



New South Wales
Law Reform Commission

Report
145

Review of the Guardianship Act 1987

May 2018
www.lawreform.justice.nsw.gov.au



**New South Wales
Law Reform Commission**

**Report
145**

Review of the Guardianship Act 1987

May 2018
www.lawreform.justice.nsw.gov.au

© New South Wales Law Reform Commission, Sydney, 2018

Copyright permissions

You may copy, distribute, display, download and otherwise freely deal with this publication for any personal or non-commercial purpose, on condition that you include proper acknowledgment on all uses.

However, you must obtain permission from the NSW Law Reform Commission if you wish to:

- charge others for access to the publication (other than at cost);
- include all or part of the publication in advertising or a product for sale; or
- modify the publication.

Disclaimer

While this publication has been formulated with due care, the NSW Law Reform Commission does not warrant or represent that it is free from errors or omission, or that it is exhaustive.

This publication deals with the law at the time it was first published and may not necessarily represent the current law.

Readers are responsible for making their own assessment of this publication and should verify all relevant representations, statements and information with their own professional advisers.

Other publication formats

The NSW Law Reform Commission is committed to meeting fully its obligations under state and Commonwealth anti-discrimination legislation to ensure that people with disabilities have full and equal access to our services.

This publication is available in alternative formats. If you require assistance, please contact the Commission on 02 8346 1284 or email nsw-lrc@justice.nsw.gov.au.

Contact details

NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001 Australia

Email: nsw-lrc@justice.nsw.gov.au

Internet: www.lawreform.justice.nsw.gov.au

Cataloguing-in-publication

Cataloguing-in-publication data is available from the National Library of Australia.

ISSN 1030 0244

ISBN 978-1-922254-30-6

21 May 2018

Hon M Speakman SC MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney

Review of the Guardianship Act 1987

We make this report pursuant to the reference to this Commission received 22 December 2015.

Yours sincerely



Alan Cameron AO

Chairperson

Table of contents

Participants	xi
Terms of reference	xii
Chairperson’s foreword	xiv
Glossary of terms	xvi
Executive summary	xxi
Recommendations	xxxix
1. Introduction	1
This report.....	1
Outline of this report.....	2
How we conducted this review.....	4
Preliminary submissions and consultations	5
Question papers.....	5
Consultations	5
Draft proposals.....	5
2. History and overview of guardianship framework	7
The history of guardianship laws in NSW.....	8
The Guardianship Act	10
Key agencies	12
Public Guardian	12
NSW Trustee and Guardian.....	12
Guardianship Division of NCAT	12
3. A changing environment	15
Profile of people using guardianship laws.....	15
Reviews of guardianship laws.....	16
NSW	16
Other jurisdictions	17
The way we think about disability.....	17
Capacity.....	19
Supported decision-making	19
Will and preferences	21
The provision of disability services: the National Disability Insurance Scheme.....	21
Elder abuse.....	23
4. A new assisted decision-making framework	25
A contemporary and accessible Act.....	25
Language and structure	26
Key terms.....	26
Policy underpinning the new framework.....	30
A wide range of decision-making assistance	30
A less restrictive approach.....	31
Maximising participation in decision-making	31

A more realistic view of decision-making ability	32
A preference for personal appointments	32
Tribunal orders as a last resort	33
Enhanced support for fair and effective informal arrangements.....	33
Accountability and safeguards	33
Interaction with other relevant laws	34
Uniformity within Australia.....	34
Special provision for Aboriginal people and Torres Strait Islanders	35
What is needed to support the new framework	36
Education and training	36
Data collection	38
Resourcing.....	39
5. Objects and principles.....	41
Statutory objects	41
New general principles.....	42
Additional general principles for Aboriginal people and Torres Strait Islanders	46
Will and preferences	48
The operation of the will and preferences model	51
6. Decision-making ability	53
Current law.....	54
Defining decision-making ability	56
Statutory presumption of decision-making ability	57
Determining decision-making ability.....	58
Circumstances of an assessment	59
Relevant considerations to determining decision-making ability	60
What should not lead to a finding of a lack of decision-making ability.....	62
Determining decision-making ability of Aboriginal people and Torres Strait Islanders	64
7. Supported decision-making	67
Our recommendations.....	71
Two methods to appoint a supporter.....	71
Support agreements	72
Tribunal support orders.....	76
Key features of supported decision-making	81
Exclusions from our supported decision-making model	89
Co-decision-making	89
Monitors	90
Registration.....	90
Supported decision-making in the broader framework.....	91
Handling personal information	91
The National Disability Insurance Scheme.....	91
8. Personal appointments of representatives.....	93
The current law	94
Our recommendations.....	95
A single agreement	95
Eligibility to appoint an enduring representative.....	98
Eligibility for appointment as an enduring representative	98
Appointment process	101
Multiple and reserve representatives	103
Functions of enduring representatives	104

Responsibilities	105
When appointment takes effect.....	107
Tribunal may declare appointment has effect	108
Tribunal review of appointments	109
Supreme Court review of appointments.....	111
Ending an arrangement	112
9. Representation orders.....	117
The current law	118
Guardianship orders	118
Financial management orders.....	120
Our recommendations.....	121
A single, limited order	122
Applying for an order.....	124
Making a representation order	125
Additional considerations for orders about Aboriginal people and Torres Strait Islanders	127
Eligibility for appointment as a representative.....	128
Suitability for appointment as a representative	130
Remuneration of professional representatives.....	134
Operation of representation orders	135
Effect of order on other appointments or agreements.....	141
Orders to be forwarded to Public Representative and/or NSW Trustee.....	141
Review of orders	142
Administrative review of decisions of the Public Representative and NSW Trustee	144
Supervision and reporting requirements	145
Enforcing representatives' decisions.....	147
Ending an order	149
Return of property	150
No new offences	151
10. Healthcare.....	153
The current law	154
Who can give consent on a patient's behalf?.....	154
When can treatment be administered without consent?	155
Our recommendations.....	156
Statutory objects	156
Application: patients who do not have decision-making ability.....	156
Definition of healthcare	157
Advance care directives	159
Urgent healthcare	161
Special healthcare	161
Major healthcare	165
Minor healthcare	166
Consent to withdrawing or withholding life-sustaining measures	167
Patient objections to healthcare	169
Effect of consent and objections	170
The person responsible	171
Tribunal consent	176
Liability for healthcare and clinical records	178
Offences	178

11. Medical research	181
Definition of “medical research procedure”	182
Approval and consent	184
Requirement to find advance care directives	187
Effect of a participant’s objection	188
Emergency treatment.....	189
Records to be filed with the Public Advocate	190
Offences.....	191
12. Restrictive practices	193
Background.....	193
Current law.....	193
The National Disability Insurance Scheme.....	196
What we heard	198
Should NSW regulate restrictive practices through legislation?	198
What areas should be regulated?	199
Definition of “restrictive practices”	200
When should restrictive practices be permitted?.....	200
Safeguards.....	200
Legislating for behaviour support plans	201
Our conclusions	201
The disability sector and the NDIS.....	202
Restrictive practices in the education, mental health and aged care sectors	203
Informal settings.....	204
A further reference	204
13. The Public Advocate	206
A Public Advocate	207
Mediation functions	210
Systemic advocacy functions.....	211
Decision-making advice and assistance functions	214
Training functions and guidelines.....	215
Investigative powers	216
Search and entry powers	218
Power to compel information.....	219
Sharing information.....	220
Investigating the need for support or representation.....	220
Intervening in proceedings	220
Referral of potential offences	221
The framework for a Public Representative	221
14. Provisions of general application	222
Directions to supporters and representatives.....	222
Personal information	223
Access to personal information	224
Non-disclosure of personal information.....	224
Protection from liability where an agreement or order does not have effect.....	225
Resolving disputes between substitute decision-makers	226
Adoption information directions.....	227
Adoption information provisions in the Adoption Act	228
Adoption information directions under the Guardianship Act	228
Our conclusion	229

Provisions in part 9 of the Guardianship Act	229
Provisions that should be retained	229
Provisions that should not be included in the new Act	231
Registration	232
Suggested benefits of registration.....	233
Our conclusions	234
Other approaches	237
Remedies against representatives.....	237
The Tribunal option	238
The District Court option	239
15. The Supreme Court.....	242
Supreme Court's inherent protective jurisdiction.....	242
Interactions between the Supreme Court and the Tribunal.....	244
Jurisdiction to make orders	244
Review of representation agreements	245
16. Tribunal composition and procedures.....	248
Overview of Tribunal procedures	249
Our recommendations.....	250
Composition of Assisted Decision-Making Division and Appeal Panels.....	250
Parties to proceedings	251
The process for appointing parents as representatives	253
Notice and service requirements.....	255
Representation at a hearing.....	256
Giving evidence under oath or on affirmation	260
Privacy	261
Access to documents.....	262
Efficient finalisation of proceedings.....	262
Appeals.....	264
17. Powers of entry, search and removal.....	266
The existing provisions.....	266
Our recommendations.....	267
Only Tribunal may make an order.....	268
Who may apply for an order.....	268
Who may be protected.....	268
Immediate risk of unacceptable harm	268
Use of force.....	269
Who may implement the order	269
Further action.....	270
18. Interaction with mental health legislation.....	272
Our recommendations.....	273
Interaction with the Mental Health Act.....	273
Interaction with the Mental Health (Forensic Provisions) Act	274
Decision-making for "mental health treatment"	274
Consent for special healthcare.....	276
Voluntary patients	277
Financial arrangements for involuntary patients.....	279

19. Recognising appointments made outside NSW	280
Recognising appointments made outside NSW	281
Maintaining the distinction between orders and personal appointments	281
Updating the Regulations to recognise substantially similar appointments	282
Effect of recognition	283
Scope of functions recognised	284
Supervision by NSW Trustee at discretion of Tribunal.....	284
Tribunal's powers of review.....	284
Tribunal's powers to vary, revoke, replace or confirm after review	285
Tribunal discretion for supervision by NSW Trustee	286
Registration.....	286
20. Transitional provisions and consequential amendments	288
Transitional provisions	288
Review of guardianship and financial management orders.....	289
Review of enduring appointments.....	291
Responsibilities of past appointees.....	292
Consequential amendments to other statutes.....	292
Appendix A Preliminary submissions	294
Appendix B Submissions	296
Appendix C Preliminary consultations	300
Appendix D Consultations	304

Participants

Commissioners

Mr Alan Cameron AO (Chairperson)
The Hon Justice Paul Brereton AM, RFD
Ms Tracy Howe

Law Reform and Sentencing Council Secretariat

Ms Erin Gough, Policy Manager
Mr Joseph Waugh PSM, Senior Policy Officer
Ms Kathleen Carmody, Policy Officer
Dr Jackie Hartley, Policy Officer
Ms Alyse Rankin, Policy Officer
Ms Nayomi Senanayake, Policy Officer
Ms Nandini Bajaj, Graduate Policy Officer
Ms Kathryn Birtwistle, Graduate Policy Officer
Ms Katherine Lilly, Graduate Policy Officer
Mr Andrew Roberts, Graduate Policy Officer
Mr Paul Chalouhi, Intern
Ms Rose Vassel, Intern
Ms Anna Williams, Research Support Librarian

Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review and report on the desirability of changes to the *Guardianship Act 1987* (NSW) having regard to:

1. The relationship between the *Guardianship Act 1987* (NSW) and
 - The *NSW Trustee and Guardian Act 2009* (NSW)
 - The *Powers of Attorney Act 2003* (NSW)
 - The *Mental Health Act 2007* (NSW)
 - other relevant legislation.
2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.
3. The report of the 2014 ALRC Equality, Capacity and Disability in Commonwealth Laws.
4. The UN Convention on the Rights of Persons with Disabilities.
5. The demographics of NSW and in particular the increase in the ageing population.

In particular, the Commission is to consider:

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.
2. The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.
3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model including the costs of implementation.
4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation.
5. Whether the language of 'disability' is the appropriate conceptual language for the guardianship and financial management regime and to what extent 'decision making capacity' is more appropriate.
6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision making incapacity.
7. In the light of the requirement of the UNCRPD that there be regular reviews of any instrument that has the effect of removing or restricting autonomy, should the *Guardianship Act 1987* provide for the regular review of financial management orders.

8. The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.
9. Any other matters the NSW Law Reform Commission considers relevant to the Terms of Reference.

[Reference received 22 December 2015]

Chairperson's foreword

When the *Guardianship Act 1987* (NSW) was enacted, it was a modern, far-reaching piece of legislation, which dramatically advanced the interests of people in need of decision-making assistance in this State. It has been administered by public officials with care and sensitivity over the intervening years, and they are still doing so.

Countless people in NSW have been helped in so many ways by decisions made and implemented under the provisions of the Act for themselves, their loved ones and friends. What was originally the Guardianship Board, later the Guardianship Tribunal and now the Guardianship Division of the NSW Civil and Administrative Tribunal, has done an outstanding job from its inception in bringing a caring and multidisciplinary approach to resolving the difficult personal decisions that so many ordinary people confront. Similarly, the Public Guardian and the NSW Trustee and Guardian have done exemplary work serving the people of NSW in this area.

But the Act has long passed its use by date. A combination of factors means that it is no longer fit for purpose. More people living longer means more people with dementia. Improved survival rates following accidents of all kinds sadly means more people living with acquired brain injury. The introduction of the far-sighted reforms of the National Disability Insurance Scheme has thrown up numerous challenges in decision-making for the thousands of people who are being or are to be helped by that Scheme.

On top of these factors, there is a new acceptance of the need for the rights of people in need of decision-making assistance to have their wishes respected so far as possible. And that is reflected in the terms of the UN *Convention on the Rights of Persons with Disabilities*. Australia is a party to that Convention.

Our widespread consultations have persuaded us that there is a need for a whole new approach. Details are contained in this Report, and I mention just these highlights:

- New formal supported decision-making arrangements should enable people to make their own decisions with the help of a supporter. This will ensure a wider range of decision-making options.
- Peoples' will and preferences should prevail over someone else's view of what is good for them, unless to do so would create an unacceptable risk of harm.
- The language of guardianship has to change, in order to remove the paternalistic overhang of that word, and to ensure that a genuine effort will now be made to ascertain a person's will and preferences, and respect them wherever possible.
- We do not want there to be formality in the future around these matters unless it is really needed. Informal support arrangements work well now in many cases, and should still work. The change will be that if informal support is not working, formal support can be utilised, rather than a substitute decision maker being the only alternative.

- Accountability and safeguard mechanisms should be applied consistently across different types of decision-making arrangements, and strengthened, where appropriate, to prevent abuse.

These changes won't be quick or easy. They will require education and training, in the community and among professionals. But they are the right thing to do.

The 1987 Act was a generational change in the law and practice in this area. This can be the next such change. I commend the Report to you.

Alan Cameron

Chairperson, NSW Law Reform Commission

May 2018

Glossary of terms

- Advance care directive** An oral or written statement that contains a person's wishes about healthcare, including end-of-life care for a time when they can no longer consent. See [10.24]-[10.29].
- Assisted Decision-Making Act** Our proposed new Act to establish a framework for assisted decision-making in NSW that replaces the *Guardianship Act 1987* (NSW) and the enduring power of attorney provisions in the *Powers of Attorney Act 2003* (NSW). See Rec 4.1.
- Assisted Decision-Making Division** Recommended new title for the Guardianship Division of the NSW Civil and Administrative Tribunal. See Rec 4.3.
- Capacity** See **Decision-making capacity** and **Legal capacity**.
- Clinical trial** Defined in the *Guardianship Act 1987* (NSW) as a trial of drugs or techniques that necessarily involves carrying out medical or dental treatment on the participants in the trial. See also **Medical research**.
- Decision-making ability** The ability to make a particular decision at the time when that decision needs to be made. See Rec 6.1.
- Decision-making capacity** An expression often used as a synonym for **decision-making ability**. Not to be confused with **Legal capacity**.
- Elder abuse** A range of acts against older people including neglect and physical, psychological, emotional, financial and sexual abuse.
- Eligible signer** Person who may sign on behalf of a person making or changing a support agreement (Rec 7.3) or enduring representation agreement (Rec 8.4). See [8.47].
- Eligible witness** Person who may witness a support agreement (Rec 7.3) or enduring representation agreement (Rec 8.4). See [8.37]-[8.46].
- Emergency order** Recommended new title for "temporary order" - an order made by the Tribunal by reason of urgency, which remains in effect for a specified period of no more than 30 days. See Rec 9.9.
- Enduring guardianship** A formal substitute decision-making system contained in the *Guardianship Act 1987* (NSW) through which a person can appoint an enduring guardian to make **Personal decisions** for them. Would be replaced by recommended **Enduring representation agreements**.
- Enduring power of attorney** A formal substitute decision-making system contained in the *Powers of Attorney Act 2003* (NSW) through which a person can appoint another person to make **Financial decisions** for them when they lose **Decision-making capacity**. Would be replaced by recommended **Enduring representation agreements**.
- Enduring representation agreement** A recommended arrangement whereby someone appoints an **Enduring representative** to make decisions for them when they do not have decision-making ability for those decisions. Would replace the current **Enduring guardianship** and **Enduring power of attorney** arrangements. See Chapter 8.
- Enduring representative** A person appointed by another person under the recommended system of **Enduring representation agreements** to make decisions for them.
- Fiduciary obligations** Duties imposed under equity on people in special relationships of trust and confidence where one party acts in the interests of the other.
- Financial decision** A decision about one or more aspects of the person's property. See Rec 4.5.

- Financial manager** A person appointed under a **Financial management order** to manage the financial affairs of another person.
- Financial management order** An order made by the Tribunal appointing a person or the NSW Trustee and Guardian to manage the financial affairs of a person in need of an order. Would be replaced by recommended **Representation orders**. See Chapter 9.
- Formal decision-making arrangement** An arrangement under a formal written agreement or Tribunal order that sets out who can be involved in making decisions with or about another person.
- General principles** Overarching principles which apply to all decisions under the new Act. See Rec 5.2.
- Guardian** A person appointed under a guardianship order to make decisions for another person.
- Guardianship** The concept that a person can be appointed to protect another person who is unable to manage aspects of their own life.
- Guardianship order** An order whereby the Tribunal appoints a **Guardian** to make decisions for another person under the *Guardianship Act 1987* (NSW). Would be replaced by recommended **Representation orders**. See Chapter 9.
- Guardianship Division** The Division of the NSW Civil and Administrative Tribunal that deals with cases about guardianship, financial management, powers of attorney, consent to medical and dental treatment and clinical trials. Would be renamed **Assisted Decision-Making Division** under recommendations.
- Healthcare** Any care, service, procedure or treatment provided by, or under the supervision of, a **Registered health practitioner** for the purpose of diagnosing, maintaining or treating a physical or mental condition of a person; the giving of placebos in the course of a medical research procedure; and any other act declared by the regulations to be healthcare. See Rec 10.4.
- Healthcare decision** A decision about a person's healthcare. See Rec 4.6 and Chapter 10.
- Inherent protective jurisdiction** See *Parens patriae*.
- Informal decision-making arrangement** A way of making decisions for or with another person that is not mandated by an order or a written agreement.
- Least restriction** See **Principle of least restriction**.
- Legal capacity** A person's entitlement under law to engage in a particular transaction or undertaking or have a particular status.
- Major healthcare** See Rec 10.10.
- Medical research procedure** A procedure carried out for the purposes of medical research, including administering pharmaceuticals or using equipment or a device, or anything prescribed by the regulations as a medical research procedure. See Rec 11.1.
- Minor healthcare** See Rec 10.12.
- National Disability Insurance Scheme ("NDIS")** The scheme implemented by the *National Disability Insurance Scheme Act 2013* (Cth).
- National Disability Insurance Agency ("NDIA")** An independent statutory agency responsible for administering the **National Disability Insurance Scheme**.
- NSW Trustee** Recommended new title for the NSW Trustee and Guardian. See Rec 4.3.
- NSW Trustee and Guardian** A corporation constituted by the *NSW Trustee and Guardian Act 2009* (NSW). It has standing to apply to the Tribunal for the making, revocation or review of a financial management order, may be

appointed as a financial manager, and authorises, directs and supervises anyone who is appointed as a financial manager.

Office of the Public Advocate A recommended new agency to replace the Public Guardian and perform dual functions as the Public Advocate and the Public Representative, including new investigative and advocacy functions.

Parens patriae The Supreme Court's inherent protective jurisdiction. See [15.3]-[15.12].

Person responsible The person, identified by statute, who may make decisions about another person's minor or major healthcare. See [10.3] and Recs 10.18 and 10.19.

Personal decision A decision that relates to personal or lifestyle matters. See Rec 4.4.

Personal information Information about a person that includes their health and financial information.

Personal and social wellbeing A standard used in making a decision for another person. Partially replaces "best interests" and "welfare and interests" standards. See [5.26]-[5.27].

Plenary order An unlimited guardianship order that gives a guardian exclusive custody of the person under guardianship, and all the functions of a guardian that a guardian has at law or in equity.

Principle of least restriction The principle that a person's autonomy should be restricted as little as possible. See Rec 5.2(l).

Protective jurisdiction See ***Parens patriae***.

Private manager A person appointed under a **Financial management order** to manage another person's financial affairs.

Public Advocate A recommended new entity to adopt the functions of the Public Representative as well as an enhanced advocacy and investigative role. See Chapter 13.

Public Guardian A public entity that is party to all Tribunal applications for guardianship, may apply for a guardianship order, receives copies of all guardianship orders made by the Tribunal and can be appointed guardian by the Tribunal as a last resort. Would be renamed the **Public Representative**.

Public Representative The recommended new name for the **Public Guardian**. See Rec 4.3.

Registered health practitioner A health practitioner within the meaning of the *Health Practitioner Regulation National Law (NSW)*, and/or any other profession or practice as declared by that regulation. See [10.19]-[10.20] and Rec 10.4.

Representation order A recommended new order whereby the Tribunal appoints a person to make decisions for a person who does not have decision-making ability for those decisions, as a measure of last resort. Would replace the current **Guardianship orders** and **Financial management orders** under the *Guardianship Act 1987* (NSW). See Chapter 9.

Representative A person appointed under a **Representation order** to make decisions on behalf of another person. See also **Enduring representative**.

Represented person A person who has a **Representative** or **Enduring representative** to make a decision when they do not have **Decision-making ability** for that decision.

Restrictive practice Any practice or intervention that has the effect of restricting the rights or freedom of movement of a person.

Restrictive practices decision A decision to approve or disapprove the use of restrictive practices on a person. See Rec 4.7.

Special healthcare See Rec 10.7.

Substitute decision-making Decision-making where a person makes decisions for another.

Supported decision-making Decision-making where a supported person makes their own decisions with the assistance of a supporter. Under our recommendations, formal supported decision-making would take place under a Tribunal support order or a personal support agreement. See Chapter 7.

Support agreement An arrangement whereby someone appoints a **Supporter** in writing to assist them in making decisions. See [7.22]-[7.38].

Support order A recommended Tribunal order appointing a **Supporter** to assist a person to make their own decisions. See [7.39]-[7.55].

Supported person A person who is assisted in making decisions by a **Supporter** appointed under a **Support order** or **Personal support agreement**.

Supporter A person appointed by the Tribunal or under a support agreement to support someone else in making decisions.

Temporary order An order made by the Tribunal by reason of urgency that the Tribunal considers appropriate in the circumstances, which remains in effect for a specified period of no more than 30 days. Would be renamed “Emergency order” under our recommendations. See Rec 9.9.

