSWCATGD 51 [40].
31. See, eg, *BFT* [2014] NSWCATGD 51 [42], [43], [46]–[48]; *BRN* [2015] NSWCATGD 43 [38].
32. *BFT* [2014] NSWCATGD 51 [42], [43].

"Own motion" reviews

3.27 The Tribunal can review a guardianship or financial management order "on its own motion".[33] This means that the Tribunal can decide to conduct a review on its own initiative, even if nobody has requested a review.

Regular reviews

3.28 The *Guardianship Act* includes processes for reviewing guardianship orders regularly. The Tribunal may state in a guardianship order that the person subject to the order and the operation of the order must be assessed at a specified time.[34] In addition, the Tribunal must generally review a guardianship order at the end of its term.[35] However, the Tribunal can state when it makes an order that it will not conduct an end-of-term review if satisfied this is in the person's best interests.[36]

3.29 The situation is different for financial management orders. The Tribunal may specify that a financial management order should be reviewed within a certain time.[37] However, financial management orders are not time limited. This means they are not subject to end-of-term reviews.

3.30 The laws of other states and territories require periodic reviews of financial management orders (known in some places as administration orders).[38] In Tasmania, a guardianship or administration order lapses after three years unless the Guardianship and Administration Board decides it should continue.[39]

3.31 The Standing Committee recommended the NSW Government should consider amending the *Guardianship Act* to require automatic reviews. However, the Standing Committee also encouraged the Government to consider the additional burden that this might place on the Tribunal's resources.[40]

3.32 The then NSW Government opposed this recommendation because:

- many people under financial management have a continuing need for an order and, for them, a review process would be "costly and burdensome for no benefit"
- the existing powers of the Tribunal to review financial management orders are sufficient
- there are few viable alternatives to formal orders due to the strict legal requirements associated with financial management and there may be little prospect of revocation if the person is incapable of managing their affairs, and

33. *Guardianship Act 1987* (NSW) s 25(1), s 25N(4)(a).
34. *Guardianship Act 1987* (NSW) s 24(1).
35. *Guardianship Act 1987* (NSW) s 25(2)(b).
36. *Guardianship Act 1987* (NSW) s 16(2A), s 25(3)(b).
37. *Guardianship Act 1987* (NSW) s 25N(1)–(3).
38. *Guardianship and Management of Property Act 1991* (ACT) s 19(2); *Guardianship and Administration Act 1993* (SA) s 57(1), s 3 definition of "protected person"; *Guardianship and Administration Act 2000* (Qld) s 28; *Guardianship and Administration Act 1990* (WA) s 84; *Guardianship and Administration Act 1986* (Vic) s 61; *Guardianship of Adults Act 2016* (NT) s 19. See also Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 382; Guardianship and Administration Bill 2014 (Vic) cl 45(1) (lapsed).
39. *Guardianship and Administration Act 1995* (Tas) s 24, s 52, s 68.
40. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 15.

- some people may be upset or confused by an annual review hearing, especially if the Tribunal confirms the order against their wishes.[41]

3.33 We received a range of responses on this issue in preliminary submissions. Those in favour of a regular review process argue that:

- it would be consistent with the UN *Convention*[42]
- regular reviews are necessary to check the person still needs the order,[43] if it is operating in their interests, and if there are any less restrictive options available[44]
- regular reviews can help prevent (or address) abuse and exploitation[45]
- someone's ability to manage their affairs may improve over time[46]
- the Tribunal rarely reviews orders on its own initiative, which means the person whose estate is being managed has to seek a review,[47] and
- people with estates under financial management often do not have anyone to help them to apply for a review.[48]

3.34 Some stakeholders proposed timeframes for review. The Seniors Rights Service considers that the Tribunal should review financial management orders every 12 months or three years, as appropriate.[49] The Disability Council NSW states that automatic reviews should occur every two years.[50]

3.35 However, other stakeholders do not believe the law should change. For instance, the NSW Trustee observes that the legislation "already provides appropriate vehicles for review" that are "within the spirit" of the UN *Convention*.[51] Regular reviews will have resource implications and they may be unnecessary or unhelpful in some cases. For instance, people with dementia require orders because they have lost capacity and "that situation is not going to change".[52]

3.36 One way of addressing some of these concerns could be to allow the Tribunal to state that a particular financial management order does not need to be reviewed regularly. The Tribunal might do this, for instance, where satisfied that the person

41. NSW Government, *Legislative Council Standing Committee on Social Issues Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 10.
42. See, eg, NSW Disability Network Forum, *Preliminary Submission PGA05,* 7–8; Seniors Rights Service, *Preliminary Submission PGA07,* 23–24; NSW Young Lawyers, *Preliminary Submission PGA32*, 8; NSW Ombudsman, *Preliminary Submission PGA41*, 6.
43. Seniors Rights Service, *Preliminary Submission PGA07,* 23.
44. Intellectual Disability Rights Service, *Preliminary Submission PGA44,* 7.
45. Seniors Rights Service, *Preliminary Submission PGA07,* 24; Council on the Ageing NSW, *Preliminary Submission PGA10,* 6.
46. NSW Family and Community Services, *Preliminary Submission PGA54*, 5.
47. Intellectual Disability Rights Service, *Preliminary Submission PGA44,* 7.
48. NSW Young Lawyers, *Preliminary Submission PGA32*, 8.
49. Seniors Rights Service, *Preliminary Submission PGA07*, 23.
50. Disability Council NSW, *Preliminary Submission PGA26*, 16.
51. NSW Trustee and Guardian, *Preliminary Submission PGA50,* 11–12. See also Australian Lawyers Alliance, *Preliminary Submission PGA52*, 6.
52. Alzheimer's Australia NSW, *Preliminary Submission PGA14,* 7.

will not become capable of managing their estate. This would not necessarily affect the Tribunal's ability to review an order on its own initiative or upon request.

Question 3.4: When orders can be reviewed

(1) What changes, if any, should be made to the process for reviewing guardianship orders?

(2) Should the NSW Civil and Administrative Tribunal be required to review financial management orders regularly?

(3) What other changes, if any, should be made to the process for reviewing financial management orders?

Potential outcomes of a review

Guardianship orders

3.37 After conducting an end-of-term review, the Tribunal can determine that the order should lapse and revoke it for any unexpired period. Following an own motion review or a review on request, the Tribunal can vary, suspend or revoke, or confirm the order. After any of these review processes, the Tribunal may also renew the order or renew and vary it.[53]

3.38 The *Guardianship Act* does not specify what the Tribunal must consider when it decides the outcome of a review. Instead, the Tribunal has developed certain principles to guide its decision.

3.39 When the Tribunal conducts an end-of-term review, it considers whether the requirements for making a guardianship order are still satisfied.[54] However, the Tribunal does not always do this when undertaking a review on request. This is because the review might not be about whether the person is still "in need of a guardian".[55] The change in circumstances that led to the review might instead require a change to the guardian's functions.[56]

3.40 Queensland takes a different approach. The Queensland Civil and Administrative Tribunal must revoke an order following a review unless satisfied that it would appoint a guardian or administrator if a new application was made.[57]

Question 3.5: Reviewing a guardianship order

(1) What factors should the NSW Civil and Administrative Tribunal consider when reviewing a guardianship order?

(2) Should these factors be set out in the *Guardianship Act 1987* (NSW)?

53. *Guardianship Act 1987* (NSW) s 25C.
54. *IF v IG* [2004] NSWADTAP 3 [20]; *XAD* [2013] NSWGT 10 [18]; *NXC* [2016] NSWCATGD 13 [37]. We considered these requirements in NSW Law Reform Commission, *Preconditions for Alternative Decision-Making Arrangements*, Review of the Guardianship Act 1987 Question Paper 1 (2016) ch 2.
55. *Guardianship Act 1987* (NSW) s 14(1).
56. *IZ v JC* [2009] NSWADTAP 4 [42].
57. *Guardianship and Administration Act 2000* (Qld) s 31(2).

Financial management orders

3.41 After reviewing a financial management order, the Tribunal must either vary, revoke or confirm the order. The Tribunal might decide to vary the order by including or excluding part of the person's estate from the scope of the order.[58]

3.42 The Tribunal can only revoke a financial management order if it:

- is satisfied that the person is capable of managing their affairs, or
- considers revocation to be in the person's best interests.[59]

3.43 The Tribunal can revoke an order on the "best interests" ground even if the person is still incapable of managing their affairs. For instance, the Tribunal might decide "there is no practical utility" for the order.[60]

3.44 We are aware of two issues about the Tribunal's powers to revoke a financial management order. The first focuses on the "best interests" standard. Under this standard, someone makes decisions based on what they think is in the person's best interests. The United Nations Committee on the Rights of Persons with Disabilities has called on governments to implement laws and policies to assist people to exercise their will and preferences.[61] In a preliminary submission, the NSW Ombudsman encourages us to examine

> the changes required to align the revocation requirements with the [UN *Convention*] – including shifting from consideration of an individual's "best interests" to consideration as to the supports provided or necessary to assist the person to manage (or develop capacity to manage) their financial affairs.[62]

3.45 The second issue is whether there should be another ground for revocation. The Intellectual Disability Rights Service comments that the *Guardianship Act* does not expressly allow "for the revocation of an order on the basis that there is no longer a need for a person's affairs to be under management".[63]

3.46 The Standing Committee recommended the *Guardianship Act* should "provide that the Tribunal may revoke a financial management order if it is satisfied there is no longer a need for a person to manage the affairs of the person subject to the order".[64] The grounds for revoking a financial management order would then reflect the preconditions for making one.[65]

3.47 The then Government referred the Standing Committee's recommendation for further review. However, it stated:

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58. *Guardianship Act 1987* (NSW) s 25P(1), s 25P(3).
59. *Guardianship Act 1987* (NSW) s 25P(2).
60. *KDP* [2016] NSWCATGD 24 [40]–[41], following *P v NSW Trustee and Guardian* [2015] NSWSC 579 [319].
61. 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]. For further discussion, see NSW Law Reform Commission, *Decision-Making Models*, Review of the Guardianship Act 1987 Question Paper 2 (2016) [4.4]–[4.10]; NSW Law Reform Commission, *The Role of Guardians and Financial Managers*, Review of the Guardianship Act 1987 Question Paper 3 (2016) [4.15]–[4.22].
62. NSW Ombudsman, *Preliminary Submission PGA41*, 6.
63. Intellectual Disability Rights Service, *Preliminary Submission PGA44,* 7.
64. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 16.
65. See *Guardianship Act 1987* (NSW) s 25G.

> The proposed amendment may be unnecessary given the current legislative scheme. At present revocation can occur if the person has regained the capacity to manage their finances. This would mean that the need for a manager has ceased. Secondly revocation can occur if it is in the best interests of the person. Such an assessment entails consideration of the need for a manager.[66]

Question 3.6: Grounds for revoking a financial management order

(1) Should the *Guardianship Act 1987* (NSW) expressly allow the NSW Civil and Administrative Tribunal to revoke a financial management order if the person no longer needs someone to manage their affairs?

(2) What other changes, if any, should be made to the grounds for revoking a financial management order?

When a guardian or a financial manager dies

3.48 When a private guardian dies, certain procedures apply until the Tribunal can conduct a review of the guardianship order under which they were appointed.[67]

3.49 The first procedure applies when there is a surviving guardian. The Tribunal can appoint two or more "joint guardians" to exercise the same functions as each other under a limited guardianship order.[68] If one joint guardian dies, the surviving guardian can continue to exercise the functions that they exercised jointly.[69]

3.50 The second procedure applies when there is no surviving guardian but there is an alternative guardian. The Tribunal can appoint an alternative guardian under a continuing order.[70] If a guardian dies, the alternative guardian is taken to be the person's guardian.[71]

3.51 Under the third procedure, the Public Guardian becomes the person's guardian when there is no surviving guardian or alternative guardian.[72]

3.52 These procedures do not apply if a private manager dies. The Standing Committee noted potential difficulties could arise if the person's estate is left without a manager until the Supreme Court or the Tribunal appoints a new one.[73] The Standing Committee recommended that the *Trustee and Guardian Act* should

> provide for the NSW Trustee and Guardian to assume management of the estate of a person under a financial management order upon the death of a

66. NSW Government, *Legislative Council Standing Committee on Social Issues Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 11.
67. *Guardianship Act 1987* (NSW) s 22A.
68. *Guardianship Act 1987* (NSW) s 16(3). The Tribunal cannot appoint the Public Guardian as a joint guardian.
69. *Guardianship Act 1987* (NSW) s 22A(1)(a).
70. *Guardianship Act 1987* (NSW) s 20(1). This applies unless the Tribunal has appointed the Public Guardian.
71. *Guardianship Act 1987* (NSW) s 22A(1)(b).
72. *Guardianship Act 1987* (NSW) s 22A(1)(c).
73. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [9.93].

private manager previously appointed and until a new manager is appointed by the relevant court or tribunal.[74]

3.53 The then Government supported this proposal[75] but subsequent governments have not implemented it.

Question 3.7: Procedures that apply if a guardian or financial manager dies

What procedures should apply if a guardian or a financial manager dies?

74. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 26.

75. NSW Government, *Legislative Council Standing Committee on Social Issues Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 15.

4. A registration system

In brief

Some law reform bodies support the introduction of a new system to register enduring appointments, guardianship orders, financial management orders, and supported decision-making arrangements. While this may have benefits, it could also have limitations and risks. A range of design issues also need to be resolved before a registration system can be introduced.

4.1 In NSW, a document that creates or revokes a power of attorney can be registered with the Registrar General.[1] However, it is only necessary to register a power of attorney document that concerns dealings with land (such as a sale, mortgage, or lease).[2] There is no public register of enduring guardianship appointments, guardianship orders or financial management orders.

4.2 The issue of whether there should be a register of decision-making arrangements has generated considerable debate across Australia.[3] Some inquiries have recommended such a system[4] while others have opposed it.[5] Several stakeholders supported a registration system in preliminary submissions to our review[6] while others raised concerns.[7]

4.3 The Australian Law Reform Commission ("ALRC") is currently consulting on a proposal to implement a national online register.[8] However, as the Victorian Law Reform Commission ("VLRC") observed, a national register might be difficult to achieve in the short term.[9] We therefore think it is important to consider if NSW

1. *Powers of Attorney Act 2003* (NSW) s 51.
2. See NSW, Land and Property Information, *Powers of Attorney in New South Wales*, Fact Sheet (2016) 6. Dealings with land have no effect unless they are registered: *Powers of Attorney Act 2003* (NSW) s 52. This does not apply to a lease of 3 years or less: s 52(4).
3. See, eg, NSW Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) [6.67]–[6.82], [6.104].
4. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 5–1; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 259; Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007) rec 20.
5. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (2010) Report 67 (2010) [16.257]–[16.259], rec 16-15.
6. See, eg, L Barry*, Preliminary Submission PGA02,* 4; Seniors Rights Service*, Preliminary Submission PGA07,* 25; B Pace*, Preliminary Submission PGA09,* 6; Disability Council NSW*, Preliminary Submission PGA26,* 17; Intellectual Disability Rights Service*, Preliminary Submission PGA44,* 2, 5–6.
7. Supreme Court of NSW*, Preliminary Submission PGA15* [19].
8. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 5-1.
9. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.91].

should implement a state-based registration system. This might be a standalone scheme or a step towards a national one.

4.4 This Chapter seeks your views on whether NSW should implement a registration system. We consider:

- the potential benefits, limitations and risks of a registration system, and
- some issues that would need to be addressed if NSW adopted such a system.

Potential benefits, limitations and risks of registration

4.5 Several reviews and inquires have identified a range of possible benefits of a registration system.[10] In particular, some see registration as an important way of preventing abuse and safeguarding the rights of people who need decision-making support.[11]

4.6 Depending on its features, a registration system could:

- help people to locate their appointment documents
- allow people to check if they have previously made an appointment – they can then revoke it and make a new appointment if they want to,[12] and
- enable people to record a revocation officially.

4.7 A registration system could also assist third parties (like banks and healthcare providers) to check:

- if a decision-making or support arrangement exists
- if an appointment document is valid or if, for instance, it has been revoked
- if an enduring appointment is in effect, and
- the authority of a particular guardian, financial manager or a supporter.

4.8 However, some stakeholders and other reviews have identified risks and challenges associated with registration.[13] For instance:

- a register could be expensive to set up and maintain

10. See, eg, NSW Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) [6.68]–[6.69], [6.82]; Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [5.29]–[5.40]; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) [16.233]–[16.237]; Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007) [3.111], [3.113].
11. NSW Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) [6.69]; Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [5.29]–[5.40]; Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007) [3.113].
12. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 5–6.
13. See, eg, NSW Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) [6.76]–[6.80]; Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [5.44]–[5.58]; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) [16.238]–[16.251].

- there may be privacy concerns, especially if the register is searchable, and
- people may be discouraged from making personal appointments, especially if registration is mandatory or if they must pay a fee to register their documents.

4.9 Some have also doubted whether registration is an effective safeguard against abuse and exploitation.[14] For instance, registration alone may not:

- prevent a person from being induced to make a personal appointment
- guarantee that third parties will search it and observe the person's wishes
- accurately record whether an enduring guardianship appointment is in effect, or
- prevent an enduring guardian, guardian or financial manager from exercising their authority in a way that does not reflect the best interests or will and preferences of the person they represent.

Question 4.1: Benefits and disadvantages of a registration system

(1) What are the potential benefits and disadvantages of a registration system? Do the benefits outweigh the disadvantages?

(2) Should NSW introduce a registration system?

(3) Should NSW support a national registration system?

The features of a registration system

4.10 In this section, we consider some issues that the NSW Government would need to address if it decided to implement a registration system. We encourage you to raise other issues for consideration.

What arrangements should be included on a register?

4.11 While some inquiries have focused on the registration of powers of attorney,[15] there may be benefits in registering other decision-making and support arrangements too.

4.12 Under the ALRC's proposal, a national online register would include documents giving effect to enduring appointments and orders for the appointment of guardians and financial managers.[16] The VLRC recommended that a register should include a wide range of appointments and advance directives, such as enduring

14. See, eg, South Australia, Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life: Second Report of the Review of South Australia's Advance Directives* (c2008) 38–39, 40; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) [16.257].
15. See, eg, NSW Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) [6.43], [6.67]–[6.82]; Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007) [3.114], rec 20.
16. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 5-1.

appointments, appointments of supporters and co-decision-makers, and tribunal-appointed guardians and administrators.[17]

Should registration be mandatory?

4.13 A contentious issue is whether registration should be mandatory. In Tasmania, for instance, enduring guardianship appointments must be registered with the Guardianship and Administration Board to be effective.[18]

4.14 The VLRC recommended mandatory registration of personal appointments.[19] It favoured mandatory registration "in order to realise some of the primary benefits of establishing a register – such as ease of locating, verifying and validating the continuing existence of an appointment".[20] Before registration, the registrar would check each personal appointment document to ensure it is valid.[21] The VLRC further stated that the Victorian Civil and Administrative Tribunal ("Victorian Tribunal") should inform the registrar when it makes new appointments.[22]

4.15 An enduring guardian would also be required to advise the registrar if they "reasonably believe" the appointor lacks capacity and they propose to start exercising their functions under the appointment document. This would be noted on the register.[23]

4.16 The VLRC also recommended processes for reporting and recording whether a personal appointment has been revoked or if the appointee has resigned. Revocation or resignation would be effective from the time the register notes this.[24]

4.17 Acts performed under an unregistered personal appointment would have no legal effect, although the Victorian Tribunal could validate acts undertaken in "the reasonable belief that an appointment had been validly made and registered".[25] However, registration would serve as "presumptive evidence" of the appointment and the authority that it confers.[26]

4.18 The ALRC has also proposed that the making or revocation of enduring documents would not be valid until registered.[27] While the ALRC considers that guardianship and financial management orders should be registered, unregistered orders would still be valid under its proposal.[28]

4.19 These features could prevent abuse in some instances. For instance, third parties might refuse to deal with someone who claims to be an enduring guardian unless their authority is stated clearly on the register.

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17. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 259.
18. *Guardianship and Administration Act 1995* (Tas) s 32(2)(d).
19. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 261; Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 5-2.
20. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.96].
21. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 266.
22. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 261.
23. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 271–272.
24. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 269–270.
25. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 262.
26. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 273.
27. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 5-2.
28. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [5.18].

4.20 However, the Queensland Law Reform Commission ("QLRC") considered that the burdens of mandatory registration of all enduring powers of attorney would likely outweigh its benefits. The QLRC expressed "serious concerns that the formality, costs and complexity of [mandatory] registration would inevitably discourage some adults from making" an appointment.[29]

Should there be a registration fee?

4.21 Fees are charged for registration in some states. The Tasmanian Guardianship and Administration Board charges $68 for the registration of an enduring guardianship appointment, $48 for the registration of a revocation and $30.60 to perform a search. The Board can consider waiving the fees upon application.[30] In NSW, Land and Property Information charges $136.30 to register a power of attorney.[31]

4.22 A registration system will cost money to establish and maintain. Registration fees could help cover some of these costs. However, a fee may discourage some people from making personal appointments.[32] For this reason, the VLRC recommended against imposing registration fees. While a fee would be imposed if someone wanted to register more than one personal appointment during a calendar year, the registrar could waive this fee.[33]

Who should be able to search the register?

4.23 Third parties could be allowed to search the register to confirm the details of an appointment. However, this raises significant privacy concerns. The register could contain sensitive personal information that an appointor may not wish to publicise. The VLRC's solution was that the Victorian Public Advocate should decide who can access the register and the information they can access.[34]

Question 4.2: The features of a registration system

If NSW was to implement a registration system, what should be the key features of this system?

29. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) [16.259].
30. Tasmanian Guardianship and Administration Board, *Fees Charged by the Board* (2016) <www.guardianship.tas.gov.au/new_fee_structure> (retrieved 13 February 2017).
31. NSW, Land and Property Information, *Land and Property Information Fee Changes from 1 July 2016*, Circular 2016/09 (2016).
32. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.119].
33. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 268.
34. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 275–280.

5. Holding guardians and financial managers to account

In brief

There are rules and procedures in NSW law to prevent abuse and to hold guardians and financial managers to account for their actions. However, there may be a need to strengthen these safeguards.

5.1 The law needs to contain effective processes to prevent guardians and financial managers from abusing their position. It is also important that people are able to take action if this does happen.

5.2 NSW law already contains a range of safeguards to prevent abuse and to hold guardians and financial managers responsible for their actions. This Chapter seeks your views on whether NSW could do more to improve accountability, transparency and other safeguards in the NSW guardianship and financial management system.

5.3 The Chapter focuses primarily on mechanisms in the *Guardianship Act 1987* (NSW) ("*Guardianship Act*") and the *NSW Trustee and Guardian Act 2009* (NSW) ("*Trustee and Guardian Act*"). We discuss the Supreme Court's powers in Question Paper 6.[1]

5.4 The NSW Law Reform Commission is unable to investigate specific complaints against the NSW Trustee and Guardian ("NSW Trustee"), the Public Guardian, private guardians or private financial managers as part of this review of the *Guardianship Act*. However, we encourage you to suggest legislative changes to improve the safeguards that apply across the system.

1. NSW Law Reform Commission, *Remaining Issues*, Review of the Guardianship Act 1987 Question Paper 6 (2017) ch 11.

5.5 The Chapter considers:

- whether there should be a legislative statement of the duties and responsibilities of guardians and financial managers
- the processes for overseeing and monitoring the activities of private financial managers, private guardians, the NSW Trustee and the Public Guardian, and
- whether NSW should introduce new offences, civil penalties and powers to make compensation orders.

5.6 Although we have chosen to focus on a range of important rules and procedures, we encourage you to suggest other ideas.

A statement of duties and responsibilities

5.7 Guardians and financial managers must observe the general principles in s 4 of the *Guardianship Act* when they exercise their functions.[2] In addition, courts expect financial managers (in particular) to observe certain "fiduciary" obligations.[3] This means they have a "foundational duty to act … in good faith".[4] They must avoid conflicts of interest and must not make "unsanctioned profit" from their role.[5]

5.8 The Victorian Law Reform Commission ("VLRC") believed "[i]t is unrealistic to expect most substitute decision makers to be aware of the extent of their duties as fiduciaries".[6] The VLRC concluded that substitute decision-makers would benefit from legislative guidance "about the manner in which they should conduct themselves".[7] It may be that the *Guardianship Act* could state the duties and responsibilities of guardians and financial managers more clearly.

Possible content of a new statement of duties and responsibilities

5.9 Legislation in some other states and territories already includes statements of duties and responsibilities. For instance, guardians and administrators in Queensland must exercise their powers:

- honestly and with reasonable diligence to protect the interests of the person on whose behalf they act, and
- as required by the terms of any order of the Queensland Civil and Administrative Tribunal ("Queensland Tribunal").[8]

2. See also *NSW Trustee and Guardian Act 2009* (NSW) s 39.
3. See, eg, *P v NSW Trustee and Guardian* [2015] NSWSC 579 [51]; *Ability One Financial Management v JB by his Tutor AB* [2014] NSWSC 245 [35], [104], [174].
4. *Ability One Financial Management v JB by his Tutor AB* [2014] NSWSC 245 [113].
5. *Ability One Financial Management v JB by his Tutor AB* [2014] NSWSC 245 [113].
6. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.142].
7. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.141].
8. *Guardianship and Administration Act 2000* (Qld) s 35, s 36. See also *Guardianship of Adults Act* (NT) s 22(1).

5.10 The VLRC recommended guardians and administrators should be required to:

(a) not exceed the powers granted under the appointment or under the statute

(b) act honestly, diligently and in good faith

(c) identify and respond to situations where the substitute decision maker's interests conflict with those of the represented person, ensure the represented person's interests are always the paramount consideration, and seek external advice where necessary

(d) communicate with the represented person throughout the decision-making process and explain, as far as possible, decisions being made on their behalf

(e) treat the person and important people in their life with dignity and respect.[9]

5.11 In addition, the VLRC made specific recommendations on the responsibilities of administrators. The VLRC recommended that administrators be required to keep appropriate records, keep their property separate from that of the person they represent, and to exercise care, skill and diligence when making investments.[10]

5.12 The VLRC proposed rules to prevent administrators from entering into unauthorised transactions that involve a conflict of interest. An exception would be the power to make reasonable gifts.[11] The Australian Law Reform Commission ("ALRC") has proposed a similar rule.[12]

5.13 NSW Young Lawyers suggests guardians could be required to:

- be familiar with the personal circumstances of the person who is the subject of a guardianship order
- consult with, and obtain instructions from this person, where practical, and
- request a review of a guardianship order where they form the view that the person has legal capacity.[13]

5.14 Both the VLRC and the ALRC proposed that guardians and administrators should sign an undertaking to comply with their responsibilities.[14]

Effect of a breach of duty

5.15 If NSW does introduce a statement of duties and responsibilities, what should happen if a guardian or financial manager breaches those standards?

9. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 288.
10. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 292, rec 287.
11. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 120–123.
12. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 5-6.
13. NSW Young Lawyers, *Preliminary Submission PGA32,* 7.
14. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 295, rec 296; Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 6-2.

5.16 One option is to introduce a new penalty. In Queensland, a guardian or administrator who fails to observe their duties (see above at [5.9]) faces a penalty of up to $24,380.[15]

5.17 The statement could also "provide a standard against which the actions of substitute decision makers can be measured where necessary".[16] For instance, the NSW Civil and Administrative Tribunal ("Tribunal") could consider whether a guardian or financial manager has complied with the statement when it reviews their appointment or decides whether to appoint them to these roles in the future.[17]

Question 5.1: A statement of duties and responsibilities

(1) Should the *Guardianship Act 1987* (NSW) and/or the *NSW Trustee and Guardian Act 2009* (NSW) include a statement of the duties and responsibilities of guardians and financial managers?

(2) If so:

(a) what duties and responsibilities should be listed in this statement?

(b) should guardians and financial managers be required to sign an undertaking to comply with these duties and responsibilities?

(b) what should happen if guardians and financial managers fail to observe these duties and responsibilities?

Oversight of private financial managers

5.18 The Tribunal can appoint a private person to manage a person's property and affairs (this is known as the person's "estate").[18] The NSW Trustee plays an important role in supervising private financial managers.

Overview of the NSW Trustee's supervisory role

5.19 In NSW, private financial managers do not automatically obtain the power to "interfere" with (or manage) the person's estate when they are appointed. They can only exercise this power if the Supreme Court or the NSW Trustee authorises it.[19]

5.20 The Supreme Court and the NSW Trustee can make orders for the administration and management of the estate. They also have the power to order that the person's property or income be used for particular purposes.[20]

15. *Guardianship and Administration Act 2000* (Qld) s 35, s 36; *Penalties and Sentences Regulation 2015* (Qld) cl 3.
16. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.162].
17. See, eg, NSW Law Reform Commission, *The Role of Guardians and Financial Managers*, Review of the Guardianship Act 1987 Question Paper 3 (2016) [2.20].
18. *Guardianship Act 1987* (NSW) s 25M(1)(a), s 3 definition of "estate". For discussion, see NSW Law Reform Commission, *The Role of Guardians and Financial Managers*, Review of the Guardianship Act 1987 Question Paper 3 (2016) [2.33]–[2.54].
19. *Guardianship Act 1987* (NSW) s 25M(2).
20. *NSW Trustee and Guardian Act 2009* (NSW) s 64, s 65, s 66.

5.21 The NSW Trustee can authorise private managers to have certain functions and direct them in the exercise of these functions.[21] Private managers must seek the NSW Trustee's approval when they propose to take action on behalf of the person whose estate they manage.[22] Someone who fails to comply with the NSW Trustee's order or direction, without reasonable excuse, can face a penalty of up to $1100.[23]

5.22 The NSW Trustee charges fees for supervising the management of the estate by a private financial manager.[24] In addition, a fee must be paid out of the estate into a "surety bond scheme".[25] A surety bond company will then reimburse the estate if the private manager's mismanagement causes a loss to the estate.[26]

5.23 Some stakeholders question the current system of oversight by the NSW Trustee. In its preliminary submission, the Intellectual Disability Rights Service supports legislative change to allow the Tribunal

> to appoint a private financial manager without requiring oversight by the NSW Trustee and Guardian where the Tribunal is satisfied that the relationship and other safeguards are such that oversight is considered unnecessary.[27]

Question 5.2: The supervision of private managers

What, if anything, should change about the NSW Trustee and Guardian's supervisory role under the *NSW Trustee and Guardian Act 2009* (NSW)?

Reporting requirements

5.24 The NSW Trustee requires private financial managers to submit reports as directed and to lodge annual accounts.[28] The Seniors Rights Service views annual accounts as "a means to check on the management of the private manager to ensure that no inappropriate or conflict transactions are entered into".[29]

5.25 The *Trustee and Guardian Act* does not specify how often private financial managers should lodge accounts.[30] The NSW Legislative Council Standing

21. *NSW Trustee and Guardian Act 2009* (NSW) s 66.
22. See NSW Trustee and Guardian, *Manager's Proposals*, Private Management Summary Factsheet 3 (2011). An exception is giving gifts to a close friend of a managed person (for example, on birthdays) or donations, provided they are reasonable in the circumstances: *NSW Trustee and Guardian Act 2009* (NSW) s 76.
23. *NSW Trustee and Guardian Act 2009* (NSW) s 118(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.
24. *NSW Trustee and Guardian Act 2009* (NSW) s 113(1); *NSW Trustee and Guardian Regulation 2008* (NSW) cl 38B. See also NSW Trustee and Guardian, "Private Management Fees" <www.tag.nsw.gov.au/private-management-fees.html> (retrieved 13 February 2017).
25. The NSW Trustee may waive the fee in certain circumstances: NSW Trustee and Guardian, *Surety Bond: Frequently Asked Questions* (2016) 1.
26. NSW Trustee and Guardian, *Surety Bond: Frequently Asked Questions* (2016) 1.
27. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 8.
28. See NSW Trustee and Guardian, *List of Reports Required by the NSW Trustee and Guardian*, Private Management Summary Factsheet 1 (2011); NSW Trustee and Guardian, *Private Management Frequently Asked Questions* (2015) 4.
29. Seniors Rights Service, *Preliminary Submission PGA07*, 24.
30. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [9.65], quoting NSW Trustee and Guardian, *Submission 13*, 10.

Committee on Social Issues ("Standing Committee") recommended the NSW Government should allow the NSW Trustee "to decide how often private managers must lodge accounts for review and exempting it from any liability arising from the exercise of this discretion".[31] This could permit the NSW Trustee to reduce or increase the reporting frequency on a case-by-case basis, leading to a more efficient allocation of resources.[32]

Question 5.3: Reporting requirements for private financial managers

Should the *NSW Trustee and Guardian Act 2009* (NSW) be amended to allow the NSW Trustee and Guardian to decide how often private managers should lodge accounts?

Removing a private financial manager from their role

5.26 If a financial manager has not fulfilled their duties adequately, the Tribunal might remove them from their role following a review. The Tribunal can review the appointment of a financial manager on its own initiative or at the request of:

- the NSW Trustee
- the person whose estate is being managed, or
- anyone else who has a genuine concern for that person's welfare (in the Tribunal's opinion).[33]

The Tribunal can also order that the appointment of a financial manager be reviewed within a specified time.[34]

5.27 The Tribunal can revoke or confirm the appointment after a review. However, the Tribunal can only revoke a financial manager's appointment if:

- the financial manager asks it to
- the Tribunal is satisfied that revocation is in the best interests of the person whose estate is being managed, or
- the Tribunal revokes the entire financial management order.

The Tribunal must appoint another person if it revokes the appointment of the existing financial manager but does not revoke the financial management order.[35]

5.28 Legislation in some other states and territories contains other reasons for removal.[36] For instance, the appointment of an administrator (or guardian) ends automatically

31. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 25.
32. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [9.68].
33. *Guardianship Act 1987* (NSW) s 25S(1).
34. *Guardianship Act 1987* (NSW) s 25S(1A).
35. *Guardianship Act 1987* (NSW) s 25U.
36. See, eg, *Guardianship and Administration Act 2000* (Qld) s 26, s 31(4)–(5); *Guardianship and Management of Property Act 1991* (ACT) s 31.

in Queensland in a range of circumstances. This includes if an administrator becomes insolvent, bankrupt, or a paid carer for the person whose estate is being managed.[37] The Queensland Tribunal may also revoke the appointment of an administrator if they are no longer competent or if someone else is more appropriate.[38]

Question 5.4: Removing private financial managers from their role

(1) When should a private financial manager be removed from their role?

(2) Should the *Guardianship Act 1987* (NSW) set out the circumstances in which a private financial manager can or must be removed from their role more clearly?

Oversight of private guardians

5.29 The Tribunal can also appoint a private person to the role of guardian.[39] Perhaps reflecting their lack of direct responsibility over financial matters, fewer accountability measures apply to private guardians.

Reporting requirements

5.30 The *Guardianship Act* does not require private guardians to keep or produce records of their activities.

5.31 In Tasmania, the Guardianship Board must obtain and consider a written report from a guardian on the circumstances of a person who is under a guardianship order at least once every 12 months. A guardian who fails to report when requested faces a penalty of up to $1570.[40]

5.32 The ALRC has proposed that enduring guardians, as well as enduring attorneys, should be required to keep records.[41] The ALRC does not refer to tribunal-appointed guardians in this proposal.

5.33 However, the VLRC considered that periodic reporting by private guardians, enduring guardians and administrators would be unlikely to promote good decision-making. The VLRC suggested that "[t]he cost of perusing reports is better invested in training guardians to perform their functions well".[42]

37. *Guardianship and Administration Act 2000* (Qld) s 26.
38. *Guardianship and Administration Act 2000* (Qld) s 31(4)–(5).
39. For discussion, see NSW Law Reform Commission, *The Role of Guardians and Financial Managers*, Review of the Guardianship Act 1987 Question Paper 3 (2016) [2.16]–[2.18].
40. *Guardianship and Administration Act 1995* (Tas) s 66; *Penalty Units and Other Penalties Act 1987* (Tas) s 4A(1); Tasmanian Department of Justice, *Value of Indexed Amounts in Legislation* <www.justice.tas.gov.au/about/legislation/value_of_indexed_units_in_legislation> (retrieved 27 February 2017). The Guardianship Board can also require the Public Guardian to provide a report: see, eg, *NN (Review Guardianship)* [2010] TASGAB 15 [13].
41. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 5-9.
42. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [18.104].

Question 5.5: Reporting requirements of private guardians

Should private guardians be required to submit regular reports on their activities? If so, to whom should they be required to report?

Directions to guardians

5.34 The Tribunal can direct a guardian on the exercise of their functions.[43] Only a guardian can apply for directions.[44]

5.35 The Tribunal's power to give directions allows it to clarify a guardian's powers.[45] The power also protects guardians: no one can take legal action against a guardian for anything they do in good faith and in accordance with the Tribunal's directions.[46]

5.36 Some other states and territories allow a wider range of people to ask a tribunal to issue directions to a guardian. Legislation in the Australian Capital Territory appears to allow "any interested person" to apply for directions.[47] In Tasmania, the Guardianship Board can direct or offer advice to a guardian on its own initiative.[48]

5.37 Allowing a wider range of people to apply to the Tribunal could be one way of guiding guardians and preventing them from misusing their authority (intentionally or unintentionally). However, it could further complicate the role of a guardian and increase the Tribunal's workload.

Question 5.6: Directions to guardians

Who should be able to apply to the NSW Civil and Administrative Tribunal for directions on the exercise of a guardian's functions?

Removing a guardian from their role

5.38 The *Guardianship Act* does not contain a specific process for removing a guardian. However, the Tribunal can remove a private guardian by revoking or varying the guardianship order under which they were appointed. It can do so following a review of the guardianship order.[49] For example, the Tribunal varied one guardianship order to replace the appointed private guardians with the Public Guardian in a case involving family conflict.[50]

5.39 As we discuss in Chapter 2, the Tribunal cannot replace an enduring guardian. Instead, the Tribunal can revoke the enduring guardianship appointment.[51] The

43. *Guardianship Act 1987* (NSW) s 28.
44. *Guardianship Act 1987* (NSW) s 26.
45. See, eg, *BAH* [2007] NSWGT 1 [9].
46. *Guardianship Act 1987* (NSW) s 30.
47. *Guardianship and Management of Property Act 1991* (ACT) s 16(1); *Omari v Omari* [2009] ACTSC 28 [65].
48. *Guardianship and Administration Act 1995* (Tas) s 31(4).
49. *Guardianship Act 1987* (NSW) s 25C.
50. *NXC* [2016] NSWCATGD 13. See also *OFN* [2014] NSWCATGD 31.
51. *Guardianship Act 1987* (NSW) s 6K(2).

Tribunal can then consider whether to make a guardianship order and appoint a different guardian.[52]

Question 5.7: Removing private guardians from their role

(1) When should a private guardian be removed from their role?

(2) Should the *Guardianship Act 1987* (NSW) set out these circumstances?

Reviewing the decisions and conduct of public bodies

5.40 The Tribunal can appoint the NSW Trustee as a financial manager or the Public Guardian as a guardian as a last resort.[53] The law in NSW enables people to seek a review of decisions made by the NSW Trustee or the Public Guardian.

Decisions of the NSW Trustee

5.41 When appointed to manage an estate, the NSW Trustee is subject to court supervision and oversight.[54] The Tribunal can also review the appointment of the NSW Trustee.[55]

5.42 In addition, certain decisions made by the NSW Trustee as a financial manager[56] or as part of its role in overseeing private managers[57] can be reviewed. The person whose estate is being managed, their spouse, and any other person whose interests are "adversely affected by the decision" (in the opinion of the Tribunal) can seek a review.[58] Two types of review are available: internal and external.