Tribunal In this report, the former Guardianship Tribunal, the current **Guardianship Division** of the NSW Civil and Administrative Tribunal (“NCAT”) or the proposed **Assisted Decision-Making Division**.

UN Convention The United Nations *Convention on the Rights of Persons with Disabilities*.

UN Convention Committee The United Nations Committee on the Rights of Persons with Disabilities.

Will and preferences An approach to making a decision for another person that involves giving effect to their will and preferences in accordance with Rec 5.4.

Executive summary

- 0.1 The Attorney General has asked us to review the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”). This report sets out our recommendations for change.
- 0.2 The recommendations envisage a new framework for assisted decision-making laws that reflects the United Nations *Convention on the Rights of Persons with Disabilities* (“UN *Convention*”). They draw upon contemporary understandings of decision-making.
- 0.3 For this review, we released six question papers covering a range of issues about guardianship, including decision-making models, the functions and responsibilities of those assisting with decision-making, court and tribunal procedure, and safeguards. We have consulted face to face with people across NSW. We also released a set of Draft Proposals to give people the opportunity to consider the details of our reforms in the context of the whole proposed framework.
- 0.4 We thank everybody who has taken the time to write or speak to us.

Background to the review (Chapters 2-3)

- 0.5 Guardianship, the concept that a person can be appointed to protect another person who is unable to manage aspects of their own life, has a long history. Many of the ideas about guardianship have remained virtually unchanged since its conception. However, in the last 20 years, there have been significant shifts in thinking.
- 0.6 The *Guardianship Act* reflects an approach that was prevalent when it was enacted. At its heart is the concept of substitute decision-making, with the “welfare and interests” of the person needing guardianship given paramount consideration in the decision-making process.
- 0.7 The Act has served the NSW community for over 30 years. However, it no longer reflects the social, legal and policy environments that surround it.
- 0.8 This is partly because of developments in human rights law. In 2008, Australia ratified the UN *Convention*. The UN *Convention* clarifies how existing international human rights obligations apply to people with disability. It adopts the “social model” of disability, which is now widely considered the leading model. This model recognises that disability is an evolving concept and that attitudinal and environmental barriers can hinder people with disability from full and effective participation in society on an equal basis with others.
- 0.9 Some important tenets of the social model of disability include:
 - Perceived or actual deficits in mental capacity must not justify denying legal capacity.
 - Supported decision-making (which emphasises that a person with impaired decision-making ability can make decisions for themselves provided they have the necessary support) should be preferred over substitute decision-making.
 - A person’s will and preferences should be respected and not overruled by action thought to be in their objective best interests.

- 0.10 The profile of people who are the subject of guardianship applications in NSW has also changed. Initially, the largest group was people with an intellectual disability. Cases involving people with dementia are now the most common. Cases involving people with a mental illness or brain injury also make up a significant number of applications.
- 0.11 The way disability services are delivered is changing. From July 2018, the National Disability Insurance Scheme (“NDIS”) will operate across NSW. Under the NDIS, eligible individuals receive allocated funding for disability supports. The NSW agency — Ageing, Disability and Homecare (“ADHC”) — will transfer all its disability support services to the non-government sector. We need to ensure that within the new service delivery landscape, State and Commonwealth oversight mechanisms interact effectively to guarantee the safety of people with disability.
- 0.12 There are ongoing and increasing concerns about elder abuse. Elder abuse can include a guardian or financial manager making inappropriate decisions or taking advantage of an older person they are supposed to be supporting. It is important that there are safeguards against such behaviour.

A new assisted decision-making framework (Chapter 4)

- 0.13 We are recommending a new framework for assisted decision-making laws. This new framework departs significantly from the existing framework, which offers only substitute decision-making.
- 0.14 NSW should have a new Assisted Decision-Making Act (“the new Act”) that provides a formal framework for both supported decision-making and (as a last resort) substitute decision-making. It would replace the *Guardianship Act* and the enduring power of attorney provisions in the *Powers of Attorney Act 2003* (NSW) (“*Powers of Attorney Act*”). **(Rec 4.1)**
- 0.15 The new Act should be internally consistent and be drafted using simple and accessible language and structure. **(Rec 4.2)**
- 0.16 The new Act should adopt terminology that reflects contemporary understandings of decision-making ability and move away from the paternalistic language of “guardian” and “guardianship”. The term “representative” should, therefore, be used when the Tribunal appoints a substitute decision-maker instead of “guardian” and “financial manager”. The term “enduring representative” should be used, when a person chooses their own representative instead of “enduring guardian” and “attorney” under a power of attorney. The term “supporter” should be used for someone who assists a person to make their own decisions. **(Rec 4.3)**
- 0.17 The recommendations assume the existence of the following key entities: the NSW Trustee (currently called the NSW Trustee and Guardian), the Public Representative (currently called the Public Guardian), the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal (currently called the Guardianship Division), and the Public Advocate (a proposed new entity).

- 0.18 The types of decisions covered by the new Act should be personal decisions, financial decisions, healthcare decisions, and restrictive practices decisions. **(Rec 4.4-4.7)**
- 0.19 The key policies underpinning our recommendations include:
- The law should recognise a wide range of decision-making assistance options.
 - A person’s autonomy should be restricted as little as possible.
 - People should participate, as much as possible, in decisions that affect them.
 - The law should reflect a more realistic view of decision-making ability.
 - People should be encouraged to appoint their own supporters and representatives.
 - Tribunal orders should be a last resort.
 - There should be enhanced support for fair and effective informal arrangements.
 - Accountability mechanisms and safeguards should be improved.
 - The new Act should interact smoothly with other relevant laws.
 - There should be uniformity with provisions elsewhere in Australia when possible and desirable.
 - The law should include specific consideration of the circumstances of Aboriginal people and Torres Strait Islanders and the systemic disadvantage they experience.
- 0.20 The fundamental shift in thinking involved in the new Act would require substantial education and training of all participants in the system. Key agencies, including the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal, the Public Advocate and the NSW Trustee would need to be adequately resourced. Data should be collected to allow empirical research into the operation of the new framework.

Objects and principles (Chapter 5)

- 0.21 The new Act should contain a statutory objects clause to guide its interpretation. It should emphasise the rights of people in need of decision-making assistance and the importance of the purposes and principles of the UN *Convention*. **(Rec 5.1)**
- 0.22 The new Act should also contain a list of general principles that everyone exercising functions under it should observe with respect to people in need of decision-making assistance. They should be:
- (a) Their will and preferences should be given effect wherever possible.
 - (b) They have an inherent right to respect for their worth and dignity as individuals.
 - (c) Their personal and social wellbeing should be promoted.

- (d) They have the right to participate in and contribute to social and economic life.
 - (e) They have the right to make decisions that affect their lives (including decisions involving risk) to the full extent of their ability to do so and to be assisted in making those decisions if they want or require assistance.
 - (f) They have the right to respect for their age, sex, gender, sexual orientation, cultural and linguistic circumstances, and religious beliefs.
 - (g) They should be supported to develop and enhance their skills and experience.
 - (h) They have the right to privacy and confidentiality.
 - (i) They have the right to live free from neglect, abuse and exploitation.
 - (j) Their relationships with their families, carers and other significant people should be recognised.
 - (k) Their existing informal supportive relationships should be recognised.
 - (l) Their rights and autonomy should be restricted as little as possible. (**Rec 5.2**)
- 0.23 There should also be specific principles relevant to Aboriginal people and Torres Strait Islanders to account for their customary law, culture, values and beliefs as well as to the disadvantage they experience. (**Rec 5.3**)
- 0.24 The recommended general principles are in line with contemporary human rights and disability rights principles. One of the most important changes is to remove the current requirement that people give “paramount consideration” to a person’s “welfare and interests” and instead require that a person’s will and preferences be given effect to wherever possible.
- 0.25 In giving effect to a person’s will and preferences, anyone exercising functions under the new Act should:
- first, be guided by the person’s expressed will and preferences (including those in a valid advance care directive) wherever possible
 - if these cannot be determined, be guided by the person’s likely will and preferences (determined by previously expressed will and preferences or by consulting people with a knowledge of the person’s will and preferences)
 - if the person’s likely will and preferences cannot be determined, make decisions that promote the person’s personal and social wellbeing, and
 - if giving effect to a person’s will and preferences creates an unacceptable risk to the person, make decisions that promote the person’s personal and social wellbeing. (**Rec 5.4**)
- 0.26 Requiring someone to be guided by a person’s will and preferences and, if these are not knowable, then their personal and social wellbeing, departs from the current “best interests” test, which is widely seen as paternalistic.

Decision-making ability (Chapter 6)

- 0.27 There is no clear or consistent definition of decision-making ability (or “capacity”) in the *Guardianship Act*. This is despite the fact that a finding that a person lacks decision-making ability can have serious consequences for their autonomy.
- 0.28 Decision-making ability is a central concept in all circumstances covered by the new Act, including the entry into, and continued operation of, personal support agreements and enduring representation agreements, the making and continued operation of support orders and representation orders, and the making of healthcare decisions.
- 0.29 The new Act should provide that a person has “decision-making ability” for a particular decision if they can, when the decision needs to be made:
- (a) understand the relevant information
 - (b) understand the nature of the decision and the consequences of making or failing to make that decision
 - (c) retain the information to the extent necessary to make the decision
 - (d) use the information or weigh it as part of the decision-making process, and
 - (e) communicate the decision in some way. (**Rec 6.1**)
- 0.30 This definition is framed in terms of ability as part of a move away from the language of disability and other discriminatory aspects of the *Guardianship Act*. Specifically referring to decision-making ability “for a particular decision” acknowledges the reality that a person’s decision-making ability can vary depending on the circumstances.
- 0.31 While the presumption of decision-making ability exists at common law, there is no statutory presumption in NSW. This should be introduced. (**Rec 6.2**)
- 0.32 The new Act should provide guidance on determining a person’s decision-making ability, including:
- that reasonable steps be taken to ensure the person’s ability is assessed at a time and in a place where it can be assessed most accurately, and
 - that decision-making ability is decision and time specific and may fluctuate over time.
- 0.33 The new Act should also provide that a finding of a lack of decision-making ability cannot be based solely on a person’s appearance, behaviour and beliefs, the fact that people may disagree with the person’s decisions, or the person’s method of communication. (**Rec 6.3**)
- 0.34 Particular attention should be given to any cultural or linguistic factors (including non-verbal communication) that may impact on assessing the decision-making ability of an Aboriginal person or Torres Strait Islander. (**Rec 6.4**)

Supported decision-making (Chapter 7)

- 0.35 The new Act should provide for formal supported decision-making as a new part of the assisted decision-making framework, where a “supporter” helps a person to make decisions about various areas of their life. Under a supported decision-making arrangement, the supported person retains their legal capacity and makes their own decisions. Formal supported decision-making can take place under a personal support agreement or a Tribunal support order.
- 0.36 Supported decision-making arrangements would be a part of a suite of different assisted decision-making options. They will not suit every circumstance. Nor do we intend that support agreements would take the place of informal arrangements that are working well. Supported decision-making should provide a less restrictive option for people who, for example, would otherwise be subject to substitute decision-making arrangements.

Personal support agreements

- 0.37 To be eligible to appoint a supporter under an agreement, the supported person should be at least 18 years of age, have decision-making ability to enter the agreement and be making the agreement voluntarily. **(Rec 7.1)**
- 0.38 There should be few limits on who can become a supporter. However, we recommend excluding anyone under the age of 16 years, the NSW Trustee and Public Representative and, if the agreement covers financial decision-making, anyone who has been bankrupt or been found guilty of an offence involving dishonesty, unless they have recorded this in the agreement. **(Rec 7.2)** In the interest of not limiting the supported person’s autonomy to decide who is appropriate, this allows someone to appoint paid care workers, volunteers and others involved in providing medical, accommodation or other daily services as supporters.
- 0.39 Personal support agreements should be in a prescribed form and made subject to the formal witnessing requirements. **(Rec 7.3)**
- 0.40 In recognition that people may need assistance in preparing a support agreement, we recommend that the Tribunal be able to refer the facilitation of a support agreement to the Public Advocate. **(Rec 7.4)** The Tribunal should also be able to declare that an appointment of a supporter under an agreement has effect. **(Rec 7.5)**

Tribunal support orders

- 0.41 A Tribunal support order involves the Tribunal appointing a supporter as a last resort to facilitate supported decision-making.
- 0.42 The person requiring support may apply to the Tribunal for a support order. The Public Representative, the Public Advocate, or a person with a genuine interest in the wellbeing of the person who requires support should also be able to apply. **(Rec 7.6)**

- 0.43 We recommend that Tribunal support orders can only be made with the consent of the supported person and the supporter, and when less restrictive measures are either unavailable or not suitable. (**Rec 7.7**)
- 0.44 Subject to the Tribunal's assessment of a potential supporter's suitability, anyone 16 or older should be eligible for appointment, except for the Public Representative or NSW Trustee. (**Rec 7.9**)
- 0.45 When deciding who to appoint, the Tribunal should take into account matters including the will and preferences of the person in need of support, the nature of the relationship between the proposed supporter and that person, and any conflict of interest that may arise. (**Rec 7.10**)
- 0.46 Paid workers or those who might be receiving remuneration to act as a supporter should not be expressly excluded from appointment.

Key features of supported decision-making

- 0.47 A support agreement or order should allow one or more people to assist with decision-making on the range of decisions covered by the new Act, including decisions about personal matters, financial matters, healthcare and restrictive practices. (**Rec 7.14** and **7.16**) A reserve supporter should also be able to be appointed. (**Rec 7.17**)
- 0.48 A supporter's role should be to access or collect information that is relevant to the decision, assist the supported person to communicate their decision and advocate for the implementation of that decision. A supporter should not be able to make decisions on behalf of the supported person or exercise their functions without the supported person's knowledge and consent. Otherwise, the support agreement or order should determine a supporter's functions. (**Rec 7.12**)
- 0.49 We recommend ensuring that all supporters are aware of their responsibilities under a support agreement or order by acknowledging them in writing. These include observing the new Act's general principles (including to give effect to the person's will and preferences), acting honestly, diligently and in good faith, not coercing, intimidating or unduly influencing the supported person, and responding appropriately to situations where there may be a conflict of interest. (**Rec 7.13**)
- 0.50 We recommend that a support agreement or order may cease to have effect in a number of ways:
- when the supported person does not have decision-making ability for a decision even when assisted by the supporter (**Rec 7.15**)
 - when the supporter resigns by notice in writing or with Tribunal approval (**Rec 7.18**)
 - when the supported person revokes the agreement or order in writing, (**Rec 7.19**) or
 - after the Tribunal has reviewed it. (**Rec 7.20** and **7.21**)

Appointment of representatives (Chapters 8 and 9)

- 0.51 The new Act should provide for two types of formal substitute decision-making arrangements as a last resort:
- enduring representation agreements where a person with decision-making ability appoints their own representatives (to replace the current arrangements for enduring guardians and enduring powers of attorney), and
 - representation orders where the Tribunal appoints a person's representatives (to replace the current arrangements for guardians and financial managers).
- 0.52 We are recommending that each representation arrangement is capable of covering all types of decisions, including personal decisions and financial decisions. We have decided on a single approach to all types of decisions because there is no reason why the majority of requirements and safeguards for the two current systems need to differ either in content or expression. We have not, however, proposed merging the roles of the Public Representative (in relation to personal decisions) or the NSW Trustee (in relation to financial decisions).
- 0.53 In framing the recommendations for appointing representatives, we have drawn on requirements and safeguards under the existing regimes. Our aim has been to avoid unnecessary requirements, to streamline procedures and to maintain and increase safeguards as appropriate.

Personal appointment of representatives (Chapter 8)

- 0.54 Under a single agreement, a person should be able to appoint one or more enduring representatives to make decisions about personal matters, financial matters, healthcare matters and/or restrictive practices. **(Rec 8.1)**
- 0.55 To be eligible to appoint an enduring representative, the person should be at least 18 years of age, have decision-making ability to enter the agreement and be making the agreement voluntarily. **(Rec 8.2)**
- 0.56 The new Act should adopt the eligibility requirements in the *Guardianship Act* that apply to enduring guardians, for the appointment of enduring representatives, while including one additional safeguard: a person who has been bankrupt or convicted of a dishonesty offence must disclose this before they can be appointed as a representative with financial functions. **(Rec 8.3)**
- 0.57 The process for appointing an enduring representative should be consistent with the current process for appointing enduring guardians in the *Guardianship Act*. **(Rec 8.4)** A person should be able to appoint multiple representatives to act jointly or severally in relation to one or more decision-making functions. They should also be able to appoint a reserve representative, for circumstances where the appointed enduring representative dies, resigns or becomes unable to undertake the role. **(Rec 8.5)** A person should have the discretion to decide when the representative should start exercising their functions. **(Rec 8.8)** These recommendations are consistent with the principle that the represented person should have as much choice as possible.

- 0.58 The person making the appointment should also have the discretion to set the scope of an enduring representative's authority, including which decision-making functions they may have, and any limits or lawful conditions on their use. **(Rec 8.6)**
- 0.59 The new Act should make clear statements in areas where the existing provisions are inadequate or silent. It should, therefore:
- set out the responsibilities of enduring representatives and require enduring representatives to acknowledge them **(Rec 8.7)**
 - set out the factors that the Tribunal should consider when reviewing an enduring representation agreement **(Rec 8.11)**, and
 - clarify the status of an advance care directive in an enduring representation agreement if the agreement has lapsed or has been suspended or revoked (unless revoked by the represented person at a time when they still have decision-making ability). **(Rec 8.17)**

Tribunal appointment of representatives (Chapter 9)

- 0.60 Under a single appointment, the new Act should allow the Tribunal to appoint one or more representatives to make decisions about personal, financial, health care and/or restrictive practices matters for the represented person. **(Rec 9.1)** The new Act should not expressly allow the Tribunal to make plenary (or unlimited) orders, as it currently can for guardianship. Rather, all agreements and orders should specify the particular functions a representative has.
- 0.61 Our recommendations about who can apply for a representation order are consistent with the *Guardianship Act*, as are provisions that require the applicant to specify the grounds upon which they seek the order. **(Rec 9.2)**
- 0.62 However, unlike the *Guardianship Act*, we have moved away from requiring the Tribunal to consider whether the person has a disability. Instead, the new Act should require that the Tribunal is satisfied that there is a need for an order and that the proposed represented person does not have decision-making ability for one or more decisions covered by the order. Before making an order, the Tribunal should be required to consider, where relevant, the adequacy of existing or available formal or informal arrangements, and the availability and suitability of less restrictive and intrusive measures to meet the person's needs. **(Rec 9.3)**
- 0.63 There should also be additional considerations that the Tribunal should take into account when making orders for Aboriginal people and Torres Strait Islanders. **(Rec 9.4)**
- 0.64 The Tribunal should only be able to make orders for people 17 years and over and orders should not come into effect until they turn 18. **(Rec 9.3 and 9.8)**
- 0.65 A person over 18 should be eligible to be appointed as a representative. People between 16 and 18 should be eligible where they are the represented person's primary carer, they are already supporting the person or making decisions on their behalf, and the proposed functions are consistent with their decision-making abilities. **(Rec 9.5(2))**

- 0.66 Corporations should be allowed to act as representatives. The Public Representative and NSW Trustee should only be appointed as a last resort. **(Rec 9.5(3))**
- 0.67 The Tribunal should only appoint a person as a representative if satisfied that they are suitable in accordance with relevant considerations set out in the new Act. **(Rec 9.6)**
- 0.68 The Tribunal should have the power to decide that a professional representative (that is, a representative with financial functions who carries on a business involving the administration of estates) can be remunerated from the represented person's estate. The NSW Trustee should be able to determine the amount of remuneration that is reasonable in the circumstances. **(Rec 9.7)**
- 0.69 We recommend placing time limits on representation orders, as well as implementing a process of periodic review for all representation orders. This changes the current law, which sets time limits on, and has a process of periodic review for, guardianship orders but not for financial management orders. **(Rec 9.8)** Our approach reflects the principle of least restriction and is consistent with the UN *Convention*, which emphasises that measures must be proportional and tailored to the person's circumstances and apply for the shortest time possible.
- 0.70 The Tribunal should have a new discretion to determine whether the NSW Trustee should supervise a Tribunal appointed representative with financial functions and whether the representative requires NSW Trustee or Supreme Court authorities or directions. **(Rec 9.19)**
- 0.71 The new Act should allow the Tribunal to make short-term orders for 30 days or less in situations where the person is exposed to an unacceptable risk and the Tribunal is satisfied that the need for the order is urgent. **(Rec 9.9)** This recommendation effectively reframes the "temporary orders" currently available under the guardianship provisions as "emergency orders" to reflect better the purpose of those orders.
- 0.72 The Tribunal should be able to appoint multiple representatives to act jointly, or severally, in relation to one or more decision-making functions, and appoint a reserve representative to act if an original representative dies, resigns or does not have the decision-making ability to act under the order. **(Rec 9.10 and 9.11)**
- 0.73 The responsibilities of representatives should be the same as the responsibilities that apply to enduring representatives, and representatives must acknowledge they have read and understood them. **(Rec 9.13)**
- 0.74 The new Act should, consistent with the *Guardianship Act*, allow a broad range of people to apply for review of orders. **(Rec 9.16)** Unlike the current provisions, the new Act should specify the factors the Tribunal should consider upon review and the orders the Tribunal may make. **(Rec 9.17)**
- 0.75 As under the *Guardianship Act*, the Tribunal should be able to make an order specifying actions a person may take to enforce a representative's decisions. **(Rec 9.20)**

- 0.76 A representative should only be able to resign with the approval of the Tribunal. **(Rec 9.21)** The new Act should set out what happens when a representative dies or does not have decision-making ability. **(Rec 9.22)**

Healthcare (Chapter 10)

- 0.77 We recommend changes to the consent framework for medical and dental treatment currently covered by part 5 of the *Guardianship Act*. These include a will and preferences approach to healthcare decisions by the “person responsible” and the Tribunal, and statutory recognition of advance care directives.
- 0.78 The general statutory objects **(Rec 5.1)** should apply to the healthcare decision-making provisions rather than specific statutory objects as set out in part 5 of the *Guardianship Act*. **(Rec 10.1)** Where people are now required to consider a patient’s views, they should instead be required to give effect to their will and preferences, to be determined as set out in **Rec 5.4**.
- 0.79 The healthcare provisions should apply to patients who do not have “decision-making ability” for a healthcare decision, rather than patients who are “incapable of giving consent”. Decision-making ability should be determined in the same way it is in all other areas covered by the new Act. **(Rec 10.2)**
- 0.80 The scheme should be expanded beyond healthcare given by medical practitioners and dentists to all registered health practitioners as defined in the *Health Practitioner Regulation National Law* (NSW). This will bring a range of healthcare decisions under the processes and safeguards of the new Act. In particular, it will ensure coverage of healthcare given by nurses and paramedics. **(Rec 10.4)**
- 0.81 The new Act should explicitly recognise advance care directives, while preserving existing common law requirements. **(Rec 10.5)**
- 0.82 The new Act should maintain the urgent treatment regime in part 5 of *Guardianship Act*, to ensure healthcare can be administered to a patient without consent if the healthcare is necessary, as a matter of urgency, to save the patient’s life, prevent serious damage to their health, or, in some cases, to prevent the patient from suffering significant pain or distress. **(Rec 10.6)**
- 0.83 The Tribunal should be able to approve “special healthcare” if satisfied it is necessary to save the patient’s life or prevent serious damage to the patient’s health. The new Act should specify that “serious damage to the patient’s health” may include damage to their psychological, emotional or physical health. Before the Tribunal can consent to sterilisation, it should have to be satisfied that the patient will not regain decision-making ability in the foreseeable future. **(Rec 10.8)**
- 0.84 The new Act should continue to allow the Tribunal to authorise a patient’s representative to consent to further special healthcare on a patient’s behalf after it gives consent in the first instance. **(Rec 10.9)**
- 0.85 The consent arrangements for “major healthcare” should effectively be the same as the current consent arrangements for “major treatment”. **(Rec 10.11)** HIV testing should not be included in the definition of “major healthcare”. **(Rec 10.10)**