5.43 An internal review is carried out by someone from the NSW Trustee who was not "substantially involved" in the original decision. The internal reviewer can affirm or vary the decision, or set it aside and make a new decision.[59]

5.44 People can apply to the Tribunal for an external review of the original decision if they are still not satisfied.[60] After considering the facts and the law, the Tribunal determines "what the correct and preferable decision is".[61] The Tribunal can affirm or vary the original decision, or set it aside and make a new one. The Tribunal can also set aside the original decision and require the NSW Trustee to reconsider the issue in light of the Tribunal's directions or recommendations.[62]

52. *Guardianship Act 1987* (NSW) s 6K(3).
53. *Guardianship Act 1987* (NSW) s 15(3), s 17(3), s 25M(1). For discussion, see NSW Law Reform Commission, *The Role of Guardians and Financial Managers*, Review of the Guardianship Act 1987 Question Paper 3 (2016) [2.23]–[2.27], [2.55]–[2.63].
54. *NSW Trustee and Guardianship Act 2009* (NSW) s 11(4).
55. *Guardianship Act 1987* (NSW) s 25S(1), s 25S(2).
56. *NSW Trustee and Guardian Act 2009* (NSW) s 62(1).
57. *NSW Trustee and Guardian Act 2009* (NSW) s 70.
58. *NSW Trustee and Guardian Act 2009* (NSW) s 62(1), s 62(2).
59. *Administrative Decisions Review Act 1997* (NSW) s 53(3), s 53(5).
60. *NSW Trustee and Guardian Act 2009* (NSW) s 62, s 70.
61. *Administrative Decisions Review Act 1997* (NSW) s 63(1).
62. *Administrative Decisions Review Act 1997* (NSW) s 63(3).

5.45 The Tribunal's decision can be appealed in some circumstances. We discuss the Tribunal's appeal process in Chapter 8.

5.46 People can also complain to the NSW Ombudsman about the NSW Trustee's conduct.[63] The Ombudsman can assess the complaint, attempt to resolve it, conduct a formal investigation and make recommendations to the NSW Trustee. If the NSW Trustee does not follow the recommendations, the Ombudsman can deliver a report to Parliament.[64] However, the Ombudsman cannot make government agencies comply with recommendations.

Decisions of the Public Guardian

5.47 Decisions of the Public Guardian made in connection with their functions as a guardian can be reviewed internally and externally.[65] Applications for review can be made by the person to whom the decision relates, their spouse, someone who has the care of the person, and any other person whose interests are "adversely affected by the decision" (in the Tribunal's opinion).[66] People can also complain to the NSW Ombudsman about the Public Guardian's conduct.[67]

Question 5.8: Reviewing decisions and conduct of public bodies

What, if anything, should change about the mechanisms for reviewing the decisions and conduct of the NSW Trustee and Guardian and the Public Guardian?

Offences, civil penalties and compensation orders

5.48 One option for enhancing accountability and preventing abuse is to introduce stronger sanctions for guardians and financial managers who misuse their role.

New criminal offences

5.49 Neither the *Guardianship Act* nor the *Trustee and Guardian Act* criminalises acts of abuse, exploitation or neglect committed by a guardian or a financial manager. Some offences contained within the *Crimes Act 1900* (NSW) could potentially be relevant in these situations. These include offences relating to:

- fraud[68]
- corrupt benefits received or solicited by a person appointed to manage property,[69] and

63. *Ombudsman Act 1974* (NSW) s 12. They should first attempt to resolve their complaint with the NSW Trustee directly: NSW Ombudsman, *Complaining to the NSW Ombudsman about NSW Government Agencies and Local Councils*, Fact Sheet (2015) 1.
64. *Ombudsman Act 1974* (NSW) pt 3, pt 4.
65. *Guardianship Act 1987* (NSW) s 80A(1); *Guardianship Regulation 2016* (NSW) cl 17.
66. *Guardianship Act 1987* (NSW) s 80A(2).
67. *Ombudsman Act 1974* (NSW) s 12.
68. *Crimes Act 1900* (NSW) s 192E.
69. *Crimes Act 1900* (NSW) s 249E.

- a person's failure to provide someone else with the necessities of life.[70]

5.50 Prosecutions involving these offences are rare. In our preliminary research, we have not found any recent cases that involve guardians or financial managers. There could be a range of reasons for this, including difficulties with evidence.[71]

5.51 In its 2016 report on elder abuse, a NSW Legislative Council committee ("Legislative Council committee") was concerned that the law contains insufficient safeguards to prevent financial abuse.[72] The committee recommended amending the *Powers of Attorney Act 2003* (NSW) ("*Powers of Attorney Act*") to introduce "new indictable offences for dishonestly obtaining or using an enduring power of attorney, which are punishable by imprisonment".[73] The committee based this recommendation upon Victoria's powers of attorney legislation.[74]

5.52 However, the ALRC has warned against duplicating existing offences and creating further complexity by introducing new offences. In its view, there is no guarantee that new offences would lead to an increase in the number of prosecutions.[75]

Question 5.9: Criminal offences

Should NSW introduce new criminal offences to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager?

New civil penalties

5.53 The VLRC observed that "the criminal justice system is sometimes unable to deal effectively" with guardians and administrators that abuse their powers.[76] The VLRC therefore recommended new civil penalties for the abuse, neglect or exploitation of people with impaired decision-making ability.[77] These penalties would apply to people who are responsible for caring for a person with impaired decision-making ability, including substitute decision-makers and supporters.[78]

5.54 These penalties would not involve the criminal justice system. Instead, they would involve civil procedures and fines. An advantage of this is that a lower standard of proof would apply.[79] The penalties could also play an educative role by "highlighting that it is unacceptable to mistreat vulnerable people".[80]

70. *Crimes Act 1900* (NSW) s 44.
71. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [4.13].
72. NSW, Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) [6.24]–[6.27], [6.96].
73. NSW, Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) [6.101].
74. NSW, Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) [6.101] rec 7; *Powers of Attorney Act 2014* (Vic) s 135.
75. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [4.20], [4.35]–[4.40].
76. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [18.73].
77. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 305–314.
78. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [18.83].
79. On the nature of civil penalties, see Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [18.86]–[18.92].
80. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [18.75], [18.86].

Question 5.10: Civil penalties

Should NSW introduce new civil penalties for abuse, exploitation or neglect committed by a guardian or financial manager?

Compensation orders

5.55 The Victorian Supreme Court or the Victorian Civil and Administrative Tribunal can order an attorney to pay compensation if the attorney has contravened the *Powers of Attorney Act 2014* (Vic) and caused the principal to suffer loss.[81] The Legislative Council committee recommended that the NSW *Powers of Attorney Act* should reflect the Victorian legislation.[82] The Seniors Rights Service also supports the introduction of powers modelled on the Victorian legislation.[83]

5.56 A compensation scheme could provide an alternative to going to court. It would enable people to access the Tribunal's low cost and less formal procedures (we discuss the Tribunal's procedures in Chapter 8).

5.57 It may also be desirable to empower the Tribunal to order other appointees to pay compensation. The ALRC has proposed that state and territory tribunals should be able to issue compensation orders against enduring attorneys, enduring guardians, and court and tribunal-appointed guardians and financial managers. Compensation would be available when an appointee's failure to comply with their obligations under relevant legislation causes loss.[84] The Queensland Tribunal or a court can already order a guardian or an administrator to pay compensation in this situation.[85]

Question 5.11: Offences, civil penalties and compensation orders

Should NSW legislation empower the NSW Civil and Administrative Tribunal to issue compensation orders against guardians and financial managers?

Question 5.12: Other issues

Would you like to raise any other issues about how guardians and financial managers can be held responsible for their actions?

81. *Powers of Attorney Act 2014* (Vic) s 77.
82. NSW Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) [6.101].
83. Seniors Rights Service, *Preliminary Submission PGA07*, 25.
84. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 5-5.
85. *Guardianship and Administration Act 2000* (Qld) s 59.

6. Safeguards for supported decision-making

In brief

There is a need for safeguards to prevent undue influence and abuse within a supported decision-making arrangement. A range of safeguards have been implemented in formal supported decision-making systems elsewhere.

6.1 In Question Paper 2, we asked if NSW should introduce a formal supported decision-making model. We considered two different types of models: "supported decision-making" and "co-decision-making". Under a supported decision-making model, a person receives help to make a decision. Under a co-decision-making model, a person makes decisions jointly with someone else.[1]

6.2 We now invite you to comment on the safeguards that should apply when a supporter or a co-decision-maker is appointed. As with any decision-making arrangement, there is a risk of undue influence, abuse and exploitation. Safeguards are needed to reduce this risk.

6.3 However, there is also a need to avoid "over-regulating to the point that the process becomes cumbersome".[2] Potential supporters or co-decision-makers might be discouraged from taking on these roles if there is too much "red tape". The Disability Council NSW also observes that it is "important to avoid excessive regulation as this could unduly interfere with relationships between the person and supporter and undermine the trust that the supporter relationship is built on".[3]

6.4 Some safeguards applicable to guardians and financial managers could also apply to supporters and co-decision-makers. For example, the Public Guardian or a new public advocate could be empowered to investigate complaints against a supporter or a co-decision-maker (see Chapter 7). Supporters and co-decision-makers could face penalties if they misuse their role (see Chapter 5).[4]

6.5 However, there may be a need to tailor some safeguards to these specific roles. In this Chapter, we provide examples taken from supported decision-making systems in other countries, pilot programs and the recommendations of other law reform

1. NSW Law Reform Commission, *Decision-Making Models*, Review of the Guardianship Act 1987 Question Paper 2 (2016) [2.6]–[2.18].
2. NSW Trustee and Guardian, *Preliminary Submission PGA50,* 8. See also B Ripperger and L Joseph, *Preliminary Submission PGA31,* 10.
3. Disability Council NSW, *Preliminary Submission PGA26,* 17.
4. See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 61, rec 91; Guardianship and Administration Bill 2014 (Vic) cl 208 (lapsed).

bodies in Australia. We encourage you to share your views on these examples and to suggest other options.

A statement of duties and responsibilities

6.6 In Chapter 5, we ask whether guardians and financial managers should be required to observe a statement of duties and responsibilities. It may also be desirable to require supporters and co-decision-makers to observe similar duties.

6.7 Reflecting the nature of their roles, some duties and responsibilities might apply specifically to supporters and co-decision-makers. These could include duties:

- to assist the supported person to obtain information and to explain the information in a way the person can understand[5]
- not to coerce, intimidate or unduly influence the supported person into taking a particular course of action[6]
- not to make a decision on behalf of the supported person[7]
- not to act without the supported person's knowledge and consent,[8] and
- to notify the NSW Civil and Administrative Tribunal ("Tribunal") or a government body if they believe the supported person no longer consents to their arrangement.[9]

6.8 A related question concerns what happens if the supporter or co-decision-maker fails to observe their duties. One option could be to impose a penalty for serious breaches. The Tribunal might also consider whether the supporter or co-decision-maker has fulfilled their duties when it reviews the decision-making arrangement (see below at [6.18]–[6.23]).

Monitors

6.9 NSW legislation could allow people to appoint a "monitor" to ensure a supporter or co-decision-maker complies with their duties. The ACT Law Reform Advisory Council observed that a trained monitor "provides a safeguard and can reduce the potential for inadvertent exercises of undue influence or conflicts of interest".[10]

6.10 In British Columbia, Canada, a person aged 19 years or older can appoint a representative to help them make decisions.[11] The supported person is also

5. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(1)(a)–(b), s 19(1)(a), (c); Guardianship and Administration Bill 2014 (Vic) cl 103(1)(e) (lapsed).
6. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 48, rec 77.
7. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(2); Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.107], rec 45, rec 74.
8. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.107], rec 45, rec 74.
9. Victorian Law Reform Commission, *Guardianship,* Final Report 24 (2012) rec 56, rec 87.
10. ACT Law Reform Advisory Council, *Guardianship Report* (2016) 89.
11. *Representation Agreement Act 1996* (British Columbia) s 7.

generally required to nominate a monitor.[12] The powers and duties of a monitor include:

- visiting and speaking with the represented person at any reasonable time
- requiring the representative to produce accounts and other records, or to prepare a report on a specific matter if there is reason to believe they are not complying with their duties
- informing the British Columbia Public Trustee and Guardian if the monitor still has reason to believe the representative is not complying with their duties.[13]

6.11 Some Australian pilot programs have also endorsed the use of monitors.[14] A supported decision-making pilot program in the Australian Capital Territory recommended that supported decision-making initiatives should include a monitor "to oversee and coach decision makers and decisions supporters".[15]

6.12 One question is whether monitors should be paid. The ACT Law Reform Advisory Council observed that monitors may need to be paid in some cases.[16] Otherwise, it may be difficult for a supported person to find a monitor in their personal network.

Reporting and record-keeping requirements

6.13 Some supported and co-decision-making laws include record-keeping and reporting requirements. Co-decision-makers in Ireland must report on the performance of their functions annually.[17] Representatives in British Columbia must keep accounts and other records. They must produce them at the request of the represented person, their monitor, or the British Columbia Public Guardian and Trustee.[18]

6.14 The Victorian Law Reform Commission ("VLRC") was "concerned that excessive accountability requirements could prove burdensome for co-decision makers, and discourage people from taking on these roles".[19] However, the VLRC recommended that the Victorian Civil and Administrative Tribunal ("Victorian Tribunal") could require co-decision-makers who have the power to assist a person to make financial decisions to lodge annual accounts.[20]

12. *Representation Agreement Act 1996* (British Columbia) s 12.
13. *Representation Agreement Act 1996* (British Columbia) s 20.
14. M Wallace, *Evaluation of the Supported Decision Making Project* (South Australia, Office of the Public Advocate, 2012) 43, 48; ACT Disability, Aged and Carer Advocacy Service, *Spectrums of Support: A Report on a Project Exploring Supported Decision Making for People with Disability in the ACT* (2013) 12.
15. ACT Disability, Aged and Carer Advocacy Service, *Spectrums of Support: A Report on a Project Exploring Supported Decision Making for People with Disability in the ACT* (2013) rec 10.
16. ACT Law Reform Advisory Council, *Guardianship Report* (2016) 89. See also ACT Disability, Aged and Carer Advocacy Service, *Spectrums of Support: A Report on a Project Exploring Supported Decision Making for People with Disability in the ACT* (2013) rec 10.
17. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 27(1).
18. *Representation Agreement Act1996* (British Columbia) s 16(8).
19. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [9.100].
20. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 84.