- Reclassifying such testing as “minor healthcare” is consistent with efforts to promote testing and decrease the stigma around HIV.
- 0.86 The definition of “minor healthcare” should effectively mirror the current definition of “minor treatment”, as should the consent arrangements. (**Rec 10.12 and 10.13**)
- 0.87 The Tribunal or a person responsible should be able to consent to withholding or withdrawing a life-sustaining measure where doing so would be inconsistent with good medical practice, and the decision gives effect to the patient’s will and preferences. (**Rec 10.14**)
- 0.88 The new Act should include a broad definition of an “objection” to healthcare. This is important because an objection, however expressed, may represent the patient’s current will and preferences. The new Act should also clarify that a person can refuse treatment in a clear advance care directive that extends to the situation at hand. (**Rec 10.15**)
- 0.89 The *Guardianship Act* allows a patient’s objection to be disregarded if the patient has minimal or no understanding of what the treatment involves and the treatment will cause the patient no distress or reasonably tolerable and transitory distress. This standard does little to protect a patient’s autonomy and right to bodily integrity and does not align with the principles of the *UN Convention*. We recommend that the Tribunal should be able to authorise a representative to override a patient’s objection only where there would be an unacceptable risk to the patient if the healthcare was not given. However, the Tribunal should not be able to act if the patient has refused the healthcare in a valid advance health care directive. (**Rec 10.16 and 10.17**)
- 0.90 The “person responsible” for consenting to healthcare should be the first person in a hierarchy of people who is: reasonably available to make a decision; has decision-making ability; and has not, if asked, declined to make a decision. Any disputes about the person responsible should be able to be referred, if necessary, to the Public Advocate. (**Rec 10.18**) The new Act should clarify that a relative according to an indigenous kinship system falls within the definition of “close friend or relative”. (**Rec 10.21**) The person responsible should be required to make decisions that give effect to a patient’s will and preferences rather than simply having regard to the patient’s views when they make decisions. (**Rec 10.22**)
- 0.91 Any person with a sufficient interest in a patient’s health and personal and social wellbeing should still be able to ask the Tribunal to consent to healthcare for the patient. (**Rec 10.23**) The Tribunal should be able consent if satisfied that the proposed healthcare is the most appropriate form of healthcare, and consenting would give effect to the patient’s will and preferences. (**Rec 10.24**)
- 0.92 The provisions in the *Guardianship Act* about liability for giving treatment and clinical record keeping should be preserved. (**Rec 10.25 and 10.26**)
- 0.93 The offences in the medical and dental treatment provisions of the *Guardianship Act* should be preserved. There should be an offence relating to taking a child or an adult who does not have decision-making ability overseas to be sterilised. (**Rec 10.27**)

Medical research (Chapter 11)

- 0.94 We recommend removing Tribunal oversight of clinical trials and allowing the person responsible to consent to a patient participating in a medical research project approved by a human research ethics committee. (**Rec 11.2**)
- 0.95 This reflects the approach to tribunal involvement taken in both Victoria and the Australian Capital Territory, and addresses feedback that:
- given the already rigorous approval process before an ethics committee, there is no need for a tribunal to approve medical research procedures, and
 - having two separate approval processes delays research projects and deters practitioners from conducting research in NSW. This has indirect disadvantages for people who do not have decision-making ability, who might otherwise benefit from the resulting advances in medical research.
- 0.96 These proposals seek to strike a balance between safeguarding the rights of participants who cannot consent to medical research procedures and ensuring that people who do not have decision-making ability can access healthcare and research on an equal basis; particularly new healthcare procedures that are only available in Australia through clinical trials.
- 0.97 We have adopted Victoria's 'medical research procedure' terminology and definition. (**Rec 11.1**) It is preferable to the current 'clinical trial' terminology because the generally understood meaning of 'clinical trial' does not align with the areas of medical practice or research that the legislation regulates.
- 0.98 Under our recommendations, medical research practitioners must:
- make reasonable efforts in the circumstances to find whether the participant has an advance care directive before they administer a medical research procedure (**Rec 11.3**), and
 - file a record with the Public Advocate when a participant without decision-making ability enrolls in a medical research procedure. (**Rec 11.6**)
- 0.99 If there is no person responsible to consent to participation in a medical research procedure once it is approved by a human research ethics committee, the Tribunal should be able to give consent. (**Rec 11.2**)
- 0.100 The *Guardianship Act* requires that consent can only be given if the research is intended to help cure or alleviate a particular condition the participant has or is at risk of having. This requirement should be removed as it prevents people participating in research for altruistic reasons. (**Rec 11.2**)
- 0.101 The new Act should allow a patient to be included in research without prior consent where the procedure involves giving accepted emergency treatment that is needed as a matter of urgency to save their life or prevent serious damage to their health. (**Rec 11.5**)
- 0.102 The new Act should expressly prohibit research practitioners from conducting medical research on a patient who objects (**Rec 11.4**), and should create new

offences for research practitioners who administer a medical research procedure without proper ethics approval and consent. (**Rec 11.7**)

- 0.103 An interested person should be able to apply to the Tribunal if they are concerned that participating in research does not align with a participant's will and preferences, or promote their personal and social wellbeing. (**Rec 11.2**)

Restrictive practices (Chapter 12)

- 0.104 NSW should not yet regulate the use of restrictive practices in the disability sector, in light of the Commonwealth's intention to do so through the NDIS. The specific and complex considerations that apply to using restrictive practices in the mental health and education sectors take such matters beyond the scope of this review.
- 0.105 In principle, we support consistent regulation of restrictive practices across NSW while recognising that certain differences in clinical contexts might lead to justifiable variations in regulation. We recommend that NSW monitor the implementation of the NDIS restrictive practices framework; first, to judge its effectiveness, and secondly, to consider if NSW should apply comparable regulation in state-regulated sectors. (**Rec 12.1(1)**) We suggest that the government give us a standalone reference on restrictive practices once the NDIS is rolled out and all details of the scheme are known. (**Rec 12.1(3)**)
- 0.106 We support the Australian Law Reform Commission's recommendation that the Commonwealth should regulate restrictive practices in residential aged care, and that the regulations should be consistent with those operating under the NDIS.
- 0.107 We are not persuaded that it is appropriate for regulations governing restrictive practices to apply to informal carers who lack training and support to implement positive behaviour supports. We have instead recommended that the Public Advocate have a role in educating families, carers and community groups to increase awareness of restrictive practices and the need to reduce and eliminate them. (**Rec 12.1(2)**)

The Public Advocate (Chapter 13)

- 0.108 There should be a new independent statutory position known as the Public Advocate to advocate for people in need of decision-making assistance, mediate decision-making disputes, provide information, advice and assistance about decision-making and investigate cases of potential abuse, neglect and exploitation.
- 0.109 Currently the Public Guardian performs some, but not all of these functions, and is largely limited to helping people under guardianship. The new Act should introduce new functions for a Public Advocate, in part to address the potential need for advocacy and investigative powers as state services are transferred to non-government organisations under the NDIS. (**Rec 13.1(1)** and **(2)**)
- 0.110 The Public Advocate and the Public Representative should be combined to form a single agency with dual functions, under the name of the Office of the Public Advocate. This would allow a full range of response options depending on the

situation at hand. The Public Advocate should have security of tenure, a dedicated staff and a duty to report to Parliament.

- 0.111 The new Act should set out the functions of the Public Advocate. **(Rec 13.1(3))** Some of the recommended functions have proved useful and effective in other states and territories. Others specifically support elements of the new framework; for example, the function of setting standards and guidelines for supporters.

Provisions of general application (Chapter 14)

- 0.112 Some of our recommendations apply generally across the new Act. They clarify and expand upon existing provisions of the *Guardianship Act* while removing some unnecessary provisions.
- 0.113 The new Act should not require registration of any agreement or order. Although many submissions support a registration system, opinion is divided on whether it should be optional or mandatory, and a number argue that a register would not adequately address cases of fraud. Privacy concerns are also raised. Our research into comparable registration schemes in other jurisdictions did not convince us that the potential benefits outweigh the likely problems. We do not intend to affect any existing provisions that require or allow for registration. **(Rec 14.9)**
- 0.114 The new Act should extend to all representatives and supporters the existing provisions that allow a guardian to apply to the Tribunal for directions about exercising their functions. Representatives and supporters should not be liable for any acts or omissions carried out in good faith in accordance with such a direction. **(Rec 14.1)**
- 0.115 Supporters, representatives and third parties who rely on an agreement or order in good faith and without knowing the agreement or order does not have effect, should be protected from liability. **(Rec 14.4)**
- 0.116 A representative, person responsible or supporter should be entitled to access any information that the person they are representing or assisting would be able to access provided it is also relevant to and necessary for carrying out their functions. **(Rec 14.2)**
- 0.117 The new Act should be consistent with provisions that prohibit anyone disclosing information obtained in connection with the administration or execution of the *Guardianship Act*. The list of exceptions to this rule should be expanded, in particular, to allow the person to authorise the disclosure of information about themselves. This recognises that a person may have the ability to make some decisions but not others, and that a person can make a decision with appropriate support. Permitting disclosure to prevent serious harm or to report a serious offence is a common exception to privilege and confidentiality provisions elsewhere. **(Rec 14.3)**
- 0.118 Substitute decision-makers, such as representatives or persons responsible, who share decision-making functions and cannot resolve a disagreement informally should be able to ask the Tribunal to direct them to undertake alternative dispute resolution. For example, this could happen when joint representatives cannot reach

a majority decision, or when representatives with different functions (such as financial and personal functions) need to align their decisions. **(Rec 14.5)**

- 0.119 The new Act should not make separate provision for people who need help exercising their rights under adoption laws. Part 4A of the *Guardianship Act*, which relates to adoption information under the *Adoption Act 2000* (NSW), currently provides separate arrangements to help such people. Omitting such provisions will not prevent people from exercising their rights through the assisted decision-making arrangements under the new Act. **(Rec 14.6)**
- 0.120 The new Act should incorporate the miscellaneous provisions in part 9 of the *Guardianship Act* that have not otherwise been the subject of a recommendation. These include provisions about service of notices, the offences of obstruction and false or misleading statements, and procedural matters. **(Rec 14.7)**

The Supreme Court (Chapter 15)

- 0.121 The Supreme Court of NSW has a range of powers to deal with people who may be in need of the Court's protection, including its inherent protective jurisdiction, and powers given by various Acts including the *Guardianship Act* and the *NSW Trustee and Guardian Act 2009* (NSW). The Court also has powers to review administrative decisions made under these Acts and to hear appeals against some decisions of the Guardianship Division of the NSW Civil and Administrative Tribunal.
- 0.122 The new Act should preserve the Court's inherent protective jurisdiction. **(Rec 15.1)**
- 0.123 Provisions in the *Guardianship Act* are inconsistent in dealing with applications made in the Supreme Court as well as in the Tribunal for guardianship orders and financial management orders. Such provisions should be aligned and expanded to clarify what should happen when the Tribunal and the Supreme Court make orders or receive applications about the same matters. **(Rec 15.2 and 15.3)**

Tribunal composition and procedure (Chapter 16)

- 0.124 We recommend some Tribunal procedures be reformed, while others should stay the same. We seek to strike the right balance between safeguarding people who are the subject of proceedings, while ensuring that the Tribunal remains a forum for the quick, inexpensive and informal resolution of disputes. We recommend:
- There should be no change to the composition of Tribunal panels. **(Rec 16.1)**
 - The new Act should clarify when a young person may be a party to a proceeding. **(Rec 16.2)**
 - The appointment process for parents of people who do not have decision-making ability, where this has been the case since before the person turned 18, should continue to be the same process as the appointment process for other representatives. **(Rec 16.3)**
 - The Tribunal should review its internal procedures to ensure that registry staff make reasonable efforts to ensure that all people with a genuine interest in the welfare of the subject person are notified of an application and the outcome of

the hearing. Notice and service requirements should otherwise remain the same. **(Rec 16.4)**

- A legal representative of the person who is the subject of an application before the Tribunal should be able to appear without seeking leave. **(Rec 16.5)**
- Separate representatives must act according to the general principles of the new Act. **(Rec 16.5)**
- The Tribunal should consider whether its procedures need to require parties to a hearing to give their evidence under oath or on affirmation where the Tribunal considers there are material facts in dispute. **(Rec 16.6)**

Powers of entry, search and removal (Chapter 17)

- 0.125 The new Act should include a mechanism for removing people in need of decision-making assistance from premises when they are at immediate risk of unacceptable harm and the harm can be mitigated by removal from those premises. We anticipate that this mechanism will be used in very limited circumstances. **(Rec 17.1)**
- 0.126 This recommendation replaces and updates the existing provisions in the *Guardianship Act* to reflect better the approach of the new Act. It should also deal better with addressing risks of immediate harm that cannot be dealt with effectively by applying to the Tribunal for an order or an emergency order.

Interaction with mental health legislation (Chapter 18)

- 0.127 The new Act should interact effectively with the *Mental Health Act 2007* (NSW) (“*Mental Health Act*”) and the *Mental Health (Forensic Provisions) Act 1990* (NSW) (“*Mental Health (Forensic Provisions) Act*”).
- 0.128 Provisions in the new Act should:
- make clear that matters addressed by orders under the *Mental Health Act* and *Mental Health (Forensic Provisions) Act* prevail over orders or agreements for supported decision-making or representation and that such orders or agreements continue to function in areas that are not the subject of orders pursuant to the *Mental Health Act* and *Mental Health (Forensic Provisions) Act* **(Rec 18.1 and 18.2)**
 - establish that the authorised medical officer of a mental health facility makes decisions in relation to the “mental health treatment” only **(Rec 18.3)**
 - implement a uniform regime for administering special treatment **(Rec 18.4)**
 - clarify the process of admitting and discharging voluntary patients including prohibiting voluntary admission of patients at the request of their representatives where the patient objects, **(Rec 18.5)** and
 - leave arrangements for financial decision-making, if required, to the provisions of the new Act rather than the Mental Health Review Tribunal. **(Rec 18.6)**

Recognising appointments made outside NSW (Chapter 19)

- 0.129 Currently, the *Guardianship Act* automatically gives effect to the appointment of an enduring guardian (or similar) appointed outside NSW. Guardians or financial managers (or similar) who have been appointed by a tribunal or court outside NSW must apply to the Tribunal to have their status formally recognised. This process is consistent with other jurisdictions and we think it should remain. (**Rec 19.1**)
- 0.130 New provisions about the recognition of representatives that have been appointed outside of NSW should clarify the effect of such recognition. (**Rec 19.2**)
- 0.131 The Tribunal should have a new power to review orders and personal appointments made outside NSW, including where there is an allegation of abuse of powers. (**Rec 19.3**) This would allow the Tribunal to appoint a new representative or supporter in circumstances of abuse.
- 0.132 There should not be a register for orders and personal appointments made outside of NSW. (**Rec 19.4**) It would be unfair to impose the burden on guardians or managers from other jurisdictions when NSW does not have a system of registration for NSW appointed substitute decision-makers.

Transitional provisions and consequential amendments (Chapter 20)

- 0.133 We recommend preserving orders and arrangements made under old legislation until they come up for review.
- 0.134 Existing guardianship orders should remain in place until they come up for periodic review (generally within three years). The Tribunal should be required to review all existing financial management orders within a certain period (for example, six years), depending on what is realistically manageable. (**Rec 20.1**) The Tribunal's considerations and actions upon review should be broadly consistent with their review powers under comparable provisions of the new Act. (**Rec 20.2**)
- 0.135 Existing enduring guardianship arrangements and enduring power of attorney arrangements should simply remain in place. (**Rec 20.3**) The Tribunal's considerations and actions upon review of enduring arrangements should be broadly consistent with their review powers under comparable provisions of the new Act. (**Rec 20.4**)
- 0.136 All existing guardians and financial managers should be bound by the general principles of the new Act from its commencement. (**Rec 20.5**)
- 0.137 Consequential amendments should be made to other NSW statutes to ensure consistency with the new Act. A comprehensive audit of guardianship-related language in other NSW statutes should be undertaken. (**Rec 20.6**)

Recommendations

4. A new assisted decision-making framework

4.1 A new Act

- (1) There should be a new Act to provide for supported decision-making and substitute decision-making called the Assisted Decision-Making Act (“the new Act”).
- (2) The new Act should replace the *Guardianship Act 1987* (NSW) and the enduring power of attorney provisions in the *Powers of Attorney Act 2003* (NSW).
- (3) The new Act should include:
 - (a) statutory objects and general principles that reflect the values upon which the Act is based and guide its interpretation and implementation
 - (b) principles to guide the assessment of decision-making ability
 - (c) assisted decision-making arrangements and the mechanisms for putting these in place, including processes for personal appointments, court and tribunal appointments and default arrangements
 - (d) principles to guide people acting under the new Act
 - (e) the roles and responsibilities of people acting under the new Act
 - (f) safeguards that ensure accountability of people acting under the new Act, including monitoring and review of orders and decisions, and
 - (g) the functions and powers of a new Public Advocate role.

4.2 Language and structure of the Act

The new Act should contain language and a structure that are as simple and as accessible as possible.

4.3 Key terms

The new Act should provide:

- (1) The Guardianship Division of the NSW Civil and Administrative Tribunal is to be renamed the **Assisted Decision-Making Division** (“the Tribunal”).
- (2) When someone appoints another person to make personal, financial, healthcare and/or restrictive practices decisions on their behalf, that person is to be referred to as an “**enduring representative**” and the person on whose behalf they act as a “**represented person**”.
- (3) A person appointed by the Supreme Court or Tribunal to make personal, financial, healthcare and/or restrictive practices decisions on behalf of someone else is to be referred to as a “**representative**” and the person on whose behalf they act as a “**represented person**”.
- (4) A person appointed by the Tribunal or under a support agreement to support someone else make decisions is to be referred to as a “**supporter**” and the person they support as a “**supported person**”.
- (5) The NSW Trustee and Guardian is to be renamed the **NSW Trustee**.
- (6) The Public Guardian is to be renamed the **Public Representative**.

4.4 Personal decisions

The new Act should provide:

- (1) A “**personal decision**” is a decision that relates to personal or lifestyle matters.
- (2) The following are examples of personal decisions:
 - (a) where a person lives
 - (b) who a person lives with
 - (c) whether a person works and, if a person works, where and how the person works
 - (d) what education and training a person undertakes
 - (e) what kind of personal services the person receives (for example, in-home care, respite services, or occupational therapy)
 - (f) whether a person applies for a licence or permit
 - (g) day-to-day decisions about, for example, dress and diet
 - (h) whether to consent to a forensic examination of a person
 - (i) whether a person will go on a holiday and where, and
 - (j) legal matters relating to a person’s personal care.

4.5 Financial decisions

The new Act should provide:

- (1) A “**financial decision**” is a decision about one or more aspects of a person’s property.
- (2) The following are examples of financial decisions:
 - (a) paying maintenance and accommodation expenses (including future expenses) for a person and the person’s dependants
 - (b) paying a person’s debts and expenses
 - (c) receiving and recovering money payable to a person
 - (d) carrying on a person’s trade or business
 - (e) performing contracts entered into by a person
 - (f) discharging a mortgage over a person’s property
 - (g) paying rates, taxes and other outgoings for a person’s property
 - (h) insuring a person or their property
 - (i) preserving or improving a person’s property
 - (j) buying and disposing of property
 - (k) dealing with land for a person
 - (l) making or continuing investments for a person
 - (m) making gifts and donations
 - (n) executing documents (for example, contract for sale of goods or property, signing a lease, and authorising bank payments)
 - (o) undertaking a transaction for a person involving the use of the person’s property as security for the benefit of the person

- (p) withdrawing money from, or depositing money into, a person's account with a financial institution
- (q) taking up the rights to the issue of new shares to which the person is entitled, and
- (r) making decisions on legal matters relating to a person's finances or property (for example, bankruptcy, signing contracts or deeds, and retaining a lawyer for legal advice).

4.6 Healthcare decisions

The new Act should provide:

- (1) A “**healthcare decision**” is a decision about a person's healthcare.
- (2) “**Healthcare**” has the meaning set out in **Recommendation 10.4**.

4.7 Restrictive practices decisions

The new Act should provide that:

- (a) A “**restrictive practices decision**” is a decision to approve or disapprove the use of restrictive practices on a person.
- (b) “**Restrictive practice**” means any practice or intervention that has the effect of restricting the rights or freedom of movement of a person.

5. Objects and principles

5.1 Statutory objects

The new Act should include a statement of statutory objects that sets out that:

- (a) the Act is founded on the principle that people in need of decision-making assistance have the same human rights as all members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights, and
- (b) the objects of the Act are accordingly to:
 - (i) implement the purposes and principles of the United Nations *Convention on the Rights of Persons with Disabilities*, and
 - (ii) promote the independence and personal and social wellbeing of people in need of decision-making assistance and provide safeguards in relation to the activities governed by the Act.

5.2 General principles

The new Act should provide that it is the duty of everyone exercising functions under the Act to observe the following principles with respect to people in need of decision-making assistance:

- (a) Their will and preferences should be given effect wherever possible, in accordance with **Recommendation 5.4**.
- (b) They have an inherent right to respect for their worth and dignity as individuals.
- (c) Their personal and social wellbeing should be promoted.

- (d) They have the right to participate in and contribute to social and economic life.
- (e) They have the right to make decisions that affect their lives (including decisions involving risk) to the full extent of their ability to do so and to be assisted in making those decisions if they want or require assistance.
- (f) They have the right to respect for their age, sex, gender, sexual orientation, cultural and linguistic circumstances, and religious beliefs.
- (g) They should be supported to develop and enhance their skills and experience.
- (h) They have the right to privacy and confidentiality.
- (i) They have the right to live free from neglect, abuse and exploitation.
- (j) Their relationships with their families, carers and other significant people should be recognised.
- (k) Their existing informal supportive relationships should be recognised.
- (l) Their rights and autonomy should be restricted as little as possible.

5.3 Additional general principles for Aboriginal people and Torres Strait Islanders

The new Act should provide that everyone exercising functions under this Act with respect to a person in need of decision-making assistance who is an Aboriginal person or Torres Strait Islander must:

- (a) to the extent that it is practicable and appropriate to do so, act in accordance with that person's customary law, culture, values and beliefs
- (b) recognise that Aboriginal people and Torres Strait Islanders have a right to respect and acknowledgment as the first peoples of Australia and for their unique history, culture and kinship relationships and connection to their traditional land and waters
- (c) recognise that many Aboriginal people and Torres Strait Islanders may face multiple disadvantages
- (d) address that disadvantage and the needs of Aboriginal people and Torres Strait Islanders, and
- (e) work in partnership with Aboriginal people and Torres Strait Islanders in need of decision-making assistance to enhance their lives.