Revocation

6.15 The ability to revoke a decision-making arrangement is an important safeguard. The VLRC recommended that a supported person should be free to revoke a personal supported decision-making appointment if they have the capacity to do so.[21] A supported person should be able to ask the Victorian Tribunal to revoke a supported decision-making order or a co-decision-making order at any time.[22]

6.16 The VLRC also recommended that supporters and co-decision-makers must notify the Victorian Tribunal if they believe the supported person no longer consents to the arrangement.[23] They should also notify the Victorian Tribunal if the supported person no longer has the capacity to make decisions with support.[24]

6.17 Legislation in Ireland, Alberta (Canada) and Texas (United States) allows supported people to terminate their supported decision-making arrangements at any time.[25] In Ireland, a person can revoke a co-decision-making agreement completely or in part.[26] In British Columbia, however, a supported person may only change or revoke a representation agreement if they are "capable of making the agreement".[27] Revocation can occur if certain formal requirements are met.[28]

Review mechanisms

6.18 In Chapters 2 and 3, we discuss the review mechanisms that apply to enduring guardianship appointments and to guardianship and financial management orders. A similar mechanism could apply to supported decision-making arrangements.

The trigger for review

6.19 One option could be to provide for regular reviews. The VLRC recommended that the Victorian Tribunal should review all supported decision-making and co-decision-making orders at least once within the first 12 months of the order and then at least once every three years.[29] In Ireland, the Director of the Decision Support Service must review a co-decision-making agreement once within the first 9 to 15 months and then at intervals not exceeding three years.[30]

6.20 It may also be important to recognise other grounds of review to minimise the risk of misuse or abuse. The VLRC recommended that "[a]ny person with an interest in the affairs of the supported person" could apply for a review if they believe:

21. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 54.
22. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 55, rec 86.
23. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 56, rec 87.
24. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 56.
25. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 10(3), s 29(1); *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 7(1), s 17(8); *Supported Decision-Making Agreement Act*, 1357 Estates Code (Texas) § 1357.053(a).
26. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 29(1).
27. *Representation Agreement Act 1996* (British Columbia) s 27(1).
28. See, eg, *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 29(2)–(3); *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 7(2), s 17(8).
29. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 49, rec 80. See also Guardianship and Administration Bill 2014 (Vic) cl 180(1) (lapsed).
30. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 26(1).

- in the case of a personal appointment, that the supported person lacked the capacity to make the appointment
- the appointment was not validly made
- the supported person no longer has capacity to participate in the arrangement or they no longer consent to it
- the supporter is acting in breach of their responsibilities
- the order is no longer appropriate to the supported person's needs, or
- the supporter is exercising undue influence over the supported person.[31]

6.21 The VLRC recommended that "[a]ny person with an interest in the affairs of either party" to a co-decision-making arrangement could apply for a review if:

- the supported person no longer consents to the order
- the supported person or the co-decision-maker no longer has capacity to participate in co-decision-making
- the co-decision-maker is acting in breach of their responsibilities
- the order is no longer appropriate to the needs of the [supported] person
- the order is contrary to the personal and social wellbeing of the supported person.[32]

6.22 In the Guardianship and Administration Bill (Vic), the Victorian Government proposed to empower the Victorian Tribunal to a conduct a reassessment of a supportive guardianship order on its own initiative or following an application.[33]

Potential outcomes of a review

6.23 Finally, what should the Tribunal be able to do after it conducts a review? For instance, the legislation might empower the Tribunal to continue the arrangement, amend it or revoke it. The Tribunal might even be able to replace the arrangement.[34] However, the supported person's consent might be needed to amend or vary an arrangement.[35]

Question 6.1: Safeguards for a supported decision-making model

If NSW introduces a formal supported decision-making model, what safeguards should this model include?

31. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 50–51.
32. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 81–82.
33. Guardianship and Administration Bill 2014 (Vic) cl 180 (lapsed).
34. See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 52, rec 83; Guardianship and Administration Bill 2014 (Vic) cl 186(1) (lapsed); *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 21(4).
35. See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 52, rec 83.

7. Advocacy and investigative functions

In brief

Unlike other states and territories, the Public Guardian in NSW does not have extensive advocacy or investigative functions. Nor does NSW have a separate public advocate to perform these roles.

7.1 The Public Guardian plays an important role in the NSW guardianship system. The NSW Civil and Administrative Tribunal ("Tribunal") can appoint the Public Guardian as a guardian of last resort.[1] The Public Guardian also provides information to the community about guardianship, supports private guardians, and promotes changes in society to benefit people with disability.[2]

7.2 However, there are limits to the Public Guardian's role. In particular, he[3] does not have the power to assist individuals with impaired decision-making capacity if they are not under guardianship. Nor can he investigate allegations that a person is being abused, neglected or in need of guardian. Furthermore, NSW does not have a separate office-holder to act as a public advocate.

7.3 This Chapter seeks your views on whether NSW should introduce new advocacy and investigative powers. We also ask if NSW should establish a standalone office-holder (such as a public advocate) to perform some or all of these new functions.

Advocacy and assistance functions

7.4 This section considers possible new advocacy and assistance functions that either the Public Guardian or a new public advocate could exercise.

1. *Guardianship Act 1987* (NSW) s 15(3).
2. *Guardianship Act 1987* (NSW) s 79; NSW, Public Guardian, *Public Guardian Advocacy Report 2016* (2016) 19.
3. Graeme Smith is the current Public Guardian: *Public Guardian*, NSW Department of Justice <www.publicguardian.justice.nsw.gov.au/> (retrieved 16 February 2017).

Assisting individuals who are not under guardianship

7.5 The Public Guardian advocates on behalf of individuals when acting as their guardian. However, the Public Guardian does not have a general power to assist individuals with disability.

7.6 Elsewhere, guardianship legislation enables public guardians or public advocates to assist people who do not have guardianship orders. Their roles can include:

- helping people with disability to resolve problems[4]
- seeking assistance from government departments, institutions, welfare organisations and service providers on behalf of people with disability[5]
- making representations on behalf of or acting for people with disability[6]
- advising and supporting people who apply for guardianship or administration[7]
- advising people about guardianship legislation in general,[8] and
- representing people with disability before a guardianship tribunal or board.[9]

7.7 In a submission to the NSW Legislative Council Standing Committee on Social Issues ("Standing Committee"), the Public Guardian recommended an amendment to the *Guardianship Act 1987* (NSW) ("*Guardianship Act*") to allow him to "assist people with decision making disabilities without a guardianship order". This power would "give effect to the right to access supported or assisted decision making as a first step rather than having to resort to full substitute decision making".[10]

7.8 The Standing Committee endorsed the Public Guardian's recommendation.[11] The then NSW Government supported the proposed amendment in principle, subject to both a financial analysis and consideration of whether NSW should appoint a separate public advocate.[12] We consider this issue below at [7.45]–[7.50].

7.9 Some stakeholders emphasise the need for enhanced advocacy functions in their preliminary submissions to our review. Bernhard Ripperger and Laura Joseph state that the inability of the Public Guardian to assist people without a guardianship order means that some people "fall through the gaps".[13]

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4. *Guardianship and Administration Act 1993* (SA) s 21(1)(d).
5. *Guardianship and Administration Act 1986* (Vic) s 16(1)(e).
6. *Guardianship and Administration Act 1986* (Vic) s 16(1)(f); *Public Guardian Act 2014* (Qld) s 12(1)(i).
7. *Guardianship of Adults Act* (NT) s 61(1)(d); *Guardianship and Administration Act 1986* (Vic) s 16(1)(g).
8. *Guardianship and Administration Act 1986* (Vic) s 16(1)(g). See also *Guardianship and Administration Act 1995* (Tas) s 15(1)(j).
9. *Guardianship and Administration Act 1995* (Tas) s 15(1)(f); *Public Trustee and Guardian Act 1985* (ACT) s 19B(1)(a).
10. NSW, Public Guardian, *Submission to the NSW Legislative Council's Inquiry into Substitute Decision-Making for People Lacking Capacity* (21 August 2009) 13.
11. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 31.
12. NSW Government, *Legislative Council Standing Committee on Social Issues: Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 17.
13. B Ripperger and L Joseph, *Preliminary Submission PGA31*, 13.

7.10 NSW Young Lawyers also supports enhanced advocacy functions. They submit that a public advocate could represent people in Tribunal hearings. A public advocate could also recommend changes to the guardianship system to governments.[14]

7.11 The NSW Trustee and Guardian ("NSW Trustee") supports turning the Public Guardian into a public advocate. In its view, the Public Guardian should be able to promote the protection of adults with impaired capacity from neglect, exploitation or abuse, and to monitor and review service delivery.[15]

Question 7.1: Assisting people without guardianship orders

Should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship?

Systemic advocacy

7.12 The Public Guardian undertakes systemic advocacy by seeking to give "a voice to groups of people under guardianship on matters that affect them collectively".[16] The Public Guardian participates in a range of networks, committees and forums.[17]

7.13 The Public Guardian's office considers that its ability to do this flows "from its role as guardian for a number of individuals affected by a common problem".[18] The Public Guardian's functions of providing community education and reporting to the relevant minister periodically provide another basis for systemic advocacy.[19] However, it may be desirable for the *Guardianship Act* to expressly empower the Public Guardian or a public advocate to undertake systemic advocacy.

7.14 Legislation in some other states and territories specifies forms of systemic advocacy that public guardians or public advocates can undertake. This includes:

- recommending new programs, or improvements to existing programs, to meet the needs of people with disability[20] and to encourage them to reach the greatest practicable degree of autonomy[21]
- promoting the provision of services and facilities[22]
- monitoring and reviewing services and facilities[23]

14. NSW Young Lawyers, *Preliminary Submission PGA32*, 6.
15. NSW Trustee and Guardian, *Preliminary Submission PGA50,* 13.
16. NSW, Public Guardian, *Public Guardian Advocacy Report 2016* (2016) 6.
17. NSW, Public Guardian, *Public Guardian Advocacy Report 2016* (2016) 23.
18. NSW, Public Guardian, *Submission to the NSW Legislative Council's Inquiry into Substitute Decision-Making for People Lacking Capacity* (21 August 2009) 10.
19. NSW, Public Guardian, *Submission to the NSW Legislative Council's Inquiry into Substitute Decision-Making for People Lacking Capacity* (21 August 2009) 10. See *Guardianship Act 1987* (NSW) s 79, s 80.
20. *Guardianship and Administration Act 1993* (SA) s 21(1)(b).
21. *Guardianship and Administration Act 2000* (Qld) s 209(1)(c).
22. *Guardianship and Administration Act 2000* (Qld) s 209(1)(d). See also *Guardianship of Adults Act* (NT) s 61(1)(c); *Guardianship and Administration Act 1995* (Tas) s 15(1)(a).
23. *Guardianship and Administration Act 2000* (Qld) s 209(1)(e).

- supporting and encouraging the development of programs and organisations that assist people with disability[24]
- promoting the protection of people with impaired capacity from neglect, exploitation and abuse[25]
- speaking for and promoting the rights of people with disability or impaired capacity,[26] and
- supporting and promoting the interests of the carers of people with disability.[27]

7.15 One of the functions of the Victorian Public Advocate is to investigate, report and make recommendations on any aspect of the Victorian guardianship legislation that the relevant minister refers to them.[28] The Tasmanian Public Guardian has a similar role.[29]

Question 7.2: Potential new systemic advocacy functions

What, if any, forms of systemic advocacy should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to undertake?

Investigative functions and powers

7.16 Unlike its counterparts in other states and territories, the Public Guardian does not have an investigatory role. This section considers the investigative functions that the Public Guardian or a public advocate could exercise and the powers they might need to undertake these functions effectively.

Investigating the need for a guardianship application

7.17 In NSW, the Public Guardian can apply for a guardianship order.[30] However, the *Guardianship Act* does not give the Public Guardian the power to investigate whether someone might need a guardian.

7.18 Other bodies may alert the Public Guardian to the need for an application. For instance, the NSW Ombudsman's office refers information about potential abuse or neglect to the Public Guardian. The Public Guardian might then seek a temporary guardianship order as it assesses the need for a continuing order or other support.[31]

7.19 Officials with similar roles to the Public Guardian in other states and territories have investigatory powers. For instance, some officials have the power to investigate:

24. *Guardianship and Administration Act 1995* (Tas) s 15(1)(c); *Guardianship and Administration Act 1986* (Vic) s 15(1)(b).
25. *Guardianship and Administration Act 2000* (Qld) s 209(1)(b).
26. *Guardianship and Administration Act 1993* (SA) s 21(1)(c); *Guardianship and Administration Act 2000* (Qld) s 209(1)(a); *Guardianship and Administration Act 1995* (Tas) s 15(1)(d).
27. *Guardianship and Administration Act 1993* (SA) s 21(1)(e).
28. *Guardianship and Administration Act 1986* (Vic) s 15(d).
29. *Guardianship and Administration Act 1995* (Tas) s 15(1)(g).
30. *Guardianship Act 1987* (NSW) s 9(1)(c).
31. NSW Ombudsman, *Preliminary Submission PGA41*, 3.

- complaints or allegations that a person needs a guardian or administrator[32]
- complaints or allegations that a person is under an "inappropriate" or "inadequate" guardianship or financial management arrangement,[33] and
- the affairs of a person who is the subject of an application for a guardianship or administration order, if directed by a tribunal.[34]

7.20 The Public Guardian submitted to the Standing Committee that the *Guardianship Act* should permit him "to investigate any complaint or allegation that a person, who appears to the Public Guardian to have a decision making disability, … is in need of a guardian".[35] The Standing Committee recommended that the NSW Government consider these proposals.[36]

7.21 The then NSW Government supported the proposal in principle, subject to an analysis of the implementation costs. The Government also noted concerns about whether the proposal would duplicate the functions of the Guardianship Tribunal (as it then was).[37] The Guardianship Tribunal did not support the proposal as its staff already assessed applications to determine if there was a need for a guardian.[38] Subsequent governments have not implemented the proposal.

7.22 In its preliminary submission to our review, the NSW Ombudsman's office observes that providing the Public Guardian with "comprehensive investigation provisions and powers" would "complement, not duplicate" its own role.[39]

Question 7.3: Investigating the need for a guardian

Should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to investigate the need for a guardian?

Investigating suspected abuse, exploitation or neglect

7.23 Legislation in some other states and territories empowers a public guardian or public advocate to investigate complaints and allegations of exploitation, abuse and

32. *Guardianship and Administration Act 1990* (WA) s 97(1)(c); *Guardianship and Administration Act 1986* (Vic) s 16(1)(h).
33. *Guardianship and Administration Act 1990* (WA) s 97(1)(c); *Guardianship and Administration Act 1986* (Vic) s 16(1)(h); *Public Guardian Act 2014* (Qld) s 19(b).
34. *Guardianship and Administration Act 1993* (SA) s 28.
35. NSW, Public Guardian, *Submission to the NSW Legislative Council's Inquiry into Substitute Decision-Making for People Lacking Capacity* (21 August 2009) 14.
36. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 30.
37. NSW Government, *Legislative Council Standing Committee on Social Issues: Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 16–17. On 1 January 2014, the NSW Civil and Administrative Tribunal was formed to consolidate the work of 22 existing tribunals (including the Guardianship Tribunal) into one tribunal: NSW Civil and Administrative Tribunal, "About NCAT" (2017) *NSW Department of Justice* <www.ncat.nsw.gov.au/Pages/about_us/about_us.aspx> (retrieved 24 February 2017).
38. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [11.12], quoting NSW Guardianship Tribunal, *Submission 5a*, 3.
39. NSW Ombudsman, *Preliminary Submission PGA41*, 4.

neglect.[40] The Public Guardian for the Northern Territory can ensure compliance with, and prosecute offences against, the guardianship legislation.[41]

7.24 In some states and territories, public guardians or public advocates can investigate complaints and allegations about the conduct of guardians, administrators and people acting, or claiming to act, under a power of attorney.[42]

7.25 This power could also apply in supported decision-making systems.[43] For instance, the Public Guardian and Trustee of British Columbia can investigate the conduct of representatives.[44] The Victorian Law Reform Commission recommended the Victorian Public Advocate should be able to investigate "the misuse of powers by private individuals or organisations appointed to substitute decision-making, co-decision-making and supporter roles".[45]

7.26 Similar powers have been proposed in NSW. The Public Guardian submitted to the Standing Committee that holders of that office should be empowered "to investigate any complaint or allegation that a person, who appears to the Public Guardian to have a decision making disability, is being exploited, neglected or abused".[46]

7.27 In its 2016 report on elder abuse, a NSW Legislative Council committee recommended that a new public advocate be given powers

> to investigate complaints and allegations about abuse, neglect and exploitation of vulnerable adults, to initiate its own investigations where it considers this warranted, and to promote and protect the rights of vulnerable adults at risk of abuse.[47]

7.28 The Australian Law Reform Commission ("ALRC") has also proposed that state and territory public advocates or public guardians be empowered to investigate elder abuse. It has suggested state and territory governments could "consider whether [this power] should apply to all adults with care and support needs".[48]

7.29 In its preliminary submission to our review, Alzheimer's Australia NSW similarly considered a public advocate could be empowered to investigate and help resolve "instances of elder abuse of people with dementia and other vulnerable adults".[49]

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40. See, eg, *Guardianship and Administration Act 1986* (Vic) s 16(1)(h); *Public Guardian Act 2014* (Qld) s 19(a).
41. *Guardianship of Adults Act* (NT) s 61(1)(j). See also Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 329.
42. See, eg, *Public Guardian Act 2014* (Qld) s 12(1)(c); *Guardianship of Adults Act* (NT) s 61(1)(e); *Guardianship and Administration Act 1995* (Tas) s 17; *Public Trustee and Guardian Act 1985* (ACT) s 19B(1)(b). See also Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 328, rec 329.
43. For an overview of supported decision-making, see NSW Law Reform Commission, *Decision-Making Models*, Review of the Guardianship Act 1987 Question Paper 2 (2016) [2.6]–[2.13].
44. *Representation Agreement Act 1996* (British Columbia) s 30–31; *Public Guardian and Trustee Act 1996* (British Columbia) s 17.
45. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 329.
46. NSW, Public Guardian, *Submission to the NSW Legislative Council's Inquiry into Substitute Decision-Making for People Lacking Capacity* (21 August 2009) 14.
47. NSW, Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales* (2016) rec 11.
48. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [3.34], [3.35].
49. Alzheimer's Australia NSW, *Preliminary Submissions PGA14*, 8. See also NSW Trustee and Guardian, *Preliminary Submission PGA50*, 13.

7.30 The outcomes of an investigation might be used in various ways, including as evidence in a legal action against a guardian, financial manager or a supporter. We discuss the penalties that could apply to people who abuse or neglect someone with impaired decision-making capacity in Chapter 5.

7.31 In addition, the Tribunal might consider the outcomes of an investigation during the review of a decision-making arrangement. The Tribunal might then remove and replace the guardian, financial manager, supporter or co-decision-maker. Alternatively, the Tribunal might vary or revoke the whole arrangement. We discuss review processes in Chapters 2, 3, 5 and 6.

Question 7.4: Investigating suspected abuse, exploitation or neglect

Should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to investigate suspected cases of abuse, exploitation or neglect?

Powers of investigation

The power to investigate complaints or to conduct "own motion" investigations

7.32 If the Public Guardian or a public advocate is to be given an investigative role, the legislation will need to specify when they can exercise this role. In most states and territories, public guardians or public advocates can undertake investigations if they receive a complaint or allegation.[50] In some places, a tribunal, board or minister can direct a public guardian or public advocate to conduct an investigation.[51]

7.33 One issue is whether the Public Guardian or a public advocate should also be able to begin an investigation "on their own motion". That is, on their own initiative, without the need for a complaint, allegation or direction from another party.

7.34 This power could be important, as some people are unable to make a complaint and have no one in their lives to do so.[52] For this reason, the Standing Committee recommended that the NSW Government

> consider the need for the Public Guardian to have the authority to visit institutions or such places where persons potentially in need of guardianship may reside to determine the need for guardianship even when no complaint or allegation has been received.[53]

50. *Guardianship and Administration Act 1990* (WA) s 97(1)(c); *Guardianship and Administration Act 1986* (Vic) s 16(1)(h); *Public Guardian Act 2014* (Qld) s 12(1)(c), s 19; *Guardianship of Adults Act* (NT) s 61(1)(e); *Guardianship and Administration Act 1995* (Tas) s 17(1); *Public Trustee and Guardian Act 1985* (ACT) s 19B(1)(b).
51. See, eg, *Guardianship and Administration Act 1986* (Vic) s 15(d); *Guardianship and Administration Act 1995* (Tas) s 17(2).
52. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [11.18].
53. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 30.

7.35 The ALRC, the Victorian Law Reform Commission ("VLRC") and a NSW Legislative Council committee report into elder abuse also supported "own motion" investigations.[54]

7.36 A further issue is whether the Public Guardian or a public advocate should be able to decide whether to investigate a particular complaint or if they should be required to investigate all complaints.

7.37 For instance, the Queensland Public Guardian "may" investigate complaints or allegations of abuse, neglect, exploitation, or about inappropriate or inadequate decision-making arrangements.[55] However, there is no duty to investigate.

7.38 During the Queensland Law Reform Commission ("QLRC")'s guardianship review, some stakeholders favoured imposing a duty to investigate all complaints. This is because people with impaired decision-making capacity are so vulnerable to abuse.[56] Stakeholders also felt that a duty could avoid the "temptation not to investigate, on the grounds of limited resources".[57] The QLRC did not support the imposition of a duty, partly because it might affect the ability of public office-holders to prioritise their case load.[58]

Question 7.5: Investigations upon complaint or "own motion"

If the Public Guardian or a public advocate is empowered to conduct investigations, should they be able to investigate on their own motion or only if they receive a complaint?

Information gathering

7.39 In some states and territories, public guardians or public advocates can compel people to provide information for the purposes of an investigation.[59] The Queensland Public Guardian has "a right to all information necessary to investigate a complaint or allegation",[60] with broad powers to require a person to supply information or answer questions. Failure to comply with the Public Guardian's request is an offence.[61]

7.40 The VLRC considered that the Victorian Public Advocate should be able to:

- require someone to provide specified documents or other materials relevant to an investigation, and

54. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 3-1; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 329; NSW, Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales* (2016) rec 11.
55. *Public Guardian Act 2014* (Qld) s 19.
56. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) [23.128], quoting the Acting Public Advocate, *Submission 160*.
57. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) [23.130], quoting Pave the Way, *Submission 135*.
58. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) [23.131].
59. See, eg, *Guardianship and Administration Act 1986* (Vic) s 16(1)(ha); *Guardianship of Adults Act* (NT) s 65.
60. *Public Guardian Act 2014* (Qld) s 22(1).
61. *Public Guardian Act 2014* (Qld) ch 3 pt 3.

- require someone to provide written answers to questions or answer questions in person.[62]

Failure to comply with an information request from the Public Advocate would be an offence.[63]

7.41 The ALRC has also proposed that public advocates or public guardians should have the power to require a person to provide information, produce documents, or participate in an interview relating to an investigation of abuse or neglect.[64]

Question 7.6: Powers to compel information during investigations

What powers, if any, should the Public Guardian or a public advocate have to compel someone to provide information during an investigation?

Powers of search and entry

7.42 Another issue is whether the Public Guardian or a public advocate should have powers of search and entry in relation to an investigation.

7.43 In Victoria, the Public Advocate has the power to enter and inspect the premises of certain health and residential institutions and of disability service providers.[65] This does not include private premises or institutions undertaking Commonwealth functions (such as aged care facilities).[66]

7.44 The VLRC recommended that the Public Advocate should be able to seek a warrant to enter any premises in suspected cases of abuse, exploitation or neglect involving a person with impaired decision-making ability due to a disability.[67] In contrast, the ALRC considers that only police agencies should have powers to enter and inspect premises without consent.[68]

Question 7.7: Powers of search and entry

What powers of search and entry, if any, should the Public Guardian or a public advocate have when conducting an investigation?

Who should exercise these enhanced functions?

7.45 One option could be to confer additional advocacy and investigative functions on the Public Guardian. If NSW follows this approach, a single office-holder would be responsible for guardianship, advocacy and investigative roles. The Public Advocate does this in Victoria.

62. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 330.
63. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 331
64. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 3-3.
65. *Guardianship and Administration Act 1986* (Vic) s 18A(1), s 18A(5).
66. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [20.76].
67. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 333.
68. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [3.42].

7.46 The VLRC noted a possible tension between the Public Advocate's guardianship and advocacy roles. While the Public Advocate promotes the rights and freedoms of people with disability, the Public Advocate is also a substitute decision-maker. Some people might not agree with decisions the Public Advocate makes for them. However, the VLRC felt the arrangement was working well and should be retained.[69]

7.47 Another option could be to establish a new, standalone office to complement the Public Guardian's work. This office-holder might be called the "Public Advocate".

7.48 Queensland, for example, has both a Public Guardian and a Public Advocate. The Public Guardian has guardianship functions for adults and powers to investigate complaints and allegations against a guardian or administrator, among other things.[70] The Public Advocate undertakes systemic advocacy but cannot investigate complaints or allegations concerning a particular adult with impaired capacity.[71]

7.49 NSW Young Lawyers suggests that a separate office-holder could improve accountability within the guardianship system. This could occur if the public advocate's role involved scrutinising the Public Guardian and the NSW Trustee.[72]

7.50 The NSW Government would need to provide sufficient resources to whoever performs these functions. Giving new functions to the Public Guardian's office might be more cost-effective than establishing a new office, but the Public Guardian would still need to be funded to undertake these additional functions.

Question 7.8: A new Public Advocate office

Should NSW establish a separate office of the "Public Advocate"? If so, what functions should be given to this office-holder?