5.4 Determining a person's will and preferences

The new Act should state that anyone exercising functions under it should approach the task of giving effect to a person's will and preferences wherever possible, as follows:

- (a) First, to be guided by the person's expressed will and preferences (including a valid advance care directive) wherever possible.
- (b) If these cannot be determined, to be guided by the person's likely will and preferences. These may be determined by the person's previously expressed will and preferences, and by consulting people who have a genuine and ongoing relationship with the person and who may be or have been aware of the person's will and preferences.

- (c) If these too cannot be determined, to make decisions that promote the person's personal and social wellbeing.
- (d) If giving effect to a person's will and preferences creates an unacceptable risk to the person (including the risk of criminal or civil liability), to make decisions that promote the person's personal and social wellbeing.
- (e) Regardless, a person's decision to refuse healthcare in a valid advance care directive must be respected if that refusal is clear and extends to the situation at hand.

6. Decision-making ability

6.1 Definition of decision-making ability

The new Act should provide that a person has decision-making ability for a particular decision if they can, when the decision needs to be made:

- (a) understand the relevant information
- (b) understand the nature of the decision and the consequences of making or failing to make that decision
- (c) retain the information to the extent necessary to make the decision
- (d) use the information or weigh it as part of the decision-making process, and
- (e) communicate the decision in some way.

6.2 Presumption of decision-making ability

The new Act should include a rebuttable presumption that a person has decision-making ability.

6.3 Determining decision-making ability

The new Act should provide that:

- (1) Anyone who must determine whether a person lacks decision-making ability for the purposes of the new Act must be satisfied that the person is or has been assessed at a time and in an environment in which their decision-making ability can be assessed most accurately.
- (2) Anyone determining whether a person lacks decision-making ability should consider that:
 - (a) decision-making ability is specific to the decision being made
 - (b) inability to make a decision may be temporary or permanent and may fluctuate over time
 - (c) decision-making ability may be different at different times
 - (d) a person may develop, gain or regain decision-making ability, and
 - (e) a person has decision-making ability for a matter if it is possible for the person to make the decision with practicable and appropriate support.
- (3) Anyone making a determination cannot conclude that a person does not have decision-making ability only because of one or more of the following:
 - (a) the person's age
 - (b) the person's appearance

- (c) an aspect of the person's behaviour (or manner)
- (d) the person's political, religious, or philosophical beliefs
- (e) the fact that people may disagree with the person's decisions (on any grounds, including moral, political or religious) or think the person's decisions are unwise
- (f) the fact that the person has a physical or mental condition
- (g) the fact that a person is a forensic patient, or may become a forensic patient
- (h) the person's methods of communication
- (i) the person's sex, gender, sexual preference or sexual conduct
- (j) the person's cultural and linguistic circumstances, or
- (k) the person's history of drug or alcohol use.

6.4 Determining decision-making ability of Aboriginal people and Torres Strait Islanders

The new Act should provide that, to the extent that it is appropriate and practicable to do so, anyone who must determine the decision-making ability of an Aboriginal person or Torres Strait Islander should have regard to:

- (a) any cultural or linguistic factors that may impact on an assessment of the person's decision-making ability, and
- (b) any other relevant considerations pertaining to the person's culture.

7. Supported decision-making

7.1 Eligibility to appoint a supporter under a support agreement

The new Act should provide that a person may appoint a supporter through a support agreement if the person making the appointment:

- (a) is at least 18 years of age
- (b) has decision-making ability to enter the agreement, and
- (c) is making the agreement voluntarily.

7.2 Eligibility for appointment as a supporter under a support agreement

The new Act should provide that a person is not eligible to be appointed as a supporter if:

- (a) the person is under 16 years of age
- (b) they are to assist with financial decision-making and they have been bankrupt or been found guilty of an offence involving dishonesty, unless they have recorded this in the support agreement, or
- (c) they are the Public Representative or the NSW Trustee.

7.3 Making a support agreement

The new Act should provide:

- (1) that a support agreement must be in a prescribed form and be signed by the person making the appointment and the proposed supporter accepting the appointment (although not necessarily at the same time or in the presence of each other).
- (2) for an eligible signer, where required, to sign for the person in the person's presence and at their direction.
- (3) for eligible witnesses to witness the signature, and certify that:
 - (a) they explained the effect of the agreement to the person making the agreement before it was signed, and
 - (b) the person making the agreement signed voluntarily and appeared to have decision-making ability in relation to the agreement.

7.4 Referral to the Public Advocate

The Tribunal may refer parties to the Public Advocate to facilitate the development of a support agreement.

7.5 Tribunal may declare appointment has effect

The new Act should provide that a supporter, a supported person, or other person with a genuine interest in the personal and social wellbeing of the supported person, may apply to the Tribunal for a declaration that an appointment under a person support agreement is valid.

7.6 Application for a Tribunal support order

The new Act should provide:

- (1) An application to the Tribunal for a support order may be made by:
 - (a) the person to whom the order will apply
 - (b) the Public Representative or the Public Advocate, or
 - (c) a person with a genuine interest in the personal and social wellbeing of the person who is the subject of the application.
- (2) An application must specify the grounds upon which there is a need for an order.
- (3) As soon as practicable after making the application, the applicant must serve the application on each of the parties.
- (4) Before conducting a hearing into the application, the Tribunal must notify each party of the hearing's time, date and location.
- (5) Failing to serve a copy of the application or a notice does not invalidate the Tribunal's decision on the application.
- (6) The Tribunal may treat an application for a representation order, review of a support order, support agreement or enduring representation agreement as an application for a support order.

7.7 Making a support order

- (1) The new Act should provide that, after conducting a hearing into an application, the Tribunal may appoint a supporter to assist the person if:
 - (a) the person needing support (“the person”) is of or above the age of 18
 - (b) there are one or more decisions to be made
 - (c) an eligible and suitable supporter is available
 - (d) the person would have decision-making ability in relation to the decision(s) covered by the order if assisted by the proposed supporter
 - (e) less intrusive and restrictive measures have already been considered and are either unavailable or not suitable
 - (f) the proposed supporter consents to the appointment, and
 - (g) the person consents to the appointment.
- (2) A support order must set out the supporter’s functions and any limits on those functions.

7.8 Additional Tribunal considerations for orders about Aboriginal people and Torres Strait Islanders

The new Act should provide that, to the extent that it is appropriate and practicable to do so, the Tribunal must, when determining whether a support order should be made for an Aboriginal person or Torres Strait Islander, have regard to:

- (a) the likely impact of the order on the person’s culture, values, beliefs (including religious beliefs) and linguistic environment
- (b) the likely impact of the order on the person’s standing or reputation in their indigenous community, and
- (c) any other relevant consideration pertaining to the person’s culture.

7.9 Eligibility for appointment as a supporter under a support order

The new Act should provide that the Tribunal may not appoint a person as a supporter under a support order if:

- (a) the person is under 16 years of age, or
- (b) they are the Public Representative or the NSW Trustee.

7.10 Suitability for appointment as a supporter under a support order

The new Act should provide:

- (1) In deciding whether a proposed supporter is suitable, the Tribunal must take into account:
 - (a) the will and preferences of the person in need of decision-making assistance (“the person”), determined as set out in **Recommendation 5.4**
 - (b) the nature of the relationship between the proposed supporter and the person
 - (c) the abilities and availability of the proposed supporter

- (d) whether the proposed supporter will be likely to act honestly, diligently and in good faith in the role
 - (e) whether the proposed supporter has or may have a conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any conflicts
 - (f) whether the supporter would promote the person's personal and social wellbeing
 - (g) the person's cultural identity, and
 - (h) where the proposed supporter will assist with financial decision-making, whether they have been bankrupt or been convicted of a dishonesty offence.
- (2) A person should not be prohibited from appointment as a supporter on the basis that they will receive financial remuneration for their appointment.

7.11 Effect of order on other appointments

The new Act should provide that a support order (including an order of the Supreme Court to like effect) operates to suspend any support agreement in its entirety, unless the Tribunal or Court allows limited operation of the agreement.

7.12 Functions of supporters

The new Act should provide:

- (1) A supporter's functions are determined by the support agreement or order and are limited to the following:
- (a) to communicate or assist the supported person in communicating their decisions to other people, and advocate for the implementation of the decision where necessary, and
 - (b) to access, collect or obtain, or assist the supported person in accessing, collecting or obtaining any relevant personal information (including financial and health information) about the supported person in order to assist the supported person to understand the information.
- (2) A supporter is not authorised to:
- (a) make decisions on behalf of the supported person
 - (b) exercise their functions without the supported person's knowledge and consent, or
 - (c) access, collect or obtain personal information about the supported person that the supported person would not be entitled to access, or collect or obtain personal information beyond that permitted by the agreement or order (as applicable).
- (3) Unless otherwise specified in the agreement or order, a supporter may, on behalf of a supported person, sign and do all such things as are necessary to give effect to any function under the agreement or order.

7.13 Responsibilities of supporters

The new Act should provide:

- (1) Supporters must:
- (a) observe the Act's general principles

- (b) act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the supported person
 - (c) act within the conditions or limitations of the agreement or order
 - (d) ensure that they identify and respond to situations where their interests conflict with those of the supported person, ensure the supported person's interests are always the paramount consideration, and seek external advice where necessary
 - (e) treat the supported person and important people in their life with dignity and respect
 - (f) if they are assisting with financial decision-making, keep accurate records and accounts
 - (g) respect the supported person's privacy and confidentiality by:
 - (i) only collecting personal information to the extent necessary for carrying out the supporter's role, and
 - (ii) only disclosing such information in circumstances permitted by **Recommendation 14.3**, and
 - (h) notify the Public Representative, if the supported person no longer has the decision-making ability to be supported to make the relevant decision.
- (2) Supporters must sign an acknowledgement that they have read and understood these responsibilities.

7.14 Types of decisions that can be made under a support arrangement

The new Act should provide that a supporter may assist a person to make decisions including those about personal matters, financial matters, healthcare and restrictive practices. The support agreement or order should specify what decisions or types of decisions the supporter may make as well as any conditions or limitations.

7.15 When support agreement or order has effect

The new Act should provide that a support agreement or order has effect in relation to a decision to which it applies except for any period during which:

- (a) the supported person does not have decision-making ability for that decision even when assisted by the supporter, or
- (b) the agreement or order is terminated or suspended or has lapsed.

7.16 Appointment of multiple supporters

The new Act should allow a person or the Tribunal to appoint more than one supporter to assist a person, either together or separately, in relation to one or more functions.

7.17 Appointment of reserve supporters

The new Act should allow a person or the Tribunal to appoint one or more reserve supporters to act if the original supporter dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the agreement or order.

7.18 Resignation of a supporter

The new Act should provide that a supporter may resign their appointment:

- (a) if the supported person understands the nature and consequences of the resignation, by giving notice in writing to the supported person, or
- (b) if the supported person does not understand the nature and consequences of the resignation, with the approval of the Tribunal.

7.19 End or suspension of a support agreement or order

The new Act should provide that:

- (1) A supported person may terminate, in writing, an appointment under a support agreement if the supported person:
 - (a) has decision-making ability in relation to the agreement and its termination, and
 - (b) terminates the agreement voluntarily.
- (2) A supported person may seek approval from the Tribunal to terminate a support order, if the supported person:
 - (a) has decision-making ability in relation to the termination of the order, and
 - (b) seeks the termination of the order voluntarily.
- (3) A support agreement or order lapses if the sole supporter appointed to carry out a function dies, or the end date is reached, or in any other circumstances specified in the agreement or order.
- (4) A support agreement or order does not lapse when a supporter dies if there is another supporter appointed to carry out the functions.
- (5) A support agreement or order is suspended, so far as it appoints a supporter, if the supporter becomes a person who does not have the decision-making ability to act as a supporter.
- (6) If a supported person becomes subject to a Tribunal representation order, any support agreement or order is suspended for the duration of the order, unless the Tribunal orders otherwise.

7.20 Tribunal review of support agreements and orders

The new Act should provide:

- (1) The Tribunal may review a support agreement or order on its own motion.
- (2) The Tribunal must review a support agreement or order if requested to do so by:
 - (a) the supported person
 - (b) the supporter
 - (c) the Public Representative or Public Advocate
 - (d) a person with a proper interest in the proceedings, or
 - (e) a person with a genuine interest in the personal and social wellbeing of the supported person

unless the request does not disclose grounds that warrant a review.

- (3) The Tribunal must, before carrying out the review, notify each party of the date, time and place of the review (although failure to do so will not invalidate a decision).
- (4) The Tribunal may order that the support agreement or order is suspended until the review is complete.

7.21 Tribunal action on review

The new Act should provide:

- (1) The Tribunal, when reviewing a support agreement, should consider, where relevant:
 - (a) whether the person met the eligibility criteria for entering into the agreement, and
 - (b) if the person did meet the eligibility criteria to enter into the agreement:
 - (i) the fact that the supporter was chosen by the person
 - (ii) whether the eligibility criteria for a supporter are still met, and
 - (iii) whether the supporter is meeting their responsibilities and carrying out their required functions.
- (2) The Tribunal must, when reviewing a support order, have regard to whether:
 - (a) there is still a need for a support order
 - (b) the eligibility and suitability criteria for a supporter are still met, and
 - (c) the supporter is meeting their responsibilities and carrying out their required functions
- (3) The Tribunal may, following its review, do any of the following to the agreement or order, in whole or in part:
 - (a) confirm it (with the consent of the supported person)
 - (b) vary it, including by appointing a replacement supporter who is suitable and eligible
 - (c) suspend it, or
 - (d) terminate it.
- (4) The Tribunal may make a fresh order in accordance with the new Act, including a representation order, to supersede the support agreement or order which has been suspended or revoked.

8. Personal appointments of representatives

8.1 Types of decisions an enduring representation agreement may cover

The new Act should provide that:

- (1) A person may appoint an enduring representative or representatives through an enduring representation agreement.
- (2) An enduring representation agreement may apply to decisions including those about personal matters, financial matters, healthcare and restrictive practices.

- (3) The agreement should specify what decisions or types of decisions the enduring representative or representatives may make as well as any conditions or limitations.

8.2 Eligibility to appoint an enduring representative

The new Act should provide that a person may appoint an enduring representative through an enduring representation agreement if the person making the appointment:

- (a) is at least 18 years of age
- (b) has decision-making ability to enter into the agreement, and
- (c) is making the agreement voluntarily.

8.3 Eligibility for appointment as an enduring representative

The new Act should provide:

- (1) A person is not eligible to be appointed as an enduring representative if:
 - (a) they are under 18 years of age
 - (b) they (or their spouse, child, brother or sister) provide, for fee or reward, healthcare, accommodation or other support services to the appointing person
 - (c) they are to be given a financial function and they have been bankrupt or been found guilty of an offence involving dishonesty, unless they have recorded this in the enduring representation agreement, or
 - (d) they are the Public Representative.
- (2) A person may only appoint the NSW Trustee as an enduring representative in relation to financial decision-making functions.
- (3) The appointment does not lapse if an enduring representative (or their spouse, child, brother or sister) is subsequently engaged to provide for fee or reward healthcare, accommodation or other support services to the represented person.

8.4 Making an enduring representation agreement

The new Act should provide:

- (1) that an enduring representation agreement must be in a prescribed form and be signed by the person making the appointment and the proposed enduring representative accepting the appointment (although not necessarily at the same time or in the presence of each other)
- (2) for an eligible signer, where required, to sign for the person in the person's presence and at their direction, and
- (3) for eligible witnesses to witness the signatures and certify that:
 - (a) they explained the effect of the document to the person making the agreement before it was signed, and
 - (b) the person making the agreement signed voluntarily and appeared to have decision-making ability in relation to the agreement.

8.5 Appointment of multiple and reserve enduring representatives

- (1) The new Act should:
 - (a) allow a person to appoint two or more enduring representatives to act jointly or severally, in relation to one or more functions, and
 - (b) provide for situations where one or more enduring representatives cannot act (by reason of death, resignation, or loss of decision-making ability).
- (2) The new Act should allow a person to appoint one or more reserve enduring representatives to act if an original enduring representative dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the agreement.

8.6 Functions of enduring representatives

The new Act should provide that:

- (1) An enduring representative's decision-making functions (and any limits or lawful conditions on them) are determined by the enduring representation agreement.
- (2) An enduring representative may sign and do all such things as are necessary to give effect to any decision-making function.
- (3) An enduring representative can access, collect or obtain personal information (including financial information and health records) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions.
- (4) The following functions cannot be given under an enduring representation agreement: making or revoking a will, making or revoking an enduring representation agreement, voting in elections, consenting to marriage, divorce, surrogacy arrangements or sexual relations, making decisions regarding the care and wellbeing or adoption of children, and managing the represented person's property after their death.

8.7 Responsibilities of enduring representatives

The new Act should provide:

- (1) Enduring representatives must:
 - (a) observe the Act's general principles
 - (b) act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the represented person
 - (c) act within the conditions or limitations of the agreement
 - (d) ensure that they identify and respond to situations where their 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
 - (e) communicate with the represented person when making decisions on their behalf and explain the decisions as far as possible
 - (f) treat the represented person and important people in their life with dignity and respect
 - (g) if they have a financial decision-making function:

- (i) keep accurate records and accounts
 - (ii) keep their money and property separate from the represented person's money and property, and
 - (iii) not gain a benefit from being a representative unless expressly authorised
- (h) respect the represented person's privacy and confidentiality by:
- (i) only collecting personal information to the extent necessary for carrying out the enduring representative's role, and
 - (ii) only disclosing such information when permitted by **Recommendation 14.3.**
- (2) Enduring representatives are expected, where possible, to:
- (a) develop a person's decision-making skills
 - (b) promote and maximise a person's autonomy, and
 - (c) provide decision-making support.
- (3) Enduring representatives, other than the NSW Trustee, must sign an acknowledgement that they have read and understood these responsibilities.

8.8 When an enduring representation agreement has effect

- (1) The new Act should allow a person to specify a time from which, a circumstance in which, or an occasion on which the decision-making functions for all matters or the decision-making functions for a specified matter are exercisable.
- (2) If the person does not specify when the representation agreement comes into effect:
- (a) for financial matters, the agreement shall come into effect at the time the appointment is made
 - (b) for personal, health and restrictive-practices decisions, the agreement shall come into effect when the represented person does not have decision-making ability for that decision.
- (3) A representative may exercise decision-making functions during any period when the represented person does not have decision-making ability, even if the specified time, circumstances or occasion has not arisen.

8.9 Tribunal may declare appointment has effect

The new Act should provide that the Tribunal may, on application by a person appointed as an enduring representative, declare that the appointment has effect if it is satisfied that:

- (a) the represented person does not have decision-making ability for a decision covered by the enduring representation agreement, and
- (b) the appointment is valid.

8.10 Tribunal review of enduring representation agreements

The new Act should provide:

- (1) The Tribunal may review an enduring representation agreement on its own motion.
- (2) The Tribunal must review an enduring representation agreement if requested to do so by:
 - (a) the represented person
 - (b) a person with a proper interest in the proceedings
 - (c) a person with a genuine interest in the personal and social wellbeing of the represented person, or
 - (d) the enduring representativeunless the request does not disclose grounds that warrant a review.
- (3) The Tribunal must, before carrying out a review, notify each party of the date, time and place of the review (although failure to do so will not invalidate any decision).
- (4) The Tribunal may order that the agreement is suspended until the review is complete.

8.11 Tribunal action on review

The new Act should provide:

- (1) The Tribunal, when reviewing the agreement, should consider, where relevant:
 - (a) whether the represented person met the eligibility criteria for entering into the agreement, and
 - (b) if the represented person did meet the eligibility criteria to enter into the agreement:
 - (i) the fact that the representative was chosen by the person
 - (ii) whether the eligibility criteria for a representative are still being met, and
 - (iii) whether the representative is meeting their responsibilities and carrying out their required functions.
- (2) The Tribunal may, on reviewing an enduring representation agreement, confirm it, vary it (including appointing a replacement enduring representative who is eligible and suitable), suspend it or revoke it, in whole or in part.
- (3) Where there is doubt about the validity of an appointment, the Tribunal may confirm the appointment if the Tribunal is satisfied it was the appointment the person intended to make.
- (4) The Tribunal may make a representation order or support order in accordance with the new Act to supersede an enduring representation agreement that has been suspended or revoked, in whole or in part.

8.12 Supreme Court review of an enduring representation agreement

The new Act should provide that the Supreme Court may review the appointment (or purported appointment) of an enduring representative under an

enduring representation agreement and may make such orders as it thinks appropriate.

8.13 Supreme Court may confirm any function of an enduring representative

The new Act should provide that the Supreme Court may, on application by a person appointed as an enduring representative, confirm (in whole or in part) any function under the enduring representation agreement if:

- (a) it appears that the represented person does not have decision-making ability to confirm the function, and
- (b) confirming the function is in accordance with the represented person's will and preferences.

8.14 Resignation of an enduring representative

The new Act should provide that an enduring representative may resign their appointment:

- (a) if the represented person understands the nature and consequences of the resignation — by giving notice in writing to the represented person.
- (b) if the represented person does not understand the nature and consequences of the resignation — with the approval of the Tribunal.

8.15 End or suspension of an enduring representation agreement

The new Act should provide that:

- (1) A represented person may, by a prescribed form that is signed and witnessed, revoke an appointment under an enduring representation agreement if the represented person:
 - (a) has decision-making ability in relation to the agreement and its revocation, and
 - (b) revokes the agreement voluntarily.
- (2) An enduring representation agreement lapses if an enduring representative dies, unless there is a joint or reserve representative to carry out the functions.
- (3) An enduring representation agreement is suspended, so far as it appoints an enduring representative, when the enduring representative does not have the decision-making ability to act under the agreement.
- (4) An enduring representation agreement is suspended, in so far as it appoints an enduring representative with a financial function, if the enduring representative becomes bankrupt or is found guilty of an offence involving dishonesty.

8.16 Possession or control of a represented person's property

The new Act should provide that:

- (1) Nothing in the new Act operates to change the ownership of any part of a represented person's property.
- (2) An enduring representative, upon ceasing to act as such, must ensure that possession or control of any part of a represented person's property in

relation to which they have functions, is transferred, as the case may require, to:

- (a) the formerly represented person, or
- (b) any replacement representative who has functions in relation to that part of the represented person's property.

8.17 Status of an advance care directive in an agreement that has ended

The new Act should provide that an advance care directive made in compliance with NSW law is valid notwithstanding that it is contained in an enduring representation agreement that has been suspended or revoked (unless revoked by the person making the appointment at a time when they have decision-making ability) or has lapsed.

8.18 Effect of marriage on an enduring representation agreement

The new Act should not provide that the marriage of a person who has made an enduring representation agreement automatically revokes the agreement.

9. Representation orders

9.1 Types of decisions a representation order may cover

The new Act should provide that a representation order may apply to decisions about personal matters, financial matters, healthcare and/or restrictive practices. The order should specify what decisions or types of decisions the representative may make as well as any conditions or limitations.

9.2 Application for a representation order

The new Act should provide that:

- (1) The following people may apply to the Tribunal for a representation order:
 - (a) the person to whom the order will apply
 - (b) the Public Representative, Public Advocate, and NSW Trustee, and
 - (c) a person with a genuine interest in the personal and social wellbeing of the person the subject of the application.
- (2) An application must specify the grounds upon which there is a need for an order.
- (3) The Tribunal may treat an application for a support order, or review of a support order, support agreement or enduring representation agreement as an application for a representation order.