Question 7.9: Other issues

Would you like to raise any other issues about the potential advocacy and investigative functions of the Public Guardian or a new public advocate?

69. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [20.63].
70. *Public Guardian Act 2014* (Qld) s 12.
71. *Guardianship and Administration Act 2000* (Qld) s 209(2).
72. NSW Young Lawyers, *Preliminary Submission PGA32*, 6.

8. Procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal

In brief

The Guardianship Division of the NSW Civil and Administrative Tribunal deals with cases about guardianship and financial management, among other things. A range of rules and procedures apply in the Guardianship Division to safeguard the rights of people involved in these cases and to promote fairness, transparency, accessibility and efficiency.

8.1 This Chapter considers the procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal ("Tribunal"). The Guardianship Division deals with cases about guardianship, financial management, powers of attorney, consent to medical and dental treatment and clinical trials.

8.2 The Guardianship Division is one of four divisions of the Tribunal.[1] Some rules and procedures apply to all divisions of the Tribunal, including the Guardianship Division. Others apply specifically to Guardianship Division cases because of their complex and sensitive nature. To reflect this, we refer to either the "Tribunal" or the "Guardianship Division" as relevant.

8.3 In this Chapter, we seek your views on whether the rules and procedures that apply to the Guardianship Division could be improved. We have chosen to focus on a range of important rules and procedures. However, we encourage you to suggest other ideas.

Overview of Tribunal procedures

8.4 Tribunals differ from courts in important ways.[2] The *Civil and Administrative Tribunal Act 2013* (NSW) ("*NCAT Act*") requires the Tribunal to act with as little formality as

1. NSW Civil and Administrative Tribunal, "About NCAT" (2017) *NSW Department of Justice* <www.ncat.nsw.gov.au/Pages/about_us/about_us.aspx> (retrieved 24 February 2017).
2. G Appleby, A Reilly and L Grenfell, *Australian Public Law* (Oxford University Press, 2nd ed, 2014) 224.

possible[3] and the Tribunal has considerable flexibility to determine its own procedures. It is free to make inquiries and inform itself as it sees fit.[4] Unlike a court, the Tribunal can call and question any witness itself.[5] In addition, the Tribunal is not required to follow the rules of evidence.[6]

8.5 However, this does not mean the Tribunal can make a decision any way it likes. In particular, the Tribunal must follow the rules of "natural justice".[7] Natural justice (also known as "procedural fairness") does not have a precise definition.[8] However, it requires the Tribunal to meet an appropriate standard of fair procedure[9] and to make decisions with "fairness and detachment".[10]

8.6 The Tribunal is also required to assist people to engage meaningfully with its processes. The Tribunal must take steps to ensure that the parties to a case[11] understand what is happening and have a reasonable chance to be heard or otherwise have their views considered. If requested, the Tribunal must explain any aspect of its procedure or any decisions or ruling it makes to the parties.[12]

8.7 In particular, the Guardianship Division tries to ensure that people who are the subject of an application or review are able to participate in a hearing. For instance, the Guardianship Division uses video and teleconferencing if someone cannot attend in person.[13] It also holds hearings:

- in aged care facilities and hospitals, where appropriate,[14] and
- outside the Sydney central business district, including in regional areas.[15]

8.8 Tribunals are generally also less costly than courts. For instance, there is no fee for making an application to the Tribunal. Most people are self-represented and it is uncommon for the Guardianship Division to order a person to pay someone else's costs.[16]

8.9 The Tribunal must seek to "facilitate the just, quick and cheap resolution of the real issues in the proceedings".[17] In addition, the Tribunal must observe the general principles set out in s 4 of the *Guardianship Act 1987* (NSW) ("*Guardianship Act*") when it exercises its functions under that Act with respect to people with disability.[18]

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3. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(4).
4. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).
5. *Civil and Administrative Tribunal Act 2013* (NSW) s 46(1).
6. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).
7. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).
8. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 366–367.
9. R Creyke, J McMillan and M Smyth, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 4th ed, 2015) [10.1.3].
10. *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, 211 CLR 476 [25] (Gleeson CJ).
11. On who can be a party, see below at [8.17]–[8.20].
12. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(5)(b).
13. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2015–2016* (2016) 40.
14. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2014–2015* (2015) 40.
15. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2015–2016* (2016) 40.
16. NSW Civil and Administrative Tribunal, Guardianship Division, *Procedural Direction 1: Costs* (14 November 2014) [17]. See also *Civil and Administrative Tribunal Act 2013* (NSW) s 60(1).
17. *Civil and Administrative Tribunal Act 2013* (NSW) s 36(1)–(2).
18. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 5; *Guardianship Act 1987* (NSW) s 4.

Composition of the Guardianship Division and Appeal Panel

8.10 A panel of three "members" makes all major decisions in the Guardianship Division, such as making a guardianship or financial management order. Each panel must include:

- a lawyer
- a member with a "professional qualification", and
- a member with a "community based qualification".[19]

8.11 A member with a professional qualification is someone with experience in assessing and treating people to whom the *Guardianship Act* relates. For instance, doctors, psychologists and social workers.[20] A member has a community-based qualification if they have "experience with persons to whom the *Guardianship Act 1987* relates".[21]

8.12 Some matters may be heard by only one or two members. This includes the review of an existing order, consent for major or minor medical treatment, or the recognition of an interstate order.[22]

8.13 As we discuss below at [8.52]–[8.57], decisions of the Guardianship Division can be appealed to an Appeal Panel of the Tribunal. This panel must generally also have three members, including two lawyers (one of whom has been a lawyer for at least seven years) and either a senior or a general member who is not a lawyer.[23]

8.14 A senior non-legal member is someone with special knowledge, skill or expertise on one or more of the kinds of cases with which the Tribunal deals.[24] A general member is someone who either has special knowledge, skills or experience in relation to any of the kinds of cases the Tribunal deals with or who is capable of representing the public, a particular organisation, body or group in relation to one or more of the kinds of cases the Tribunal deals with.[25]

8.15 Three-member panels can bring a mix of experience, skills and insights to Guardianship Division cases. No preliminary submissions question the need for three-member panels.

8.16 However, one stakeholder submits that some members with a community-based qualification do not understand the health care system sufficiently.[26] Another says the members of Appeal Panels sometimes do not have enough knowledge of disability issues.[27]

19. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 4(1).
20. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 1(2)(a).
21. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 1(2)(b).
22. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 4(2).
23. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 13(1).
24. *Civil and Administrative Tribunal Act 2013* (NSW) s 13(5)(b).
25. *Civil and Administrative Tribunal Act 2013* (NSW) s 13(6).
26. Department of Rehabilitation Medicine St Vincent's Hospital, *Preliminary Submission PGA28,* 2.
27. J Barham, *Preliminary Submission PGA27,* 2.

Question 8.1: Composition of the Guardianship Division and Appeal Panels

(1) Are the current rules on the composition of Guardianship Division and Appeal Panels appropriate?

(2) If not, what would you change?

The parties to guardianship and financial management cases

8.17 The people directly involved in a case are known as the "parties". Who is a party in a particular Guardianship Division case will depend on the kind of application.

8.18 Generally, the following people are parties:

- the person who made the application
- the person who is the subject of the application or review
- the husband, wife or de facto partner (if their relationship is close and continuing), or carer of the person who is the subject of the application or review
- the Public Guardian or the NSW Trustee and Guardian (where relevant)
- the guardian, financial manager, enduring guardian or enduring power of attorney of the person who is the subject of the application or review, and
- anyone else that is "joined" as a party.[28]

8.19 The Tribunal can join anyone it thinks should be a party. The Tribunal might think someone should be a party because they have a concern for the welfare of the person who is the subject of the application or review, or for any other reason.[29] However, the Guardianship Division has a long-standing practice of placing "a sensible limit on the number of parties".[30]

8.20 We consider the issue of whether children should be able to become parties in Question Paper 6.[31]

Question 8.2: Parties to guardianship and financial management cases

(1) Are the rules on who can be a party to guardianship and financial management cases appropriate?

(2) If not, who should be a party to these cases?

28. *Guardianship Act 1987* (NSW) s 3F, s 3 definition of "spouse".
29. *Civil and Administrative Tribunal Act 2013* (NSW) s 44(1), sch 6 cl 7(1).
30. *DNS* [2016] NSWCATGD 6 [22], [26]–[27].
31. NSW Law Reform Commission, *Remaining Issues*, Review of the Guardianship Act 1987 Question Paper 6 (2017) ch 5.

The requirement for a hearing

8.21 A "hearing" involves interactions between the members of the Guardianship Division and the parties at the same time. The parties are entitled to attend the hearing in person or some other way (such as by telephone).

8.22 Generally, hearings must be held in Guardianship Division cases.[32] For instance, the Guardianship Division must hold hearings to determine applications for, or to review, guardianship or financial management orders.

8.23 Hearings are not required for "ancillary" or "interlocutory" decisions.[33] This includes decisions on whether to adjourn the case, agree to an extension of time for something to be done or to join someone as a party.[34]

8.24 In other divisions, the Tribunal can decide a case without a hearing where it thinks it can make the decision based on written arguments and evidence.[35]

8.25 The Victorian Law Reform Commission ("VLRC") thought that it may not always be necessary to hold a hearing in guardianship cases. For instance, the VLRC considered that the Victorian Civil and Administrative Tribunal ("Victorian Tribunal") should be able to assess the most appropriate way to conduct a review.[36]

8.26 In addition, the Guardianship and Administration Bill 2014 (Vic) included a procedure that would have allowed the Victorian Tribunal to appoint someone's parent as their guardian or administrator without holding a hearing.[37] We consider this proposal in Question Paper 6.[38]

8.27 Some people may find it less intimidating and more convenient if the Guardianship Division dealt with guardianship and financial management cases without holding a hearing.

8.28 However, there may be benefits to holding a hearing. For instance, hearings allow members of the Guardianship Division to hear evidence in person and to ask questions. It may be difficult to have this degree of interaction otherwise. In addition, some people may find it difficult to present their case in writing. Hearings can give them the chance to present their views.

Question 8.3: The requirement for a hearing

When, if ever, would it be appropriate for the Guardianship Division to make a decision without holding a hearing?

32. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 6(1).
33. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 6(2).
34. *Civil and Administrative Tribunal Act 2013* (NSW) s 4, definition of "interlocutory decision" and "ancillary decision".
35. *Civil and Administrative Tribunal Act 2013* (NSW) s 50(2).
36. Victorian Law Reform Commission, *Guardianship,* Final Report 24 (2012) [21.163]–[21.164].
37. Guardianship and Administration Bill 2014 (Vic) s 41 (lapsed).
38. NSW Law Reform Commission, *Remaining Issues*, Review of the Guardianship Act 1987 Question Paper 6 (2017) ch 5.

Notice of hearings and reviews

8.29 The Tribunal must let the parties know where and when the Guardianship Division will hear an application for, or review, a guardianship or financial management order.[39] However, a failure to notify the parties does not affect the validity of a decision on the application or review.[40]

8.30 Only the parties to the case are entitled to receive this notice (for information on who can be a party, see above at [8.17]–[8.20]). Some may argue that this is not enough. For instance, one preliminary submission raised concerns that a person's family did not know that a guardian had been appointed in one case.[41]

8.31 The VLRC recommended that a wider range of people should receive notice of a hearing date, including the nearest known relative of the person who is the subject of the application or review (other than the applicant or the proposed substitute decision-maker).[42]

8.32 However, it could be difficult to identify, locate and notify other relatives. There may also be privacy concerns and questions over whether the law allows this information to be disclosed (we discuss privacy issues below at [8.58]–[8.63]).

Question 8.4: Notice requirements

(1) Are the current rules around who should receive notice of guardianship and financial management applications and reviews adequate? If not, what should change?

(2) If people who are not parties become entitled to notice, who should be responsible for notifying them?

Representation in Guardianship Division cases

8.33 There is no right to representation in the Tribunal[43] and people are generally responsible for running their own case.

8.34 In this section, we consider whether changes should be made to the:

- law on when a person can be represented
- funding arrangements for separate representatives, and
- rules on the representation of people with impaired capacity.

39. *Guardianship Act 1987* (NSW) s 10(1A), s 25(4), s 25I(4), s 25N(6).
40. *Guardianship Act 1987* (NSW) s 10(2), s 25(5), s 25I(5), s 25N(7).
41. M and M Watts, *Preliminary Submission PGA1*, 1.
42. Victorian Law Reform Commission, *Guardianship,* Final Report 24 (2012) rec 354.
43. *Civil and Administrative Tribunal Act 2013* (NSW) s 45(1)(a).

Representation with leave

8.35 A lawyer or a non-lawyer may attend a hearing to support or assist a party without actually representing them. A person who does this is known as a "McKenzie friend". People who wish to attend hearings as McKenzie friends do not need to seek the Tribunal's permission (known as "leave") to do so.[44] A lawyer might also assist someone (for instance, by providing advice or helping to prepare documents) without appearing at the hearing.[45] However, a party must seek and be granted leave if they want to be represented by another person at a hearing.[46]

8.36 Other states and territories do not always require people to seek leave to be represented in guardianship cases. In the Northern Territory, for instance, a party is entitled to represent themselves or be represented by a lawyer. However, parties have to seek leave to be represented by someone who is not a lawyer.[47] In South Australia, the person to whom a case relates is entitled to free legal representation in all reviews and appeals.[48]

8.37 The Queensland Law Reform Commission ("QLRC") considered that a presumption against legal representation should not apply to guardianship cases.[49] The VLRC also believed that all parties should have a right to legal representation. Other professional advocates could represent the parties with the leave of the Victorian Tribunal.[50]

8.38 Representation can help ensure that a party can participate effectively in a hearing. However, hearings in the Guardianship Division could become more formal and time-consuming if more people have lawyers. Legal representation can also be costly and people who cannot afford lawyers may be disadvantaged if other parties are represented.

Question 8.5: When a person can be represented

When should a person be allowed to be represented by a lawyer or a non-lawyer?

Separate representatives

8.39 The Tribunal may order a party be "separately represented".[51] A separate representative is independent and does not act on the instruction of the person they

44. NSW Civil and Administrative Tribunal, Guardianship Division, *Procedural Direction 2: Representation* (14 November 2014) [11], [37]. See also *McKenzie v McKenzie* [1971] P 33.
45. NSW Civil and Administrative Tribunal, Guardianship Division, *Procedural Direction 2: Representation* (14 November 2014) [11].
46. *Civil and Administrative Tribunal Act 2013* (NSW) s 45(1)(b).
47. *Northern Territory Civil and Administrative Tribunal Act* (NT) s 130. See also *State Administrative Tribunal Act 2004* (WA) s 39; *Civil and Administrative Tribunal Act 2008* (ACT) s 30.
48. *Guardianship and Administration Act 1993* (SA) s 65. See also South Australia, Office of the Public Advocate, "Rights: Guardianship and Administration Orders and your Rights" (2017) <www.opa.sa.gov.au/rights/guardianship_and_administration_orders_and_your_rights> (retrieved 3 January 2017).
49. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) [21.196].
50. Victorian Law Reform Commission, *Guardianship,* Final Report 24 (2012) [21.136]–[21.140], rec 372.
51. *Civil and Administrative Tribunal Act 2013* (NSW) s 45(4)(c).

represent. Their role is to make submissions about the person's best interests. A separate representative should try to understand the views and opinions of the person they represent and explain those views. A separate representative can also seek the views of other people involved in the case.[52]

8.40 A separate representative might be appointed for someone who is the subject of a Guardianship Division case if:

- there are serious doubts about the person's capacity to instruct a lawyer
- there is intense conflict between the parties about the person's best interests
- the person is vulnerable to pressure or intimidation by other people involved
- there are serious allegations of abuse, exploitation or neglect
- other parties have been granted leave to be represented, or
- the case involves particularly serious issues likely to have a profound impact on the person's interests and welfare.[53]

8.41 Legal Aid NSW is notified when an order for separate representation is made.[54] While there is no entitlement to legal aid for separate representation,[55] Legal Aid NSW appoints a legal representative in most cases.[56]

8.42 Applications for legal aid for separate representatives are not means tested. Legal Aid NSW submits that s 60 of the *NCAT Act* should be amended to require the Tribunal to consider (at the end of a case) whether the person can afford to pay for separate representation without causing hardship. If so, the Tribunal should be able to order that the costs of representation provided by Legal Aid NSW be paid from the person's estate.[57]

Question 8.6: Separate representatives

How should separate representation be funded?

Representation and capacity

8.43 A lawyer must act on the "lawful, proper and competent instructions" of their client.[58] However, a person's capacity to make decisions is often a key issue in Guardianship Division cases. This can make it hard for a lawyer to know how to act appropriately.

52. NSW Civil and Administrative Tribunal, Guardianship Division, *Procedural Direction 2: Representation* (14 November 2014) [49]–[51].
53. NSW Civil and Administrative Tribunal, Guardianship Division, *Procedural Direction 2: Representation* (14 November 2014) [47].
54. Legal Aid NSW, *Preliminary Submission PGA13,* 7.
55. *Civil and Administrative Tribunal Act 2013* (NSW) s 45(5).
56. Legal Aid NSW, *Preliminary Submission PGA13,* 7.
57. Legal Aid NSW, *Preliminary Submission PGA13,* 7.
58. *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 8.

8.44 Special rules address the ability of a vulnerable person to instruct a lawyer in cases in the Mental Health Review Tribunal. Under the *Mental Health Act 2007* (NSW), a person's mental illness, intellectual or developmental disability, or other mental condition is presumed not to prevent them from being represented by lawyers in the Mental Health Review Tribunal.[59]

8.45 A similar rule does not exist for Guardianship Division cases, raising the question of whether either the *Guardianship Act* or the *NCAT Act* should include such a rule.

Question 8.7: Representation of a client with impaired capacity

Should the *Guardianship Act 1987* (NSW) or the *Civil and Administrative Tribunal Act 2013* (NSW) allow a person to be represented by a lawyer in Guardianship Division cases when the person's capacity is in question?

Timeframes for finalising Guardianship Division cases

8.46 In 2015–16, the Guardianship Division finalised 10,273 cases.[60] From 2011–16, applications to the Guardianship Division grew by approximately 17%.[61]

8.47 Registry staff of the Guardianship Division "triage" applications to determine when a hearing will be listed. The time taken for an application to be heard depends on factors such as the extent of any risk to the person and how long it will take to gather the evidence for the hearing.[62]

8.48 However, the Guardianship Division is not required to finalise cases within a certain time. There is some concern about the time it takes to finalise applications. This is a particular concern when someone cannot be discharged from hospital until a guardian is appointed and appropriate accommodation arrangements made. This can tie up hospital beds and cost the health system. It also puts the person at risk of acquiring an infection and "of becoming de-socialised" in a hospital setting.[63]

8.49 In consultation with the Guardianship Division, the NSW Ministry of Health has established a project to minimise unnecessary lengths of hospital stays. The project aims to have all guardianship applications from NSW Health inpatient facilities finalised within 21 days.[64]

8.50 NSW Health also suggests that the legislation could be amended to require the Guardianship Division to determine applications within a specified time.[65] An issue for further consideration is whether such a requirement would apply only to certain urgent applications (for instance, those involving hospital patients) or to all applications. A statutory timeframe that only applies to certain applications might

59. *Mental Health Act 2007* (NSW) s 152.
60. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2015–2016* (2016) 41.
61. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2015–2016* (2016) 40.
62. NSW Civil and Administrative Tribunal, "Application Process" <www.ncat.nsw.gov.au/Pages/guardianship/application_process/application_process.aspx> (retrieved 4 January 2017).
63. NSW Health, *Preliminary Submission PGA49,* 8–9; Department of Rehabilitation Medicine St Vincent's Hospital, *Preliminary Submission PGA28,* 1–2.
64. NSW Health, *Preliminary Submission PGA49,* 9.
65. NSW Health, *Preliminary Submission PGA49*, 9.

lead the Guardianship Division to prioritise these applications over others. The Division may then take longer to finalise other applications.

8.51 Any amendment aimed at reducing the timeframes for finalising cases could have resource implications. Without sufficient resources, it would be impossible for the Guardianship Division to deal with applications within the required time.

Question 8.8: Timeframes for finalising Guardianship Division cases

What, if any, changes to the legislation are required to support the timely finalisation of Guardianship Division cases?

Appealing a decision

8.52 If a party is not happy with a decision of the Guardianship Division or believes it has made a mistake, they may be able to appeal to either an Appeal Panel of the Tribunal or to the NSW Supreme Court.[66] The person needs to choose between the Appeal Panel and the Supreme Court. They cannot appeal the same case to both.[67]

8.53 A party has a right to appeal when they think that the Guardianship Division has misunderstood or misapplied the law. If they wish to appeal the decision on any other ground (for example, that the Division has misunderstood the facts or evidence) they need to seek leave from the Appeal Panel or the Supreme Court.[68]

8.54 The Appeal Panel can make the orders it considers appropriate. For instance, the Appeal Panel might confirm, vary or set aside the original decision.[69]

8.55 The Tribunal also has a separate power to order that a decision be set aside or varied. The Tribunal can do this if:

- all of the parties consent, or
- the decision was made in the absence of a party and the Tribunal is satisfied this meant the party's case was not argued adequately.[70]

8.56 Some states take very different approaches to appeals. For example, in Victoria there is no ability to appeal to an internal panel of the Victorian Tribunal.[71] However, a party can apply for a "rehearing" of the application.[72] When someone makes an application for a rehearing, the Tribunal must reconsider the case. The Victorian Tribunal can affirm, vary or set aside the original order.[73]

66. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 12(1). On the Supreme Court's powers of review, see also *Supreme Court Act 1970* (NSW) s 69.
67. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 12(3)–(4).
68. *Civil and Administrative Tribunal Act 2013* (NSW) s 80(2)(b), sch 6 cl 14(1)(b).
69. *Civil and Administrative Tribunal Act 2013* (NSW) s 81(1).
70. *Civil and Administrative Tribunal Regulation 2013* (NSW) cl 9(1).
71. Legal questions can be appealed to the Victorian Supreme Court: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(1).
72. *Guardianship and Administration Act 1986* (Vic) s 60A. People who are entitled to receive notice of the application but who are not parties can apply for a rehearing only if the Victorian Civil and Administrative Tribunal grants leave: s 60A(2).
73. *Guardianship and Administration Act 1986* (Vic) s 60C(2).

8.57 According to the VLRC, a rehearing operates in much the same way as an internal appeal.[74] However, unlike NSW, there is no requirement that a party must obtain leave if their application for rehearing does not involve a legal question.

Question 8.9: Appealing a Guardianship Division decision

(1) Is the current process for appealing a Guardianship Division case appropriate and effective?

(2) If not, what could be done to improve this process?

Privacy and personal information

8.58 Because cases in the Guardianship Division often involve deeply personal issues, there are rules to protect the privacy of people involved in these cases.

8.59 While Tribunal hearings are generally open to the public, a hearing might be held in private where this is desirable. For instance, the case might involve confidential evidence.[75] The Tribunal can also prohibit or limit the publication or broadcast of any report of a case.[76]

8.60 Without the Tribunal's consent, a person cannot publish or broadcast the name of the person who is the subject of a Guardianship Division case, any witness, or anyone mentioned or involved in the case.[77]

8.61 In addition, any information obtained in connection with the "administration or execution" of the *Guardianship Act* cannot be disclosed unless an exception applies. For instance, someone can disclose such information with the consent of the person who gave it to them.[78]

8.62 The NSW Legislative Council Standing Committee on Social Issues recommended that the NSW Government consider amending the *Guardianship Act* to allow the Tribunal to order that certain evidence not be disclosed to the parties. The Tribunal could do this where the disclosure would neither help it make a decision nor be in the best interests of the person who is the subject of the case.[79]

8.63 The then NSW Government did not support this proposal. It felt the existing rules were sufficient. The Government was also concerned that the amendment would limit the rule of natural justice that requires the "appropriate disclosure of relevant information". The Government stated that natural justice "remains essential for the Tribunal to ensure a fair process for people with disabilities and other parties coming before the Tribunal". The Government also thought the amendment might

74. Victorian Law Reform Commission, *Guardianship,* Final Report 24 (2012) [21.156].
75. *Civil and Administrative Tribunal Act 2013* (NSW) s 49(1)–(2).
76. *Civil and Administrative Tribunal Act 2013* (NSW) s 64.
77. *Civil and Administrative Tribunal Act 2013* (NSW) s 65(2). This also prohibits the disclosure of any information, picture, or other material that identifies the person or is likely to: s 65(4).
78. *Guardianship Act 1987* (NSW) s 101.
79. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [6.21]–[6.25], rec 7.

breach the United Nations *Convention on the Rights of Persons with Disabilities*[80] by removing natural justice protections in cases involving people with disability.[81]

Question 8.10: Privacy and confidentiality

What, if anything, should be changed in the law to protect the privacy of people involved in Guardianship Division cases?

Access to documents

8.64 Who can access documents from Guardianship Division cases, and at what stage of a case, raises issues of fairness, open justice, privacy and confidentiality. Private and personal information should not be made available to more people than necessary. However, it is also important that the people involved in a case have access to relevant information.

8.65 A party is entitled to inspect the documents related to a case that are held by the Tribunal's registry. A person who is not a party can apply to inspect "public access documents" relating to a case that has been finalised.[82] A public access document includes, among other things, the application and any reply to it, documents admitted into evidence, transcripts, records of orders made and the reasons for decisions.[83] The Registrar can allow a non-party to access these documents but require them to comply with certain conditions.[84]

8.66 Some documents cannot be accessed by either a party or non-party, such as documents that the Tribunal has ordered not be disclosed and documents that cannot be disclosed due to prohibitions in other laws.[85]

8.67 The Registrar may choose to give someone a copy of a document rather than let them inspect the original document at the registry. However, there does not appear to be a right to receive a copy.[86]

8.68 The QLRC recommended that parties should have a right to a copy of any document they are entitled to inspect. The QLRC believed this was important so the party could prepare and present their case effectively. The QLRC did "not consider it appropriate that an issue as fundamental as an active party's right to obtain a copy of a document should be a matter of discretion for the Tribunal".[87]

80. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008).
81. NSW Government, *Legislative Council Standing Committee on Social Issues: Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 5–6. For a discussion of this rule, see: NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [6.16]–[6.20].
82. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(1)–(2).
83. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(8), r 3 definition of "originating document".
84. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(2), r 42(4).
85. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(5).
86. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(3).
87. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) [21.248], rec 21-10.

Question 8.11: Access to documents

(1) Who should be allowed to access documents from Guardianship Division cases?

(2) At what stage of a case should access be allowed?

Question 8.12: Other issues

Would you like to raise any other issues about the procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal?

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)
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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