9.3 Grounds for an order

The new Act should provide that:

- (1) The Tribunal may, after conducting a hearing into an application, appoint a person to be a representative under a representation order if:
 - (a) the proposed represented person is at least 17 years old
 - (b) the proposed represented person does not have decision-making ability for one or more decisions

- (c) less intrusive and restrictive measures are neither available nor suitable, and
 - (d) there is a need for an order.
- (2) In considering whether there is a need for an order, the Tribunal should take into account, where relevant:
- (a) the adequacy of existing or available formal or informal arrangements in meeting the person's decision-making needs, and
 - (b) the availability and suitability of less restrictive and intrusive measures to meet the person's needs, including but not limited to a support order or support agreement.

9.4 Additional Tribunal considerations for orders in respect of Aboriginal people and Torres Strait Islanders

The new Act should provide that, to the extent that it is appropriate and practicable to do so, the Tribunal must, when determining whether a representation order should be made for an Aboriginal person or Torres Strait Islander, have regard to:

- (a) the likely impact of the order on the person's culture, values, beliefs (including religious beliefs) and linguistic environment
- (b) the likely impact of the order on the person's standing or reputation in their Indigenous community, and
- (c) any other relevant consideration pertaining to the person's culture.

9.5 Eligibility for appointment as a representative

The new Act should provide that:

- (1) The Tribunal can appoint, as a representative, under a representation order:
- (a) an eligible person, or
 - (b) in relation to personal, healthcare and/or restrictive practices decision-making functions - the Public Representative
 - (c) in relation to financial decision-making functions - the NSW Trustee.
- (2) A person is an "eligible person" if they are:
- (a) at least 18 years old, or
 - (b) at least 16 years old and:
 - (i) they are the person's primary carer, and
 - (ii) they are already supporting the person or making decisions on their behalf, and
 - (iii) the proposed functions are consistent with their decision-making abilities.
- (3) The Tribunal (other than in an emergency representation order) must not appoint the Public Representative or the NSW Trustee as a representative if some other person can be appointed.

9.6 Suitability for appointment as a representative

The new Act should provide that:

- (1) The Tribunal may only appoint a person as a representative if it is satisfied that they are suitable and the proposed representative consents to the appointment.
- (2) In deciding whether a person (other than the Public Representative or NSW Trustee) is suitable, the Tribunal must take into account:
 - (a) the will and preferences of the person in need of decision-making assistance (“the person”)
 - (b) the nature of the relationship between the proposed representative and the person
 - (c) the abilities and availability of the proposed representative
 - (d) whether the proposed representative is likely to act honestly, diligently and in good faith
 - (e) whether the proposed representative has or may have a conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any conflicts
 - (f) whether the proposed representative will promote the person’s personal and social wellbeing
 - (g) the person’s cultural identity
 - (h) whether the proposed representative has been convicted of a serious indictable offence, and
 - (i) where they will have a financial function, whether the proposed representative has been bankrupt or been convicted of a dishonesty offence.

9.7 Remuneration of professional representatives with financial functions

The new Act should provide that:

- (1) The Tribunal may determine that a representative with financial functions, who carries on a business that includes the administration of estates, is entitled to remuneration out of the represented person’s estate for their work in administering that estate.
- (2) As part of any oversight and direction of representatives with financial functions, the NSW Trustee should decide the amount of any remuneration.

9.8 When a representation order has effect

The new Act should provide that:

- (1) A representation order has effect only if the represented person is aged 18 years or over.
- (2) Unless a representation order is revoked or suspended or has lapsed, it has effect in relation to a decision to which the order applies only when the represented person does not have decision-making ability for that decision.
- (3) The Tribunal must specify that an order (except for an emergency order) has effect for no more than:
 - (a) 1 year for an initial order, or

- (b) 3 years for an order that is renewed following review.
- (4) However, if the Tribunal is satisfied that the represented person will never have the relevant decision-making ability and there is a need for an order of longer duration the Tribunal may specify that the order (except for an emergency order) has effect for no more than:
 - (a) 3 years for an initial order, and
 - (b) 5 years for an order that is renewed following review.
- (5) The Tribunal may specify that an order will not be reviewed at the end of the period for which it has effect, but only if the Tribunal is satisfied that, in all the circumstances, not reviewing the order promotes the personal and social wellbeing of the represented person.

9.9 Emergency orders

The new Act should provide:

- (1) The Tribunal may, where it considers it appropriate by reason of unacceptable risk to the person and urgency,
 - (a) make an order it considers appropriate in the circumstances in respect of a person that remains in effect for a specified period of no more than 30 days, if it addresses the unacceptable risk to the person, and
 - (b) renew the order for a further specified period of not more than 30 days if it addresses the unacceptable risk to the person.
- (2) The Tribunal may make the order at the request of the person to whom the order relates, or at the request of a person with a genuine interest in the personal and social wellbeing of the person to whom the order relates.
- (3) In making an emergency order, the Tribunal may appoint the Public Representative (in relation to personal, healthcare and/or restrictive practices decisions) and/or the NSW Trustee (in relation to financial decisions) as representative if the person does not have a representative or person responsible, and it considers that there may be grounds for making an order.
- (4) The Tribunal is not prevented from making an emergency order just because evidence about a person's decision-making ability is limited.
- (5) In making an emergency order, the Tribunal must specify the extent (if any) to which the proposed representative has custody of the person.
- (6) The Tribunal cannot make an emergency order if:
 - (a) there is a valid advance care directive that expressly prohibits the decision for which the order is sought, or
 - (b) another order would be more appropriate.

9.10 Multiple representatives

The new Act should:

- (a) allow the Tribunal to appoint two or more representatives to act jointly or severally, in relation to one or more functions
- (b) provide for situations where one or more representatives cannot act (by reason of death, resignation, or loss of decision-making ability), and

- (c) ensure that the Public Representative and NSW Trustee are not appointed as joint representatives for the same decision-making functions with each other or with anyone else.

9.11 Reserve representatives

The new Act should allow the Tribunal to appoint a reserve representative to act if an original representative dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the order.

9.12 Functions of representatives

The new Act should provide:

- (1) A representative's decision-making functions (and any limits or conditions on them) are determined by the representation order.
- (2) A representative may sign and do all such things as are necessary to give effect to any decision-making function.
- (3) A representative can access, collect or obtain personal information (including financial information and health records) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions.

9.13 Responsibilities of representatives

The new Act should provide that:

- (1) Representatives must:
 - (a) observe the Act's general principles
 - (b) act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the represented person
 - (c) act within any conditions and limitations of the order
 - (d) ensure that they identify and respond to situations where their 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
 - (e) communicate with the represented person when making decisions on their behalf and explain the decisions as far as possible
 - (f) treat the represented person and important people in their life with dignity and respect
 - (g) if they have a financial decision-making function:
 - (i) keep accurate records and accounts
 - (ii) keep their money and property separate from the represented person's money and property, and
 - (iii) not gain a benefit from being a representative unless expressly authorised
 - (h) respect the represented person's privacy and confidentiality by:
 - (i) only collecting personal information to the extent necessary for carrying out the representative's role, and

- (ii) only disclosing such information when permitted by **Recommendation 14.3.**
- (2) Representatives are expected, where possible, to:
 - (a) develop a person's decision-making skills
 - (b) promote and maximise a person's autonomy, and
 - (c) provide decision-making support.
- (3) Representatives, other than the NSW Trustee or the Public Representative, must sign an acknowledgement that they have read and understood these responsibilities.

9.14 Effect of order on other appointments or agreements

The new Act should provide that a representation order (including an order of the Supreme Court to like effect) suspends any enduring representation agreement, support agreement, or support order in its entirety, unless the Court or Tribunal order expressly allows a limited continuing operation.

9.15 Orders to be forwarded to Public Representative and/or NSW Trustee

The new Act should provide that if the Tribunal makes a representation order appointing a person other than:

- (a) the Public Representative as a representative in relation to a personal, healthcare or restrictive practices decision-making function, and/or
- (b) the NSW Trustee as a representative in relation to a financial decision-making function,

it should forward a copy to the Public Representative and/or the NSW Trustee as the case may require.

9.16 Tribunal review of representation orders

The new Act should provide that:

- (1) The Tribunal may review a representation order on its own motion.
- (2) The Tribunal must review a representation order:
 - (a) at the end of the period for which the order has effect (unless the order provides there is to be no review at the end of the period), or
 - (b) if requested to do so by:
 - (i) the represented person
 - (ii) a person with a proper interest in the proceedings
 - (iii) a person with genuine interest in the personal and social wellbeing of the represented person
 - (iv) the representative, or
 - (v) the Public Representative, the NSW Trustee or the Public Advocate,

unless the request does not disclose grounds that warrant a review order.

- (3) The Tribunal should, before carrying out the review, notify each party of the date, time and place of the review (although failure to do so will not invalidate any decision).

9.17 Tribunal action on review

The new Act should provide that:

- (1) The Tribunal should, when reviewing an order, consider, where relevant:
 - (a) whether there is still a need for the order
 - (b) whether eligibility and suitability criteria for a representative are still met, and
 - (c) whether the representative is meeting their responsibilities and carrying out their required functions.
- (2) The Tribunal may, on reviewing a representation order:
 - (a) at the end of the period for which the order has effect, renew it, renew and vary it, or decide that it may lapse
 - (b) confirm, vary, suspend (in whole or in part) or revoke the order, or
 - (c) make a support order in accordance with the new Act.

9.18 Administrative review of decisions of the Public Representative and NSW Trustee

The new Act should provide that:

- (1) A person may apply to the Civil and Administrative Tribunal under the *Administrative Decisions Review Act 1997* (NSW) for an administrative review of a decision of the Public Representative or the NSW Trustee that:
 - (a) is made in connection with the exercise of the Public Representative's or NSW Trustee's functions as a representative under the new Act, and
 - (b) is of a class of decision prescribed by the regulations for the purposes of these provisions.
- (2) Such an application may be made by:
 - (a) the person to whom the decision relates,
 - (b) the spouse of the person
 - (c) the person who has the care of the person, or
 - (d) any other person whose interests are, in the opinion of the Civil and Administrative Tribunal, adversely affected by the decision.

9.19 Supervising representatives with a financial function

- (1) The new Act should provide that:
 - (a) The Tribunal may require the NSW Trustee to supervise a representative with a financial function, but only if the Tribunal considers it necessary.
 - (b) In considering whether supervision is necessary, the Tribunal must take into account:
 - (i) the size and complexity of the represented person's property
 - (ii) whether there are other measures to protect the represented person
 - (iii) any potential conflicts of interest between the represented person and the representative, and

- (iv) any other relevant matters.
 - (c) The Tribunal must always require NSW Trustee supervision when appointing a professional representative with a financial function.
 - (d) If the order requires NSW Trustee authorisation for the representative to make financial decisions, the representative can do what is necessary to protect the property pending authorisation.
- (2) The *NSW Trustee and Guardian Act 2009* (NSW) should provide that the NSW Trustee, when supervising a representative with a financial function, may decide the nature and timing of any financial reporting.

9.20 Enforcing representatives' decisions

The new Act should provide that:

- (1) A Tribunal order may specify the actions that:
- (a) a representative
 - (b) a specified person or a person of a specified class, or
 - (c) a person authorised by the representative
- may take (including the use of force) to ensure that the represented person complies with any decision of the representative in the exercise of the representative's functions.
- (2) However, the Tribunal may not make such an order unless the Tribunal is satisfied that:
- (a) the represented person will be exposed to an unacceptable risk of harm, including by way of neglect, abuse or exploitation, if the order is not made
 - (b) allowing such action is the least restrictive option for ensuring the represented person is not exposed to the harm in (2)(a)
 - (c) the actions authorised by the order are appropriate and proportionate to the circumstances, and
 - (d) the order is for the shortest period necessary to give effect to the order.
- (3) The Tribunal may at any time:
- (a) impose conditions or give directions about exercising the actions specified in the order, or
 - (b) revoke the order.
- (4) A person permitted in the order to use force may use such force as is reasonably necessary in the circumstances.
- (5) A person acting in accordance with such an order, in good faith, is not liable to any action, liability, claim or demand arising from the action.

9.21 Resignation of a representative

The new Act should provide that a representative, other than the Public Representative or the NSW Trustee, may resign with the approval of the Tribunal.

9.22 End or suspension of a representation order

The new Act should provide that:

- (1) A representation order lapses if a representative dies, unless there is a joint or reserve representative to carry out the functions.
- (2) The Tribunal shall, on application or its own motion, review a representation order and appoint a replacement representative, where necessary (for example, if the order has lapsed). Until the Tribunal makes an order following review:
 - (a) the Public Representative shall act as a representative for personal, healthcare and/or restrictive practices decision-making functions, and
 - (b) the NSW Trustee shall act as a representative for financial decision-making functions.
- (3) A representation order is suspended, so far as it appoints a representative, when the representative does not have the decision-making ability to act under the order.

9.23 Possession or control of a represented person's property

The new Act should provide that:

- (1) Nothing in the Act operates to change the ownership of any part of a represented person's property.
- (2) A representative, upon ceasing to act as such, must ensure that possession or control of any part of a represented person's property in relation to which they have functions, is transferred, as the case may require, to:
 - (a) the formerly represented person, or
 - (b) any replacement representative who has functions in relation to that part of the represented person's property.

10. Healthcare

10.1 Statutory objects

The new Act should not have separate statutory objects for healthcare decision-making.

10.2 Application of healthcare provisions

The new Act should provide that its healthcare provisions apply to a patient:

- (a) who is of or above the age of 16 years, and
- (b) who does not have decision-making ability for a healthcare decision.

10.3 Decision-making ability

The definition of decision-making ability in **Recommendation 6.1** should apply to the new Act's healthcare provisions.

10.4 Definition of “healthcare”

The new Act should provide that:

- (1) “**Healthcare**” includes:
 - (a) any care, service, procedure or treatment provided by, or under the supervision of, a registered health practitioner for the purpose of diagnosing, maintaining or treating a physical or mental condition of a person
 - (b) in the case of healthcare in the course of a medical research procedure — the giving of placebos, and
 - (c) any other act declared by the regulations to be healthcare.
- (2) “**Healthcare**” does not include:
 - (a) any non-intrusive examination for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears)
 - (b) first-aid
 - (c) administering a pharmaceutical drug for which a prescription is not required and which is normally self-administered in accordance with the manufacturer’s recommendations as to purpose and dosage level
 - (d) mental health treatment given to a patient or affected person under the *Mental Health Act 2007* (NSW) or *Mental Health (Forensic Provisions) Act 1990* (NSW), or
 - (e) anything else that the regulations declare is not healthcare for the purposes of these provisions.
- (3) “**Registered health practitioner**” means a person who practises in:
 - (a) a health profession within the meaning of the *Health Practitioner Regulation National Law* (NSW), and/or
 - (b) any other profession or practice as declared by the regulations.

10.5 Advance care directives

The new Act should provide:

- (1) A patient may consent to healthcare or a medical research procedure in a valid advance care directive.
- (2) Healthcare must not be given and a medical research procedure must not be undertaken if it would be against a patient’s will and preference as expressed in an advance care directive that is clear and extends to the situation at hand.
- (3) An advance care directive can be made in any form, including orally.
- (4) An advance care directive can include instructions on specific matters as well as expressions of values and preferences.
- (5) The provisions do not limit the common law about advance care directives.
- (6) A requirement to consider a person’s will and preferences includes considering any valid advance care directive (see also **Recommendation 5.4**).
- (7) A registered health practitioner must make a reasonable effort in the circumstances to find out if a patient who does not have decision-making

ability has an advance care directive before treating them or seeking another person's consent to treat them.

- (8) Notwithstanding an advance care directive, a registered health practitioner is not under any obligation to deliver a life-sustaining measure if to do so would be inconsistent with standard medical practice.

10.6 Urgent healthcare

The new Act should provide:

- (1) Healthcare may be provided to a patient without consent if the registered health practitioner carrying out or supervising the healthcare considers the healthcare is necessary, as a matter of urgency:
 - (a) to save the patient's life, or
 - (b) to prevent serious damage to the patient's health, or
 - (c) except in the case of special healthcare — to prevent the patient from suffering or continuing to suffer significant pain or distress.
- (2) In urgent circumstances, a registered health practitioner is not required to search for an advance care directive that is not readily available.

10.7 Definition of “special healthcare”

The new Act should provide that “**special healthcare**” means:

- (a) any healthcare that is intended, or is reasonably likely, to render the patient permanently infertile
- (b) any healthcare that is not supported by a substantial number of registered health practitioners specialising in the relevant practice area, or
- (c) any healthcare that the regulations declare to be special healthcare.

10.8 Tribunal consent to special healthcare

The new Act should provide:

- (1) The Tribunal may consent to special healthcare for a patient if it is satisfied that it is necessary:
 - (a) to save the patient's life, or
 - (b) to prevent serious damage to the patient's emotional, psychological or physical health.
- (2) In the case of healthcare intended or reasonably likely to render the patient permanently infertile, the Tribunal must be satisfied that the patient will not regain decision-making ability in the foreseeable future.
- (3) In the case of healthcare that is not supported by a substantial number of health practitioners specialising in the relevant practice area, the Tribunal may give consent only if:
 - (a) the treatment is the only or most appropriate way of treating the patient, and
 - (b) it is satisfied that any relevant National Health and Medical Research Council guidelines have been or will be complied with.

*For matters that the Tribunal must consider before giving consent, see **Recommendation 10.24**.*

10.9 Consent to continuing or further special healthcare

The new Act should provide:

- (1) The Tribunal may, when consenting to special healthcare, authorise the patient's representative to consent to:
 - (a) continuing the special healthcare, or
 - (b) further special healthcare of a similar nature.
- (2) The Tribunal may only give such an authority if the representative requests it or consents to it.
- (3) The Tribunal may at any time:
 - (a) impose conditions or give directions as to the exercise of such an authority, or
 - (b) revoke such an authority.
- (4) If the representative has such an authority, any person may ask the representative for their consent to give the relevant special healthcare.
- (5) In considering a request for consent to further or continuing healthcare, a representative must give effect to the will and preferences of the patient (to be determined as set out in **Recommendation 5.4**).

10.10 Definition of “major healthcare”

- (1) The new Act should provide that “**major healthcare**” means healthcare that the regulations declare to be major healthcare.
- (2) The new regulations should mirror the present regulations except that HIV testing should not be included.

10.11 Consent to major healthcare

The new Act should provide that the person responsible or the Tribunal may consent to major healthcare for a patient.

*For matters that the person responsible must consider before giving consent, see **Recommendation 10.22**.*

*For matters that the Tribunal must consider before giving consent, see **Recommendation 10.24**.*

10.12 Definition of “minor healthcare”

The new Act should provide that “**minor healthcare**” means healthcare that is not special healthcare or major healthcare.

10.13 Consent to minor healthcare

The new Act should provide:

- (1) The person responsible may consent to minor healthcare for a patient.
- (2) If there is no person responsible, minor healthcare may be carried out on a patient without consent provided that the registered health practitioner carrying out, or supervising the minor healthcare, certifies in writing in the patient's clinical record that:
 - (a) the healthcare is necessary and is in a form that will most successfully promote the patient's health and personal and social wellbeing, and

(b) the patient does not object to the healthcare.

(3) The Tribunal may consent to minor health care for a patient in any case.

*For matters that the person responsible must consider before giving consent, see **Recommendation 10.22**.*

*For matters that the Tribunal must consider before giving consent, see **Recommendation 10.24**.*

10.14 Consent to withdrawing or withholding life-sustaining measures

The new Act should provide:

- (1) The person responsible or Tribunal may consent to withholding or withdrawing a life-sustaining measure, but only if:
 - (a) starting or continuing the measure would be inconsistent with good medical practice, and
 - (b) the decision gives effect to the patient's will and preferences, as set out in **Recommendation 5.4**.
- (2) Death as a result of withdrawing or withholding life-sustaining measures is not necessarily incompatible with promoting a patient's personal and social wellbeing.

10.15 Patient objections to healthcare

The new Act should provide that a patient is taken to object to healthcare:

- (a) if the patient indicates (by whatever means) that they do not want the healthcare, or
- (b) if the patient:
 - (i) has previously indicated, in similar circumstances, that they did not then want the healthcare (including in an advance care directive that is clear and unambiguous and extends to the situation at hand), and
 - (ii) has not subsequently indicated otherwise.

10.16 Overriding a patient's objection to major or minor healthcare

The new Act should provide:

- (1) The Tribunal may authorise a representative (at their request or with their consent) to override the patient's objection to major or minor healthcare if satisfied that:
 - (a) the patient has not refused the healthcare in an advance care directive that is clear and extends to the situation at hand
 - (b) there would be an unacceptable risk to the patient if the healthcare was not given, and
 - (c) receiving the healthcare would promote the patient's health and personal and social wellbeing.
- (2) The Tribunal may at any time:
 - (a) impose conditions on or give directions about exercising the authority, or
 - (b) revoke the authority.

- (3) The patient's representative may exercise the authority only if satisfied that the healthcare promotes the patient's health and personal and social wellbeing.
- (4) These provisions do not apply to healthcare delivered in the course of a medical research procedure.

10.17 Effect of consent and objections

The new Act should provide:

- (1) A healthcare consent has effect as if:
 - (a) the patient had decision-making ability, as defined in **Recommendation 6.1**, to consent to the healthcare, and
 - (b) the healthcare had been given with the patient's consent.
- (2) A consent given by the person responsible has no effect:
 - (a) if the person giving or supervising the healthcare knows, or ought reasonably to know, that the patient objects to the healthcare, or
 - (b) if the healthcare is to be carried out for any purpose other than that of promoting the patient's health and personal and social wellbeing.
- (3) A consent given by the patient's representative has effect even if the patient objects when the representative is authorised by the Tribunal under **Recommendation 10.16**.

10.18 Identifying the person responsible

- (1) The new Act should define the “**person responsible**” as follows:
 - (a) The person responsible for a young person aged 16 or 17 is the person with parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*).
 - (b) The person responsible for an adult is the first person in the person responsible hierarchy who:
 - (i) has decision-making ability for the decision
 - (ii) is reasonably available to make a decision, and
 - (iii) has not, if asked, declined to make a decision.

See **Recommendation 10.19** for the person responsible hierarchy.

- (2) The new Act should provide for a record to be made if a person in the hierarchy declines to make a decision, or if the health practitioner decides that a person who would otherwise be the person responsible is not reasonably available or does not have decision-making ability for the decision. The regulations should make provisions about the keeping of such records.
- (3) The new Act should provide that disputes about who is the person responsible may be referred to the Public Advocate for mediation.

10.19 The person responsible hierarchy

The new Act should provide:

- (1) The person responsible hierarchy is:

- (a) a person who is empowered to make the relevant decision under an enduring representation agreement or representation order
 - (b) the spouse of the person, if they have decision-making ability for the decision and the relationship is close and continuing
 - (c) a person who has the care of the person, or
 - (d) a close friend or relative of the person.
- (2) The “spouse” of an Aboriginal person or a Torres Strait Islander includes a spouse married according to customary law.

10.20 When a person “has the care of another person”

- (1) The new Act should provide that a person may be regarded as “**having the care of another person**” where, for example, they, on a regular basis:
- (a) provide domestic services and support for another person
 - (b) arrange such services and support for another person, or
 - (c) provided or arranged such services and support immediately before the other person moved to a place where they receive care (such as a hospital, nursing home, group home, boarding-house or hostel),
- provided they are or were not paid for the services and support by the other person or from any other source (except for a carer’s pension).
- (2) The definition of “has care of another person” should appear in the same section or part of the new Act as the person responsible hierarchy.

10.21 Definition of “close friend or relative”

The new Act should provide:

- (1) A “**close friend or relative**” of another person is a friend or relative (including a member of the extended family or kin of an Aboriginal or Torres Strait Islander person according to their culture) who maintains:
- (a) a close personal relationship with the other person through frequent personal contact, and
 - (b) a personal interest in the other person’s welfare
- provided they are not paid by the other person or from any other source (except for a carer’s pension) for, or have a financial interest in, any care services that they perform for the person.
- (2) The definition of “close friend or relative” should appear in the same section of the new Act as the person responsible hierarchy.

10.22 Consent of the person responsible

- (1) The new Act should provide:
- (a) Any person may ask the person responsible to consent to a course of healthcare for a patient.
 - (b) The request must explain:
 - (i) that the patient does not have decision-making ability for the decisions that need to be made
 - (ii) the patient’s condition that requires healthcare

- (iii) the courses of healthcare that are available for that condition
 - (iv) the general nature and effect of each of those courses
 - (v) the nature and degree of any significant risks associated with those courses, and
 - (vi) the reasons why any particular course should be carried out.
- (c) In considering such a request, the person responsible must:
- (i) give effect to the patient's will and preferences (to be determined as set out in **Recommendation 5.4**), and
 - (ii) have regard to the matters referred to in the request.
- (2) The regulations should provide when a consent or request for consent must be in writing.

10.23 Application to Tribunal for consent

The new Act should provide:

- (1) Any person can apply to the Tribunal for consent for healthcare for a patient.
- (2) The application shall state:
 - (a) how the patient does not have decision-making ability for the decision or decisions that need to be made
 - (b) the patient's condition that requires healthcare
 - (c) the courses of healthcare that are available for that condition
 - (d) the general nature and effect of each of those courses
 - (e) the nature and degree of any significant risks associated with those courses, and
 - (f) the reasons why any particular course should be carried out.
- (3) The Tribunal need not consider an application if it is not satisfied that the applicant has a sufficient interest in the patient's health and personal and social wellbeing.
- (4) Whenever an application is made for consent to healthcare and the healthcare cannot be given without that consent, the Tribunal may:
 - (a) order the person who is to give the healthcare not to start it, or
 - (b) if the healthcare has already started, order the person who is carrying out the healthcare to stop it,until the Tribunal has determined the application.
- (5) The service arrangements set out in s 43 of the *Guardianship Act 1987* (NSW) should continue to apply.

10.24 Tribunal consent to healthcare

The new Act should provide:

- (1) In considering an application for consent to healthcare, the Tribunal must have regard to the matters that must be stated in the application (as set out in **Recommendation 10.23(2)**).

- (2) After conducting a hearing, the Tribunal may consent to the healthcare if it is satisfied that it is the most appropriate form of healthcare and gives effect to the patient's will and preferences (as set out in **Recommendation 5.4**).

10.25 Liability for healthcare

The new Act should provide that nothing in the Act relieves a person from liability in respect of giving healthcare to a patient, if they would have been liable:

- (a) had the patient been able to consent to the healthcare, and
- (b) had the healthcare been given with the patient's consent.

10.26 Clinical records

The new Act should provide that the regulations may make provision about keeping records of a patient's healthcare carried out under the Act.

10.27 Offences

The new Act should provide:

- (1) A person must not give healthcare to a patient unless:
 - (a) consent for the healthcare has been given in accordance with the new Act, or
 - (b) the healthcare provisions authorise the healthcare without consent, or
 - (c) the healthcare is given in accordance with an order of the Supreme Court in the exercise of its inherent jurisdiction.
- (2) A registered health practitioner has a defence if they have, in good faith and without negligence, administered or not administered healthcare to a patient and believed on reasonable grounds that the requirements of the Act have been complied with.
- (3) A person must not take another person without decision-making ability outside Australia to obtain an unauthorised sterilisation procedure.

11. Medical research

11.1 Definition of "medical research procedure"

The new Act should provide:

- (1) A "medical research procedure" is:
 - (a) a procedure carried out for the purposes of medical research, including (as part of a clinical trial or otherwise):
 - (i) administering pharmaceuticals, or
 - (ii) using equipment or a device, or
 - (b) anything prescribed by the regulations as a medical research procedure.
- (2) "Medical research procedure" does not include any of the following:
 - (a) any non-intrusive examination including:

- (i) a visual examination of the mouth, throat, nasal cavity, eyes or ears, or
 - (ii) the measurement of a person's height, weight or vision
 - (b) observing a person's activities
 - (c) administering a survey
 - (d) collecting or using information, including:
 - (i) personal information within the meaning of the *Privacy and Personal Information Protection Act 1998* (NSW)
 - (ii) health information within the meaning of the *Health Records and Information Privacy Act 2002* (NSW), or
 - (e) any other procedure prescribed by the regulations as not being a medical research procedure.
- (3) “**Medical research practitioner**” includes a person who practises in a health profession within the meaning of the *Health Practitioner Regulation National Law* (NSW).

11.2 Approval and consent to a medical research procedure

The new Act should provide that:

- (1) A person can consent to a medical research procedure in an advance care directive.
- (2) A medical research practitioner must not administer a medical research procedure to a participant who does not have decision-making ability for that procedure unless the relevant human research ethics committee has approved the research; and
 - (a) the participant has consented to the medical research procedure or medical research procedures of a similar nature in a valid advance care directive
 - (b) if there is no relevant advance care directive, the person responsible has consented to the procedure, or
 - (c) if there is no person responsible, the Tribunal has consented to the procedure.
- (3) The approval of the relevant human research ethics committee will not be effective for the purposes of (2) unless the committee has satisfied itself that the consent material gives sufficient information in a clear enough form to enable the person responsible to make an informed decision about participation.
- (4) The person responsible or the Tribunal may consent to the medical research procedure only if they are satisfied the decision gives effect to the participant's will and preferences (to be determined as set out in **Recommendation 5.4**) taking into account:
 - (a) the likely effects and consequences of the medical research procedure, including the likely effectiveness of the procedure, and
 - (b) whether there are any alternatives, including not administering the medical research procedure.
- (5) The fact that a research procedure may involve administering placebos should not necessarily prevent the person responsible or the Tribunal from

being satisfied that taking part would promote the participant's personal and social wellbeing.

- (6) A medical research practitioner must not administer a medical research procedure if they know that the participant has refused the particular procedure in an advance care directive.
- (7) An interested person can apply to the Tribunal to review the decision of the person responsible and whether it gives effect to a participant's will and preferences or promotes their personal and social wellbeing. This may include interpreting a participant's will and preferences as expressed in an advance care directive.

11.3 Requirement to find advance care directives

The new Act should provide that:

- (1) Before a medical research practitioner administers a medical research procedure to a participant who does not have decision-making ability, they must make reasonable efforts in the circumstances to ascertain if the participant has an advance care directive.
- (2) Failure to take these steps is unprofessional conduct.

11.4 Effect of a participant's objection

The new Act should provide that nothing may be done to a participant in the course of a medical research procedure if the participant objects orally or by conduct. This includes an objection given in an advance care directive that is clear and extends to the situation at hand.

11.5 Medical research involving emergency treatment

The new Act should provide that:

- (1) A human research ethics committee may approve a research project that involves the administration of emergency medical treatment (involving participants who do not have decision-making ability) without prior consent in accordance with Chapter 4.4 of the *National Statement on Ethical Conduct in Human Research*.
- (2) Once approved, a medical research practitioner may carry out a medical research procedure without seeking consent from the participant or the person responsible if the procedure involves administering accepted emergency treatment.
- (3) **"Accepted emergency treatment"** means urgent treatment that aligns with standard clinical practice.
- (4) A medical research practitioner must not administer a medical research procedure if they are aware that the participant has refused the particular procedure or a procedure of a similar nature in an advance care directive. However, a practitioner is not required to search for an advance care directive not readily available in urgent circumstances.
- (5) A medical research practitioner must notify the participant or the person responsible that they have been included in a medical research project as soon as reasonably possible. The participant or the person responsible must have the opportunity to stop the procedure and withdraw from the research without compromising the person's ability to receive any available alternative medical treatment or care.

11.6 Records to be filed with the Public Advocate

- (1) The new Act should require:
 - (a) medical research practitioners to file a record with the Public Advocate when a person who does not have decision-making ability is enrolled as a participant in a medical research procedure, including in relation to emergency treatment, and
 - (b) the Public Advocate to use these records to monitor and report on medical research in NSW that involves participants who do not have decision-making ability.
- (2) The new Act should provide that the failure of a medical research practitioner to file the necessary records with the Public Advocate amounts to unprofessional conduct.

11.7 Offences

The new Act should provide:

- (1) It is an offence for a medical research practitioner to administer a medical research procedure to a person who does not have decision-making ability, unless:
 - (a) a human research ethics committee has approved the procedure, and
 - (b) consent has been obtained in accordance with the new Act.
- (2) A medical research practitioner has a defence if they have, in good faith and without negligence, administered or not administered healthcare to a person and believes on reasonable grounds that the Act's requirements have been complied with.

12. Restrictive practices

12.1 Regulation of restrictive practices

- (1) The NSW government should closely monitor the implementation of the NDIS restrictive practices regulatory scheme with a view to considering whether to apply comparable regulation in the sectors that NSW regulates, including education and mental health.
- (2) The new Act should provide that the Public Advocate has the function of educating families, carers and community groups about restrictive practices and the need for their reduction and eventual elimination.
- (3) The NSW government should consider giving the NSW Law Reform Commission a standalone reference on the use and regulation of restrictive practices in NSW once the NDIS is rolled out and all details of the scheme are known.

13. The Public Advocate

13.1 New advocacy and investigative functions

- (1) The new Act should introduce new advocacy and investigative functions.
- (2) The new Act should provide that these functions are to be carried out by a new statutory agency known as the Public Advocate.

- (3) The new functions should be to:
- (a) mediate disputes about assisted decision-making, including between:
 - (i) parties to a court or tribunal application
 - (ii) enduring representatives, representatives and/or persons responsible, and
 - (iii) formal and informal supporters
 - (b) undertake systemic advocacy for people in need of decision-making assistance through:
 - (i) educating the community and public agencies about the decision-making framework and the role of family and friends
 - (ii) educating and advising families, carers and community groups about restrictive practices and the need for their reduction and eventual elimination
 - (iii) supporting organisations that promote advocacy and undertake community education
 - (iv) monitoring, investigating, researching, reporting, making recommendations and advising on any aspect of the system the relevant Minister refers to it, and
 - (v) having standing in court and tribunal matters of general interest to people who need decision-making assistance
 - (c) provide decision-making advice and assistance to people who do not have access to formal decision-making support, including:
 - (i) seeking help for people who need decision-making assistance from government agencies (including the NDIS), institutions, welfare organisations and service providers, and negotiating on their behalf to resolve issues
 - (ii) advising people on making applications for support and representation orders
 - (iii) advising people on and facilitating the development of support and representation agreements, and
 - (iv) administering and/or promoting decision-making assistance services and facilities (including its own)
 - (d) provide information and training to supporters and representatives
 - (e) set guidelines for supporters and representatives
 - (f) investigate suspected abuse, neglect and exploitation on its own motion or in response to a complaint, with powers to:
 - (i) apply to an authorised officer under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (“LEPRA”) for a search warrant of any premises, if the Public Advocate has reasonable grounds to believe that a person in need of decision-making assistance is at risk of abuse, neglect or exploitation on the specified premises or that the new Act is being contravened
 - (ii) execute a search warrant issued by an authorised officer under LEPRA including by entering specified premises, inspecting those premises for evidence of abuse, neglect or exploitation and seizing

- any evidence relevant to abuse, neglect or exploitation of a person in need of decision-making assistance
- (iii) require people, departments, authorities, service providers, institutions and organisations to provide documents, answer questions, and attend compulsory conferences
 - (iv) refer complaints or allegations of abuse and neglect to Public Advocates (or equivalent) outside NSW for investigation or other appropriate action in response to alleged victims and/or alleged abusers moving across borders
 - (v) exchange information with the relevant bodies (including the Tribunal, the NSW Ombudsman's office, the National Disability Insurance Agency, the NDIS Quality and Safeguarding Commissioner, and relevant non-government organisations) on matters affecting the safety of a person in need of decision-making assistance – such as information relating to allegations of abuse and neglect, and
 - (vi) have read-only access to the police (COPS) and child protection (KiDS) databases
- (g) when an application for a support or representation order is before the court or Tribunal, investigate, on its own motion or by request from the court or Tribunal, whether there is a need for a support or representation order and if it is the least restrictive option being taken
 - (h) intervene in court or Tribunal proceedings in certain cases (for example, if the Public Advocate has been closely connected with the person subject to the hearing), and
 - (i) refer possible offences under the new Act to law enforcement and prosecuting authorities.
- (4) The new Act should provide that it is an offence to fail to produce documents, answer questions or attend a conference in response to a request from the Public Advocate, except where doing so would result in self-incrimination or disclosure of material that is the subject of legal professional privilege.

13.2 The Public Representative

In addition to incorporating the new functions proposed in **Recommendation 13.1**, the new Act should apply the provisions currently in part 7 (the Public Guardian) of the *Guardianship Act 1987* (NSW) insofar as they are consistent with the new framework.

14. Provisions of general application

14.1 Directions to supporters, representatives and persons responsible

The new Act should provide that:

- (1) Supporters, representatives and persons responsible can apply to the Tribunal for directions about the exercise of their functions.
- (2) Where a person is authorised to take a particular action by an order of the Supreme Court acting in its inherent protective jurisdiction, and a Tribunal

direction might conflict with this order, the Tribunal may only give directions if the Supreme Court consents.

- (3) Supporters, representatives and persons responsible are not liable for any acts or omissions carried out in good faith in accordance with such a direction.
- (4) If the Tribunal gives a direction under this section, it should ensure a copy is forwarded to the Public Representative and/or NSW Trustee, as appropriate.

14.2 Access to personal information

The new Act should provide that:

- (1) A representative, supporter or person responsible should be entitled to access, collect or obtain personal information (including financial and health information) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions.
- (2) A person holding that information, on being satisfied that a person is entitled to access that information, must allow them to access that information.

14.3 Non-disclosure of personal information

The new Act should provide that it is an offence for a person, including a representative or supporter, to disclose any information obtained in connection with the administration or execution of the Act unless it is:

- (a) for the purpose of acting as the person's representative or supporter, including, where relevant, to seek legal or financial advice, or counselling, advice or other treatment
- (b) in connection with the administration or execution of the Act
- (c) necessary for proceedings under the Act
- (d) authorised by law
- (e) authorised by the person to whom the information relates if they have decision-making ability to do so
- (f) authorised by a court or tribunal in the interests of justice, or
- (g) disclosed to authorities as necessary to prevent serious risk to life, health or safety or to report a suspected serious indictable offence.

14.4 Protection from liability where an agreement or order does not have effect

The new Act should provide that:

- (1) A person who:
 - (a) purports to act as a supporter or representative under a relevant agreement or order, and
 - (b) does so in good faith, and without knowing the agreement or order does not have effect,can rely on the agreement or order in any case.

- (2) A third party who:
- (a) relies on a person who purports to act as a supporter or representative under a relevant agreement or order, and
 - (b) does so in good faith, and without knowing the agreement or order does not have effect,
- can rely on the agreement or order in any case.

14.5 Resolving disputes between substitute decision-makers

The new Act should provide that, if there are 2 or more people who can make a decision under the Act and they cannot agree about one or more decisions that need to be made, after attempting to resolve the disagreement (whether informally or through mediation), a person may apply to the Tribunal for directions to resolve any such disagreement by dispute resolution processes.

14.6 No separate provision for exercising rights under adoption laws

The new Act should not make separate provision for people who need help exercising their rights under adoption laws.

14.7 Provisions in part 9 of the *Guardianship Act 1987* (NSW)

The new Act should incorporate the substance of the provisions contained in part 9 of the *Guardianship Act 1987* (NSW), except where to do so would contradict another recommendation, and with adjustments to ensure consistency with the new framework.

14.8 Proof of certain matters and evidential certificates

Provisions to the effect of s 107 and s 107A of the *Guardianship Act 1987* (NSW) concerning proof of certain matters and evidential certificates should not be included in the new Act.

14.9 No mandatory registration

- (1) The new Act should not require registration of any agreement or order.
- (2) The new Act should provide that:
 - (a) an enduring representation agreement that includes financial functions may be registered as though it were a power of attorney under s 51 or s 52 of the *Powers of Attorney Act 2003* (NSW)
 - (b) it does not limit a requirement or option for registration for the purposes of any other Act.

15. The Supreme Court

15.1 Supreme Court's inherent protective jurisdiction

The new Act should state that it does not limit the Supreme Court's inherent protective jurisdiction, including its *parens patriae* jurisdiction.

15.2 Jurisdiction to make orders

The new Act should provide:

- (1) The Tribunal does not have jurisdiction to make a support order or representation order where:
 - (a) an application in respect of anything that can be the subject of the support order or representation order is before the Supreme Court, or
 - (b) an appeal resulting from such an application is before a court.
- (2) Where the Supreme Court has made an order, a subsequent representation order or support order by the Tribunal in respect of the same subject matter will take effect only in accordance with an order of the Supreme Court. The original Supreme Court order then ceases to have effect with respect to that subject matter.
- (3) Where the Tribunal has made a representation order or support order, a subsequent order by the Supreme Court will cause the Tribunal order to have no effect to the extent that it covers the same subject matter.
- (4) The Supreme Court may:
 - (a) on application by the Tribunal, or by a party in relation to any proceedings before the Tribunal, order that the proceedings before the Tribunal be transferred to the Supreme Court;
 - (b) on its own motion, or on application, order that any proceedings before it be transferred to the Tribunal to be dealt with under the new Act.

15.3 Review of representation agreements

The new Act should provide:

- (1) The Supreme Court may review part or all of an enduring representation agreement (or purported agreement), provided that an application for review of the same matter is not before the Tribunal.
- (2) The Tribunal may review part or all of an enduring representation agreement (or purported agreement), provided that an application for review of the same matter is not before the Supreme Court.
- (3) An application for review may be withdrawn with the leave of:
 - (a) the Supreme Court (if the application was made to the Supreme Court), or
 - (b) the Tribunal (if the application was made to the Tribunal).
- (4) If an application for review is made:
 - (a) to the Supreme Court, the Supreme Court may (on its own motion or on request) refer the application to the Tribunal;
 - (b) to the Tribunal, the Tribunal may (on its own motion or on request) refer the application to the Supreme Court.

16. Tribunal composition and procedures

16.1 Composition of the Assisted Decision-Making Division and Appeal Panels

The composition of the Assisted Decision-Making Division and Appeal Panels of the NSW Civil and Administrative Tribunal should be determined by the provisions of Schedule 6 of the *Civil and Administrative Tribunal Act 2013* (NSW).

16.2 Parties to proceedings

The new Act should:

- (1) retain the definition of a party to Tribunal proceedings set out under s 3F of the *Guardianship Act 1987* (NSW) with amendments to reflect the new framework (including the addition of the Public Advocate as a party in all cases).
- (2) expressly provide that a child or young person is a party to proceedings before the Tribunal if:
 - (i) they are the person to whom the application relates
 - (ii) they are the primary carer of the person to whom the application relates, or
 - (iii) they would be directly affected by any support or representation order.

16.3 The appointment process for representatives who are parents

Under the new Act, the appointment process for parents of people who do not have decision-making ability, where this has been the case since before the person turned 18, should be the same process as the appointment process for other representatives.

16.4 Notice and service requirements

The new Act should provide that:

- (1) As soon as practicable after making a Tribunal application, the applicant must serve a copy of the application on each of the parties.
- (2) Before conducting a hearing into the application, the Tribunal must notify each party of the date, time and place of the hearing.
- (3) Failing to serve a copy of the application or a notice does not invalidate the Tribunal's decision on the application.
- (4) The Tribunal should consider whether it needs to change its procedures to ensure that its registry staff:
 - (a) take reasonable efforts to determine and notify people with a genuine interest in the person who is the subject of a hearing
 - (b) have regard to any family violence considerations evident on the face of the available materials when deciding whether to notify family members, and
 - (c) advise all people notified of a hearing of the outcome of the hearing.

16.5 Representation of parties

The new Act should provide:

- (1) A legal representative of the person who is the subject of an application before the Tribunal may appear without seeking leave.
- (2) Separate representatives must act according to the general principles set out in **Recommendation 5.2**.

16.6 Requirement to give evidence under oath or on affirmation

The Tribunal should consider whether it needs to change its procedures to ensure parties to a Tribunal hearing give their evidence under oath or on affirmation where the Tribunal considers that there are material facts in dispute.

17. Powers of entry, search and removal

17.1 Powers of entry, search and removal

The new Act should provide:

- (1) If the Tribunal is satisfied, on application or its own motion, that a person in need of, or receiving, decision-making assistance under the new Act, is at immediate risk of unacceptable harm (that can be mitigated by removal from premises), the Tribunal may order that an employee of the Public Advocate or a police officer enter and search premises and remove the person from those premises, using such force as is reasonably necessary in the circumstances.
- (2) A police officer or medical practitioner, or both, may accompany an employee of the Public Advocate executing a search and may take all reasonable steps to assist the employee.
- (3) When a person is removed from premises, the Public Advocate must, if necessary, assist them to find alternative accommodation and may, if necessary, apply to the Tribunal for a support order or representation order.

18. Interaction with mental health legislation

18.1 Interaction with the Mental Health Act

The new Act should provide:

- (1) An order or agreement for support or representation may be made in respect of a patient or affected person within the meaning of the *Mental Health Act 2007* (NSW).
- (2) An order or agreement for support or representation made under the new Act is not suspended or revoked if the supported or represented person becomes subject to the *Mental Health Act 2007* (NSW).
- (3) If a supported or represented person is, or becomes, subject to orders under the *Mental Health Act 2007* (NSW), any order or agreement for support or representation made under the new Act is only effective to the extent it does not conflict with orders made under the *Mental Health Act 2007* (NSW).

18.2 Interaction with the Mental Health (Forensic Provisions) Act

The new Act should provide:

- (1) An order or agreement for support or representation may be made in respect of a forensic patient or a correctional patient within the meaning of the *Mental Health (Forensic Provisions) Act 1990* (NSW).
- (2) An order or agreement for support or representation made under the new Act is not suspended or revoked if the supported or represented person becomes subject to the *Mental Health (Forensic Provisions) Act 1990* (NSW).
- (3) If a supported or represented person is, or becomes, subject to orders under the *Mental Health (Forensic Provisions) Act 1990* (NSW), any order or agreement for support or representation made under the new Act is only effective to the extent it does not conflict with orders made under the *Mental Health (Forensic Provisions) Act 1990* (NSW).

18.3 Decision-making for “mental health treatment”

- (1) The new Act should provide:
 - (a) An authorised medical officer (as defined in the *Mental Health Act 2007* (NSW)) may give, or authorise:
 - (i) any mental health treatment which they consider appropriate, to a supported or represented person who is detained in a mental health facility (as defined in the *Mental Health Act 2007* (NSW))
 - (ii) any healthcare that is incidental to mental health treatment.
 - (b) “**Mental health treatment**” is a course of action taken to:
 - (i) remedy a mental illness
 - (ii) diagnose a mental illness
 - (iii) alleviate or manage the symptoms or reduce the effects of the illness
 - (iv) reduce the risks posed by or to the person with the mental illness, or
 - (v) monitor and evaluate a person’s mental health.
 - (c) “**Mental illness**” refers to a mental illness or mental disorder as defined in the *Mental Health Act 2007* (NSW) or a mental condition as defined in the *Mental Health (Forensic Provisions) Act 1990* (NSW).
 - (d) Any decisions relating to healthcare other than mental health treatment for supported or represented people are subject to the new Act.
- (2) The *Mental Health Act 2007* (NSW) should be amended to include an identical definition for “mental health treatment”.

18.4 Consent for special healthcare

- (1) The provisions in the new Act relating to special healthcare should apply universally, including to people subject to the *Mental Health Act 2007* (NSW).
- (2) The *Mental Health Act 2007* (NSW) should refer to the new Act for matters relating to special healthcare and all provisions relating to “special medical treatment” in the *Mental Health Act 2007* (NSW) should be repealed.

- (3) The *Mental Health Act 2007* (NSW) should continue to regulate Electro-Convulsive Treatment.

18.5 Voluntary patients

Sections 7 and 8 of the *Mental Health Act 2007* (NSW) should be amended to provide that, in cases where a representative has relevant healthcare and/or personal functions:

- (1) a represented person may be admitted to a mental health facility as a voluntary patient if their representative makes a request to an authorised medical officer and the represented person does not object to this request being made
- (2) a represented person must not be admitted as a voluntary patient if they, or their representative, objects to the admission to the authorised medical officer
- (3) an authorised medical officer must discharge a represented person who has been admitted as a voluntary patient if the represented person requests to be discharged, and
- (4) an authorised medical officer must give notice of the discharge of a voluntary patient who is a represented person to the person's representative.

18.6 Financial arrangements for involuntary patients

- (1) The provisions of the *NSW Trustee and Guardian Act 2009* (NSW) that relate to Mental Health Review Tribunal orders for management of estates of mental health patients (s 43-51 and 88) should be repealed to remove the Mental Health Review Tribunal's jurisdiction over a detained patient's financial matters.
- (2) The new Act should provide that the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal has the power to revoke any orders relating to financial management that were made by the Mental Health Review Tribunal pursuant to the *NSW Trustee and Guardian Act 2009* (NSW) or by a magistrate conducting a mental health inquiry.

19. Recognising appointments made outside NSW

19.1 Recognition of appointments made outside NSW

- (1) The new Act should:
 - (a) provide for automatic recognition of valid enduring personal substitute decision-making and supported decision-making appointments made outside NSW, and
 - (b) allow people appointed with substitute decision-making or supported decision-making functions by a court or tribunal under the law of another jurisdiction, which is listed in the regulations, to apply to the Tribunal to have their status recognised.
- (2) The regulations to the new Act should recognise forms of personal substitute decision-making and supported decision-making appointments and orders made outside of NSW that grant powers substantially similar to those that can be lawfully granted in NSW.

19.2 Effect of recognition

The new Act should provide that:

- (1) Recognition does not affect the validity of the original appointment in its originating jurisdiction.
- (2) Recognition gives the applicant the same powers as if they had been appointed in NSW. The applicant can only exercise functions authorised by their original appointment and only if those functions can be authorised in NSW.
- (3) Automatic recognition of a personal enduring appointment made in another jurisdiction will not bring a representative with financial functions under the supervision of the NSW Trustee.

19.3 Tribunal review

The new Act should provide:

- (1) The Tribunal has the power, after review in accordance with relevant review provisions in **Recommendations 7.21(1), 7.21(2), 8.11(1), and 9.17(1)**, to vary, revoke, replace or confirm an order or personal appointment made in another jurisdiction as it operates in NSW. This does not affect the operation of the personal appointment or order in its originating jurisdiction.
- (2) The Tribunal has discretion to order that a person with a financial decision-making function under an appointment or order made in another jurisdiction be supervised by the NSW Trustee in relation to their operations in NSW.
- (3) Where the Tribunal varies, revokes, replaces or confirms an order as it operates in NSW, it should notify the relevant court or tribunal in the place where the original order or personal appointment was made.

19.4 Registration

NSW should not introduce a compulsory register for appointments made in other jurisdictions.

20. Transitional provisions and consequential amendments

20.1 Review of guardianship and financial management orders made under the *Guardianship Act 1987* (NSW)

The new Act should provide:

- (1) On or after the commencement of the Assisted Decision-Making Act, the Tribunal may review a guardianship order or financial management order on its own motion.
- (2) On or after the commencement of the Assisted Decision-Making Act, the Tribunal must review a guardianship order or financial management order if requested to do so by:
 - (a) the represented person
 - (b) a person with a proper interest in the proceedings
 - (c) a person with a genuine interest in the personal and social wellbeing of the represented person

- (d) the guardian or financial manager, or
 - (e) the Public Representative, the NSW Trustee or the Public Advocate
- unless the request does not disclose grounds that warrant a review.
- (3) A guardianship order made before the commencement of the Assisted Decision-Making Act remains in force until:
 - (a) the order reaches its review date
 - (b) the order reaches the expiry of its term, or
 - (c) the Tribunal reviews the order on its own motion or upon request.
 - (4) The Tribunal must review all financial management orders made before the commencement of the Assisted Decision-Making Act that have not otherwise expired within a prescribed period. The prescribed period should be determined after consultation with the Tribunal.

20.2 Tribunal action on review of orders

The new Act should provide:

- (1) When reviewing a guardianship or financial management order made under the *Guardianship Act 1987* (NSW), the Tribunal should consider where relevant:
 - (a) whether there is still a need for the order
 - (b) whether the eligibility and suitability criteria for a representative are met, and
 - (c) whether the guardian or financial manager is likely to meet the responsibilities and carry out the functions of a representative under the Assisted Decision-Making Act.
- (2) Upon reviewing a guardianship or financial management order, the Tribunal must:
 - (a) allow the order to lapse
 - (b) make a representation order in the same terms as the original order or in different terms
 - (c) revoke the order and make a support order, or
 - (d) revoke the order.

20.3 Review of enduring appointments

The new Act should provide:

- (1) On or after the commencement of the Assisted Decision-Making Act, the Tribunal may review the appointment (or purported appointment) of an attorney under an enduring power of attorney, or an enduring guardian, on its own motion, or if requested to do so by:
 - (a) the person making the appointment
 - (b) a person with a proper interest in the proceedings
 - (c) a person with a genuine interest in the personal and social wellbeing of the appointor
 - (d) the guardian or attorney, or
 - (e) the Public Representative, the NSW Trustee or the Public Advocate,

unless the request does not disclose grounds that warrant a review.

- (2) The appointment of an enduring guardian or the appointment of an attorney under an enduring power of attorney, made before the commencement of the Assisted Decision-Making Act, remains in force unless the Tribunal decides it should not remain in force (in whole or in part) after such a review.

20.4 Tribunal action on review of an enduring appointment

The new Act should provide:

- (1) When reviewing the appointment or purported appointment of an enduring guardian under the *Guardianship Act 1987* (NSW), or an attorney under an enduring power of attorney, the Tribunal should consider where relevant:
 - (a) whether the appointor met the eligibility criteria for entering into the arrangement, and
 - (b) if the appointor did not meet the eligibility criteria for entering into the arrangement:
 - (i) the fact that the enduring guardian or attorney was chosen by the appointor
 - (ii) whether the eligibility and suitability criteria for an enduring representative are met, and
 - (iii) whether the enduring guardian or attorney is likely to meet the responsibilities and carry out the functions of a representative under the Assisted Decision-Making Act.
- (2) Upon reviewing an enduring appointment, the Tribunal may confirm it, vary it, suspend it or revoke it, in whole or in part.
- (3) The Tribunal may make a representation order or support order in accordance with the new Act to supersede an enduring appointment that has been suspended or revoked, in whole or in part.

20.5 Responsibilities of past appointees

The new Act should provide that all guardians, enduring guardians, attorneys under enduring powers of attorney and financial managers must observe the new general principles (**Recommendation 5.2**) from the commencement of the new Act.

20.6 Consequential amendments to other statutes

Amendments should be made to NSW statutes that reference guardianship law and guardianship arrangements, to ensure that the terminology and intent of those references is consistent with the new Act.

1. Introduction

In brief

This Report recommends that NSW introduce a new Assisted Decision-Making Act. The Act would establish a framework for assisted decision-making that reflects the United Nations *Convention on the Rights of Persons with Disabilities* and draws upon contemporary understandings of decision-making. This chapter describes how we undertook our review, and outlines the content of our report.

This report.....	1
Outline of this report.....	2
How we conducted this review.....	4
Preliminary submissions and consultations	5
Question papers.....	5
Consultations	5
Draft proposals.....	5

This report

- 1.1 This is the final report on our review of the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”). We make recommendations for updating NSW guardianship laws and related laws to cater better to the needs of people who require assistance with decision-making.
- 1.2 Since the *Guardianship Act* came into force over 30 years ago, the way people think about decision-making and decision-making ability has changed. This is partly due to developments in human rights law. In particular, there has been a shift towards enabling people who need decision-making assistance to participate as fully as possible in decisions that affect them. Changes to the makeup of NSW’s population have also altered how the *Guardianship Act* operates and the groups of people it affects.
- 1.3 We are recommending a new Assisted Decision-Making Act (“the new Act”), which establishes a framework for assisted decision-making in NSW that reflects the United Nations *Convention on the Rights of Persons with Disabilities* (“UN *Convention*”). The new Act draws upon contemporary understandings of decision-making.
- 1.4 The key changes include:
 - the introduction of a formal supported decision-making framework
 - the requirement that anyone operating under the new Act should give effect to a person’s will and preferences wherever possible, and
 - recognition that a person’s decision-making ability can fluctuate over time and may differ depending on the subject matter.

- 1.5 We also recommend a complete change to the terminology used. The new Act focuses on a person's decision-making ability. The term "disability" has, therefore, been removed as a precondition for a Tribunal order and from the legislation altogether. We recommend other new terms that are consistent with a framework designed to promote autonomy; for example, "representative" rather than guardian or financial manager.
- 1.6 This report assumes the existence of the following key entities: the NSW Trustee (currently the NSW Trustee and Guardian), the Public Representative (currently the Public Guardian), the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal (currently the Guardianship Division), and the Public Advocate (a proposed new entity).
- 1.7 We recommend that the Public Advocate carry out certain investigative and advocacy functions. We also recommend that the Public Advocate be combined with the Public Representative to form a single agency with dual functions under the name of the Office of the Public Advocate. However, we have distinguished these entities in our recommendations in case different administrative arrangements are adopted, to make clear which agency should undertake which function.

Outline of this report

- 1.8 The rest of this chapter describes how we undertook our review. The remainder of the report is set out as follows:
- **Chapter 2 — History and overview of guardianship framework** briefly outlines the history of NSW's guardianship laws and provides an overview of the current framework.
 - **Chapter 3 — A changing environment** summarises the key changes to the social, legal and policy environments that surround guardianship law, including changes to the way that people think about decision-making ability, the National Disability Insurance Scheme ("NDIS") and concerns about elder abuse.
 - **Chapter 4 — A new assisted decision-making framework** provides an overview of the policy that we believe should underpin the new Act. It includes recommendations for a contemporary and accessible Act, and sets out the education, data and resourcing needed to support the proposed new framework.
 - **Chapter 5 — Objects and principles** contains the statutory objects and general principles that underpin the new Act. They are designed to align with the UN *Convention*, to accord with contemporary understandings of decision-making ability, and to give effect to a person's will and preferences, wherever possible.
 - **Chapter 6 — Decision-making ability** defines the central concept of "decision-making ability", recommends a statutory presumption of decision-making ability, and describes the principles that should guide an assessment of a person's decision-making ability.
 - **Chapter 7 — Supported decision-making** recommends a formal supported decision-making framework, where a "supporter" assists a person to make decisions about various areas of their life, as a new component to NSW's assisted decision-making framework.

- **Chapter 8 — Personal appointment of representatives** recommends a formal system of “enduring representation agreements” that allows a person to make a single representation agreement to cover personal matters, financial matters, healthcare matters and restrictive practices.
- **Chapter 9 — Tribunal appointment of representatives** recommends, as a last resort, that the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal (“Tribunal”) should be able to make an order appointing one or more representatives to make decisions about a person’s personal matters, financial matters, healthcare and restrictive practices, when that person does not have decision-making ability for particular decisions.
- **Chapter 10 — Healthcare** recommends changes to the consent framework for medical and dental treatment. These include a will and preferences approach to healthcare decisions and statutory recognition of advance care directives.
- **Chapter 11 — Medical research** recommends removing Tribunal oversight of clinical trials and allowing “persons responsible” to give consent for a patient to participate in a medical research project approved by a human research ethics committee.
- **Chapter 12 — Restrictive practices** considers the approach that should be taken to regulating restrictive practices, particularly in light of the uncertain regulatory environment surrounding the NDIS.
- **Chapter 13 — The Public Advocate** recommends a new independent statutory position known as the Public Advocate to advocate for people in need of decision-making assistance, mediate decision-making disputes, provide information, advice and assistance about decision-making and investigate cases of potential abuse, neglect and exploitation.
- **Chapter 14 — Provisions of general application** recommends some changes that would apply generally across the new Act, largely to clarify and expand upon provisions that already exist in the *Guardianship Act*. This includes recommendations about disclosing personal information, search and removal powers, registering decision-making arrangements and dispute resolution. It also recommends repealing some existing provisions that are no longer relevant, such as the current provisions about adoption information applications.
- **Chapter 15 — The Supreme Court** preserves the Supreme Court’s inherent protective jurisdiction, and consolidates and aligns limited and uncertain provisions in the *Guardianship Act* to clarify what should happen when the Tribunal and the Supreme Court make orders or receive applications about the same matters.
- **Chapter 16 — Tribunal composition and procedures** recommends ways of improving and clarifying Tribunal procedures, including changes designed to clarify when a young person may be a party to proceedings, and to ensure that a person who is the subject of an application is entitled to representation without leave.
- **Chapter 17 — Powers of entry, search and removal** outlines a mechanism for removing people in need of decision-making assistance from premises when they are at immediate risk of unacceptable harm and the harm can be mitigated by removal from those premises.

- **Chapter 18 — Interaction with mental health legislation** makes recommendations that are designed to ensure the new Act interacts effectively with the *Mental Health Act 2007* (NSW) and the *Mental Health (Forensic Provisions) Act 1990* (NSW).
- **Chapter 19 — Recognising appointments made outside NSW** makes recommendations about the automatic recognition of certain decision-making appointments made elsewhere in Australia and overseas. It also makes recommendations designed to clarify the effect of such recognition and to give the Tribunal new powers to review such appointments.
- **Chapter 20 — Transitional provisions and consequential amendments** contains recommendations for consequential amendments to other statutes and transitional provisions between existing laws and the new legislation.

How we conducted this review

- 1.9 In December 2015, the Attorney General asked us to review the *Guardianship Act* and report our findings and recommendations. The review's terms of reference require us, among other things, to consider recent developments in law, policy and practice, both in Australia and around the world; the *UN Convention*; and NSW's changing demographics — in particular, the increase in the number of older people.
- 1.10 Guardianship laws affect a wide range of people across different sections of the community, including people who do not have decision-making ability; their carers, family members and advocates; medical and legal professionals; and public agencies. Broad consultation across the State has therefore been a key part of our process. We are grateful to everyone who spoke or wrote to us to share their experiences and insights.
- 1.11 We sought to reach a wide audience by:
- releasing all of our written documents (including this report) in Easy English
 - creating short surveys on each of the question paper topics as a means of engaging people who might not make a formal written submission
 - making short videos introducing each of the question papers
 - receiving submissions in a wide range of formats, including via telephone and sound file
 - advertising the review through targeted emails and through a range of social media platforms, including our website, Twitter and Facebook, and through key agency newsletters, and
 - meeting people interested in sharing their ideas at accessible venues across NSW.
- 1.12 You can find a full list of the submissions we received and the consultations we held in the appendices.

Preliminary submissions and consultations

- 1.13 To help us identify issues relevant to the review, we invited preliminary submissions in early 2016 from members of the community and key organisations and agencies. We received 54 preliminary submissions. We also held meetings with some of the key agencies and organisations affected by the *Guardianship Act*.
- 1.14 We released a background paper in May 2016. The paper gave an overview of NSW guardianship laws and the changing environment in which they operate.

Question papers

- 1.15 Throughout 2016 and 2017, we released a series of question papers on various elements of NSW's guardianship laws, specifically asking what should change.¹ These included questions about decision-making models, the role of substitute decision-makers and supporters, safeguards, Tribunal procedures, and consent to healthcare. We received 130 submissions in response to six question papers.

Consultations

- 1.16 We consulted with the community through a series of roundtables and discussions with individuals who had made submissions, key community groups and government agencies. These structured sessions helped us develop and test our ideas.
- 1.17 We also held focus groups with members of the public in Sydney and Parramatta, where we heard about a range of guardianship-related issues people had faced.
- 1.18 In July and August 2017, we partnered with the NSW Council of Social Services to hold consultations at their regional conferences in Orange, Kiama, Newcastle and Wagga Wagga.

Draft proposals

- 1.19 We released a series of Draft Proposals in November 2017. Since our proposals represented a significant departure from the current guardianship framework, this step allowed people to consider all parts of the proposed new framework in context. It also allowed people to consider the appropriateness of the parts of the existing framework that we proposed to retain. We received 35 submissions on the proposals.

1. NSW Law Reform Commission, *Preconditions for Alternative Decision-Making Arrangements*, Review of the Guardianship Act 1987 Question Paper 1 (2016); NSW Law Reform Commission, *Decision-Making Models*, Review of the Guardianship Act 1987 Question Paper 2 (2016); NSW Law Reform Commission, *The Role of Guardians and Financial Managers*, Review of the Guardianship Act 1987 Question Paper 3 (2016); NSW Law Reform Commission, *Safeguards and Procedures*, Review of the Guardianship Act 1987 Question Paper 4 (2017); NSW Law Reform Commission, *Medical and Dental Treatment and Restrictive Practices*, Review of the Guardianship Act 1987 Question Paper 5 (2017); NSW Law Reform Commission, *Remaining Issues*, Review of the Guardianship Act 1987 Question Paper 6 (2017).

2. History and overview of guardianship framework

In brief

We briefly outline the history of NSW's guardianship laws and provide an overview of the current guardianship framework.

The history of guardianship laws in NSW.....	8
The Guardianship Act	10
Key agencies	12
Public Guardian	12
NSW Trustee and Guardian.....	12
Guardianship Division of NCAT	12

2.1 In this Chapter, we briefly outline the history of NSW's guardianship laws and provide an overview of the current guardianship framework.

2.2 Broadly, “guardianship” refers to the concept that a person can be appointed to protect another person who is unable to manage aspects of their own life. Guardianship has a very long history. It was recognised in Roman law from at least the 5th century BC.¹ Many of the ideas, concepts and approaches in guardianship have remained virtually unchanged for most of its history.² However, there have been some significant changes in:

- who can be under guardianship
- our understanding of the various types of disability, injuries and neurological conditions that can affect a person's decision-making ability, and the language we use to refer to them
- the extent to which families and networks of the person under guardianship are involved in the decision-making process, and
- the extent to which the person under guardianship is given a role in decision-making.

2.3 Some of the biggest shifts in thinking around guardianship have occurred in the past twenty years. The United Nations *Convention on the Rights of Persons with Disabilities*³ (“UN Convention”) reflects these shifts, and has provided a catalyst for people around the world to challenge, and remove, existing out-dated guardianship systems.

1. T Carney, “Civil and Social Guardianship for Intellectually Handicapped People” (1982) 8 *Monash University Law Review* 199, 205.

2. See C P Sherman, “Debt of the Modern Law of Guardianship to Roman Law” (1913) 12 *Michigan Law Review* 124.

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

The history of guardianship laws in NSW

- 2.4 When the colony of NSW was established, guardianship law was transposed from the English law of the “mentally unfit”. This was through various instruments such as the Royal Prerogative, statutes that declared the Royal Prerogative (one dating from the time of Edward II), the common law, and equity.⁴ These were later crystallised in NSW law in various ways.
- 2.5 In 1823, the newly constituted Supreme Court was given specific jurisdiction by the Crown to:
- appoint ... guardians, and keepers of the persons and estates of natural fools, and of such as are or shall be deprived of their understanding or reason by the act of God, so as to be unable to govern themselves and their estates ... [and] to inquire, hear, and determine, by inspection of the person, or such other ways and means by which the truth may be best discovered and known.⁵
- 2.6 Today, this jurisdiction is known as the Court’s “parens patriae” — or protective — jurisdiction.
- 2.7 The Lunacy Act of 1878 (NSW) concerned the care of people with mental illness and their estates and expressly repealed the statutes that declared the Royal Prerogative.⁶ The Lunacy Act of 1878 established the Master in Lunacy,⁷ who became the Master in the Protective Jurisdiction in 1958,⁸ and the Master assigned to the Protective Division in 1972.⁹ The law of lunacy was consolidated in the Lunacy Act of 1898 (NSW), which remained in effect until repealed by the *Mental Health Act 1958* (NSW).¹⁰
- 2.8 The *Mental Health Act 1958* (NSW) aimed to bring NSW legislation “into line with modern thought” and to ensure that people with mental illness received “the same consideration as is given to patients in general hospitals”.¹¹ At the time, it was noted that “[t]hroughout all English-speaking countries there has been a gradual awakening to the need for an entirely new approach to this important problem”.¹² The Act replaced terminology such as “lunacy”, “idiot” and “hospital for the insane” with terms such as “mentally ill” and “mental hospital”. “Most importantly, the Act replaced the idea that mental hospitals were places of restraint and confinement with the idea that they were places of treatment”.¹³ The Act dealt with both the care, treatment and control of people with mental illness and the management of their affairs.

4. J H McClemens and J M Bennett, “Historical Notes on the Law of Mental Illness in New South Wales” (1962) 4 *Sydney Law Review* 49, 53, quoted in N O’Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [5.2.1].

5. *The Third Charter of Justice for New South Wales*, Letters Patent (13 October 1823) XVIII.

6. *Lunacy Act 1878* (NSW) s 2.

7. *Lunacy Act 1878* (NSW) s 105.

8. *Mental Health Act 1958* (NSW) s 51.

9. *Supreme Court Act 1970* (NSW) s 8(1)(e).

10. *Mental Health Act 1958* (NSW) s 3(1).

11. NSW, *Parliamentary Debates*, Legislative Assembly, 5 November 1958, 1868.

12. NSW, *Parliamentary Debates*, Legislative Assembly, 5 November 1958, 1868.

13. N O’Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [5.2.3].

- 2.9 Around this time, most people who were not being cared for by their families were housed in mental hospitals. The focus of the law was therefore on managing the “mentally ill” person’s property and affairs rather than on guardianship.¹⁴
- 2.10 The *Mental Health Act 1958* (NSW) only dealt with people with mental illness and did not cover either adults or children with cognitive impairment.¹⁵ In the years that followed, people with cognitive impairment sometimes sought voluntary admission to mental hospitals in order to take advantage of the estate management provisions. They were otherwise accommodated under provisions of the *Child Welfare Act 1939* (NSW) until its repeal in 1987.¹⁶
- 2.11 The 1960s saw the rise of civil and disability rights movements, which championed a shift in thinking away from the “medical model” of disability towards a “social welfare model”. People who were once institutionalised were provided with welfare, and encouraged to gain employment.¹⁷
- 2.12 These new ideas, together with subsequent moves towards deinstitutionalisation of people living in mental hospitals, meant that people who had previously had decisions about medical treatment, lifestyle and education made for them by the staff of residential facilities were now living in the community, without access to decision-making assistance.
- 2.13 In 1983, two Acts were passed together: the *Mental Health Act 1983* (NSW) (“*Mental Health Act*”) and the *Protected Estates Act 1983* (NSW) (“*Protected Estates Act*”). These Acts were intended to acknowledge and protect the individual rights of people with mental illness — “rights too often ignored or suppressed in the past”.¹⁸
- 2.14 The *Mental Health Act* provided for the care, treatment and control of people who were mentally ill. At the time of its introduction, it was noted that it was “undoubtedly the case that in the past some mentally ill people have been locked away and forgotten, and that they have been subjected to harsh and inhumane treatment against their will”. The intention was “to ensure that these circumstances can never occur in the future”.¹⁹
- 2.15 The *Protected Estates Act* provided for the management of the property and affairs of people who were deemed unable to manage their own affairs. It replaced the property provisions of the *Mental Health Act 1958* (NSW) and established the Protective Office, under a Protective Commissioner and Deputy Protective Commissioner, who were officers of the Supreme Court. For the first time, people with cognitive impairments could have their affairs managed without being brought under the provisions of mental health legislation.

14. N O'Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [5.2.3].

15. NSW, *Parliamentary Debates*, Legislative Assembly, 27 November 1958, 2151.

16. NSW, *Parliamentary Debates*, Legislative Assembly, 12 November 1987, 15937-15938.

17. R McCallum, Evidence to the Legislative Council Standing Committee on Social Issues, *Inquiry into Substitute Decision-Making for People Lacking Capacity*, 4 November 2009, 2-3.

18. NSW, *Parliamentary Debates*, Legislative Assembly, 22 November 1983, 3087.

19. NSW, *Parliamentary Debates*, Legislative Assembly, 22 November 1983, 3087.

- 2.16 The social welfare model and the move to deinstitutionalisation prompted, at least in part, the next development in NSW: the introduction, in 1987, of the legislation that would become the current *Guardianship Act*.

The Guardianship Act

- 2.17 The *Disability Services and Guardianship Act 1987* (NSW) was enacted to address perceived inadequacies of the law and to reflect new ideas about disability and guardianship (it would be renamed the *Guardianship Act 1987* (NSW) in 1993). The Act was modelled on the corresponding Victorian legislation,²⁰ and its provisions reflected the approach to disability that was prevalent at the time. At the heart of the model was the concept of substitute decision-making. The “welfare and interests” of the person with a disability were given paramount consideration in the decision-making process. These remain key features of the legislation to this day.
- 2.18 The defining features of this new regime included:
- the establishment of a multi-disciplinary body, named the Guardianship Board, whose function was to issue guardianship and other orders about a person with a disability, and
 - the establishment of the Office of the Public Guardian, which performed certain guardianship functions for people with disabilities who did not have any other person to act as guardian. The Public Guardian assumed responsibilities previously undertaken by the Protective Commissioner.
- 2.19 The Act also regulated medical and dental procedures on people who were unable to give informed consent.
- 2.20 In 1998, the Guardianship Board became the Guardianship Tribunal, which in 2013 became the Guardianship Division of the NSW Civil and Administrative Tribunal (“NCAT”).
- 2.21 Initially, the Guardianship Board could not hear matters on financial management unless there was also an application for guardianship. However, this changed once the *NSW Trustee and Guardian Act 2009* (NSW) created the new statutory agency of the NSW Trustee and Guardian.²¹
- 2.22 The *Guardianship Act* has undergone substantial amendment, although notably, the most significant changes occurred during the first ten years of its operation.²²
- 2.23 In 1997, provisions for enduring guardianship appointments were included in the *Guardianship Act* for the first time.²³ The amendments gave people “the dignity to

20. *Guardianship and Administration Act 1986* (Vic).

21. *NSW Trustee and Guardian Act 2009* (NSW) s 5-6.

22. See, eg, *Guardianship (Amendment) Act 1993* (NSW); *Guardianship Amendment Act 1997* (NSW); *Guardianship Amendment Act 1998* (NSW).

23. *Guardianship Amendment Act 1997* (NSW) sch 1[9].

decide” who would make personal decisions on their behalf, just as an enduring power of attorney allowed an appointment for financial decisions.²⁴

- 2.24 At the same time, financial management orders, which had previously been subject to the *Protected Estates Act*, were incorporated into the *Guardianship Act*²⁵ on the basis that there should be a more consistent approach to personal, lifestyle and financial substitute decision-making. Before this, a financial management order, once made, remained in place permanently until it was found that the person had regained the ability to manage their affairs. The amendments introduced broader Tribunal powers for reviewing such orders.²⁶
- 2.25 In 1998, the provisions on clinical trials were inserted²⁷ to ensure that valid substitute consent could be given for people under guardianship. This would help people to access double-blind trials for drugs that mitigated damage from strokes and other brain injuries, which could be of significant benefit to them.²⁸
- 2.26 Since these amendments, the *Guardianship Act* has remained largely unchanged, despite further shifts in the understanding of disability and decision-making. These are discussed in Chapter 3.
- 2.27 A key feature of the *Guardianship Act* is s 4, which requires any person exercising functions under the Act “with respect to persons who have disabilities” to observe certain core principles. These are:
- (a) the welfare and interests of such persons should be given paramount consideration,
 - (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
 - (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
 - (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
 - (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
 - (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
 - (g) such persons should be protected from neglect, abuse and exploitation,
 - (h) the community should be encouraged to apply and promote these principles.

24. NSW, *Parliamentary Debates*, Legislative Council, 7 May 1997, 8135.

25. *Guardianship Amendment Act 1997* (NSW) sch 1[27].

26. NSW, *Parliamentary Debates*, Legislative Council, 7 May 1997, 8134-8135.

27. *Guardianship Amendment Act 1998* (NSW).

28. NSW, *Parliamentary Debates*, Legislative Council, 29 April 1998, 4045-4046.

- 2.28 The Supreme Court retains an inherent protective jurisdiction, as well as other functions in relation to guardianship and financial management under various provisions.

Key agencies

Public Guardian

- 2.29 The Public Guardian plays an important role in the NSW guardianship system. The Public Guardian is a party to all Tribunal applications for guardianship, may apply for a guardianship order, receives copies of all guardianship orders made by the Tribunal in favour of individuals and can be appointed by the Tribunal as a guardian of last resort.²⁹ The Public Guardian also provides information to the community about guardianship, supports private guardians, and promotes changes in society to benefit people with disability.³⁰
- 2.30 However, there are limits to the Public Guardian's role. In particular, the Public Guardian does not have the power to assist individuals who may need decision-making assistance if they are not under guardianship. Additionally, the Public Guardian cannot investigate allegations that a person is being abused, neglected or in need of a guardian. Currently, NSW does not have an official or agency to perform these functions.

NSW Trustee and Guardian

- 2.31 The NSW Trustee and Guardian ("NSW Trustee") plays an important role in relation to financial management orders. The NSW Trustee may apply for a financial management order, may be appointed by the Tribunal as a financial manager, authorises, directs and supervises anyone who is appointed as a financial manager, and may apply for the revocation of a financial management order or for the review of the appointment of a financial manager.³¹
- 2.32 The NSW Trustee charges fees for supervising the management of an estate by a private financial manager.³²

Guardianship Division of NCAT

- 2.33 The Guardianship Division of NCAT deals with cases about guardianship, financial management, powers of attorney, consent to medical and dental treatment and clinical trials.

29. *Guardianship Act 1987* (NSW) s 3F(2)(e), s 9(1)(c), s 15(3), s 19.

30. *Guardianship Act 1987* (NSW) s 79; NSW, Public Guardian, *Public Guardian Advocacy Report 2016* (2016) 19.

31. *Guardianship Act 1987* (NSW) s 25I(1)(a), s 25M, s 25R(b), s 25S(1)(b)(i).

32. *NSW Trustee and Guardian Act 2009* (NSW) s 113(1); *NSW Trustee and Guardian Regulation 2017* (NSW) cl 27. See also NSW Trustee and Guardian, *Private Manager's Handbook* (2018) 17.

- 2.34 The Guardianship Division is one of four divisions of NCAT.³³ 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”.³⁴
- 2.35 A member with a professional qualification must have experience in assessing and treating people to whom the *Guardianship Act* relates — for instance, doctors, psychologists and social workers.³⁵ A member has a community-based qualification if they have experience with people to whom the *Guardianship Act* relates.³⁶
- 2.36 Some matters may be heard by only one or two members. These include the review of an existing order, consent for major or minor medical treatment, or the recognition of an interstate order.³⁷

33. *Civil and Administrative Tribunal Act 2013* (NSW) s 16(1).

34. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 4(1).

35. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 1(2)(a).

36. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 1(2)(b).

37. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 4(2).

3. A changing environment

In brief

Since the *Guardianship Act 1987* (NSW) was enacted, the social, legal and policy environments in which it operates have changed. The way people think about decision-making ability is different from what it was, as is the profile of people using guardianship laws. The National Disability Insurance Scheme (“NDIS”) is being rolled out. There is growing concern about elder abuse.

Profile of people using guardianship laws.....	15
Reviews of guardianship laws.....	16
NSW	16
Other jurisdictions	17
The way we think about disability.....	17
Capacity.....	19
Supported decision-making	19
Will and preferences	21
The provision of disability services: the National Disability Insurance Scheme.....	21
Elder abuse.....	23

- 3.1 The *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) has served the NSW community for over 30 years. However, the social, legal and policy environments that surround it have changed. In particular, the way people think about disability has changed. This is partly because of developments in human rights law, but also because of changes in society. This Chapter summarises the key changes to the environment in which our guardianship laws operate.

Profile of people using guardianship laws

- 3.2 The profile of people who are the subject of guardianship applications in NSW is different from what it was in 1987. Initially, the largest cohort coming before the (then) Guardianship Board was people with an intellectual disability. Now, cases involving people with dementia are the most common, making up about 42% of the work of the Guardianship Division of the NSW Civil and Administrative Tribunal (“the Tribunal”) in 2016-2017. In the same financial year, 20% of cases concerned people with an intellectual disability.¹
- 3.3 The growth in dementia cases has increased the workload of the Tribunal. The application rate has grown by about 24% since 2010-2011. In 2016-17, around 61% of applications made concerned people 65 years of age or older, and 23% concerned people 85 years of age and older.²
- 3.4 The increase in dementia cases has also added to the complexity of the matters heard by the Tribunal. It is now common for the Tribunal to make orders for people

1. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2016-2017* (2017) 44.

2. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2016-2017* (2017) 44.

who are experiencing changes in their decision-making ability. The Tribunal has also seen a related increase in cases involving older people who have complicated financial arrangements and people whose family members disagree on questions of guardianship and financial management.³ There is likely to be a continuing rise in the numbers of such matters since the increase in the number of dementia cases corresponds with a steadily ageing population.⁴

- 3.5 Cases involving people with a mental illness or brain injury also make up a significant number of Tribunal matters. In 2016-2017, 15% of applications to the Tribunal reported mental illness as the relevant disability, and 8% reported brain injury.⁵
- 3.6 These trends raise the question of whether the current guardianship framework, designed primarily for people with an intellectual disability, is suited to the current range of cases.

Reviews of guardianship laws

- 3.7 In recent years, there have been a number of reviews of guardianship laws and laws in related areas, both in NSW and elsewhere. Their recommendations are informed by the changes in policy and attitudes outlined in the rest of this Chapter. This Report draws on these reviews, the most significant of which are described below.

NSW

- 3.8 In 2010, the NSW Legislative Council's Standing Committee on Social Issues ("Standing Committee") released its report into *Substitute Decision Making for People Lacking Capacity*.⁶ The Standing Committee considered whether any NSW legislation should be changed to better provide for financial management and guardianship.
- 3.9 Its recommendations included establishing a single legislative definition of "capacity", better recognising people's existing informal assisted decision-making arrangements, introducing periodic review of financial management orders, legislating for the use of restrictive practices in the guardianship context, and allowing the NSW Public Guardian to assist people lacking decision-making ability without a guardianship order.
- 3.10 In 2011, the then NSW government broadly supported the Standing Committee's recommendations and indicated it would refer some issues to us for further consideration. These issues included defining "capacity" in legislation and introducing supported decision-making by public agencies.

3. NSW Civil and Administrative Tribunal, *Consultation PCGA4*.

4. In 2014 there were more than 1.1 million people aged 65 and over living in NSW. Population projections in NSW indicate all areas outside of Sydney will have more older residents than under 15s by as early as 2021: NSW Department of Planning and Environment, *Population NSW*, (2015) Issue 7, 2.

5. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2016-2017* (2017) 44.

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

- 3.11 In 2016, the NSW Legislative Council’s General Purpose Standing Committee No 2 released its report on elder abuse, which is an issue that intersects significantly with guardianship.⁷ Its recommendations included establishing a Public Advocate with powers of investigation and enhancing safeguards in respect of enduring powers of attorney.

Other jurisdictions

- 3.12 We also drew upon the reviews into guardianship laws undertaken elsewhere in Australia including by the Queensland Law Reform Commission (“QLRC”),⁸ the Victorian Law Reform Commission (“VLRC”)⁹ and the Australian Capital Territory (“ACT”) Law Reform Advisory Council.¹⁰
- 3.13 The 2014 report of the Australian Law Reform Commission (“ALRC”), *Equality, Capacity and Disability in Commonwealth Laws*, was another key resource. Among other things, the report proposed a model for supported decision-making and a set of National Decision-Making Principles.¹¹
- 3.14 We took into account the ALRC’s 2017 report on elder abuse. It recommended a series of safeguards and procedures aimed at ensuring that people who lack decision-making ability are not abused by their representatives.¹²
- 3.15 We also considered reviews undertaken outside of Australia, specifically in the UK and Canada, including the Law Commission of Ontario’s 2017 report on guardianship laws.¹³

The way we think about disability

- 3.16 The way we think about disability has changed since the *Guardianship Act* was enacted. In his evidence to the 2010 NSW Parliamentary Inquiry into substitute decision-making, Professor Ronald McCallum described the different models of disability that have been prominent over the years.

For the first two thirds of the twentieth century and earlier the prevalent model looking after persons with disability was the medical model. The notion was that we should try to cure as many persons with disability as we can and, if not, they should be looked after. Many were institutionalised in those days. By the 1970s we had moved forward, certainly in this country, to what we might call the social

-
7. NSW Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) rec 1.
8. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010).
9. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012).
10. ACT Law Reform Advisory Council, *Guardianship Report* (2016).
11. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-1.
12. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017).
13. Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship*, Final Report (2017). See also Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship*, Discussion Paper (2014).

welfare model. Welfare was provided to enhance the lives of persons with disabilities, and many of us were encouraged and, indeed, assisted by Federal, State and on some occasions municipal governments to gain employment.¹⁴

The *Guardianship Act* primarily reflects the social welfare model.

- 3.17 In 2008, Australia ratified the United Nations *Convention on the Rights of Persons with Disabilities* (“UN Convention”).¹⁵ The UN *Convention* clarifies how existing international human rights obligations apply to people with disability. Its principles include the right of people with disability to dignity, autonomy, full and active participation in society and equal recognition before the law. While international conventions do not become a part of Australian law until incorporated into domestic law by statute,¹⁶ by ratifying the UN *Convention*, Australia has committed in good faith to give effect to it.¹⁷
- 3.18 The UN *Convention* adopts the “social model” of disability, which is now widely considered the leading model. This model recognises that:
- [D]isability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.¹⁸
- 3.19 This represents a shift away from previous modes of thinking about people with disability “as *objects* of charity, medical treatment and social protection and towards viewing them as *subjects* having *rights*”.¹⁹ It views people with disability as “capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as of being active members of society”.²⁰
- 3.20 The move towards the social model of disability and an alignment with the principles of the UN *Convention* is reflected in several of the recent reviews in Australia that we examined, including those of the NSW Legislative Council, the QLRC, VLRC, ALRC and the ACT Law Reform Advisory Council.²¹
- 3.21 The legislative move towards the social model of disability in NSW is exemplified in the *Disability Inclusion Act 2014* (NSW), which replaced the *Disability Services Act*

14. R McCallum, Evidence to the Legislative Council Standing Committee on Social Issues, *Inquiry into Substitute Decision-Making for People Lacking Capacity*, 4 November 2009, 2-3.

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

16. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-8, 315.

17. *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (entered into force 27 January 1980) art 26.

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

19. United Nations, “Persons with Disabilities” <<http://www.un.org/en/sections/issues-depth/persons-disabilities/index.html>> (retrieved 24 April 2018) (emphasis added).

20. United Nations, “Persons with Disabilities” <<http://www.un.org/en/sections/issues-depth/persons-disabilities/index.html>> (retrieved 24 April 2018).

21. 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); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report 124 (2014); ACT Law Reform Advisory Council, *Guardianship Report* (2016).

1993 (NSW). The 2014 Act governs how state agencies provide disability supports and services, with objectives including:

- to acknowledge that people with disability have the same human rights as other members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights, and
- to support, to the extent reasonably practicable, the purposes and principles of the *UN Convention*.²²

3.22 Key principles underlying the social model include the presumption of decision-making ability, the promotion of supported or assisted decision-making rather than substitute decision-making, and an emphasis on giving effect to a person's "will and preferences" wherever possible, rather than making judgments about what is in their "best interests". Some of the key concepts underlying the social model are outlined below.

Capacity

3.23 In guardianship law, "capacity" generally refers to a person's decision-making ability (sometimes referred to as "mental capacity"). "Mental capacity" is different from "legal capacity", which is about a person's authority under law to engage in a particular undertaking or have a particular status. The *UN Convention* says that "parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life".²³

3.24 The United Nations Committee on the Rights of Persons with Disability ("UN *Convention* Committee") has commented that under the *UN Convention*, "perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity".²⁴ A person's disability *status*, therefore, should not of itself determine their decision-making ability.²⁵

Supported decision-making

3.25 Supported decision-making (sometimes referred to as "assisted decision-making") emphasises that a person with impaired decision-making ability can make decisions for themselves, provided they have the necessary support to make and communicate those decisions. It acknowledges that a person has legal capacity regardless of the level of support they need,²⁶ and recognises that all independent

22. *Disability Inclusion Act 2014* (NSW) s 3.

23. United Nations, *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3, (entered into force 3 May 2008) art 12(2).

24. United Nations Committee on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, General Comment No 1 (2014) [13].

25. NSW Disability Network Forum, *Preliminary Submission PGA05*, 6; Council on the Ageing NSW, *Preliminary Submission PGA10*, 3; Alzheimer's Australia NSW, *Preliminary Submission PGA14*, 5; Being, *Preliminary Submission PGA22*, 4; Institute of Legal Executives (Victoria), *Preliminary Submission PGA35*, 4.

26. M Bach, "Supported decision making under Article 12 of the UN Convention on the Rights of Persons with Disabilities: Questions and Challenges" (Paper presented at the Conference on Legal Capacity and Supported Decision-Making Parents' Committee of Inclusion Ireland, Athlone, Ireland) 3 November 2007, 4.

- adults have the right to make decisions, including the right to make risky or “bad” decisions.
- 3.26 The preference for “supported” as opposed to “substitute” decision-making is another important element of the social model of disability. This approach is a shift away from the more traditional, paternalistic decision-making models currently used in NSW, where a person (or “substitute”) makes decisions *on another person’s behalf* according to “best interests” or similar principles.
- 3.27 In 2013, the UN *Convention* Committee recommended that Australia:
- take immediate steps to replace substitute decision-making with supported decision-making and ... provide a wide range of measures which respect a person’s autonomy, will and preferences and are in full conformity with article 12 of the Convention.²⁷
- 3.28 Supported decision-making takes many forms and there is limited agreement about the basic concepts and principles that define it.²⁸ There is also limited evidence on the efficacy of the various forms of supported decision-making. A number of Australian non-statutory projects and pilots have trialled different supported decision-making approaches, including in South Australia,²⁹ the ACT,³⁰ NSW,³¹ and across jurisdictions.³²
- 3.29 Within Australia, only Victoria has implemented a framework of formal supported decision-making. Victorians can now appoint a “supportive attorney” in relation to “any personal or financial or other matters specified in the appointment”³³ and can appoint a “support person” to support them to “make, communicate and give effect to the person’s medical treatment decisions”.³⁴
- 3.30 Several Canadian provinces have also introduced mechanisms to facilitate and encourage supported decision-making arrangements, including Alberta,³⁵ Saskatchewan³⁶ and British Columbia.³⁷

-
27. United Nations, Committee on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, Concluding Observations on the initial report of Australia adopted by the Committee at its tenth session (2-13 September 2013) [25].
28. T Carney, “Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?” (2015) 4 *Laws* 37, 39.
29. M Wallace, *Evaluation of the Supported Decision Making Project* (South Australia, Office of the Public Advocate, 2012) 4–5, 45-46.
30. 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) 55–56.
31. NSW, Family and Community Services, *My Life, My Decision: An Independent Evaluation of the Supported Decision Making Pilot* (2015) 78.
32. Queensland, Office of the Public Advocate, “Project Fact Sheet: Effective Decision-Making Support for People with Cognitive Disability” <http://www.justice.qld.gov.au/_data/assets/pdf_file/0007/430999/Effective-decision-making-support.pdf> (retrieved 26 April 2018).
33. *Powers of Attorney Act 2014* (Vic) pt 7, s 85(1).
34. *Medical Treatment Planning and Decisions Act 2016* (Vic) pt 3 div 3, s 32(1)(a).
35. *Adult Guardianship and Trusteeship Act 2008* (Alberta) pt 2 div 1-2.
36. *Adult Guardianship and Co-decision-making Act 2000* (Saskatchewan) s 14(1)(a), s 40(1)(a).
37. *Representation Agreement Act 1996* (British Columbia) s 7.

- 3.31 In addition, Ireland has introduced assisted decision-making and co-decision-making to respond to the range of support needs that people may have.³⁸
- 3.32 In November 2015, the Commonwealth Senate Community Affairs References Committee reported on *Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings*. Its recommendations included driving a nationally consistent move away from substitute decision-making towards supported decision-making.³⁹

Will and preferences

- 3.33 The concept of “best interests” is central to guardianship laws in Australia and elsewhere. Under these laws, substitute decision-makers make decisions according to what they believe is in a person’s best interests.⁴⁰
- 3.34 The UN *Convention* Committee has said that “best interests” substitute decision-making does not comply with the UN *Convention*, which requires parties to provide people with disability with the “support they may require in exercising their legal capacity”.⁴¹ The Committee has interpreted the UN *Convention* as requiring governments to provide support to people with decision-making impairments to ensure that their will and preferences are respected and not overruled by action thought to be in their objective best interests.⁴²
- 3.35 Several Australian reviews have recommended changes to guardianship legislation so that substitute decision-makers are required to give effect to a person’s will and preferences where possible.⁴³

The provision of disability services: the National Disability Insurance Scheme

- 3.36 In July 2013, the National Disability Insurance Scheme (“NDIS”) was initiated in Australia. In line with the UN *Convention*, which recognises the legal capacity of

38. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) pt 3, pt 4.

39. Australia, Senate, Community Affairs References Committee, *Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability*, Final Report (2015) rec 10.

40. R Croucher, “Seismic Shifts - Reconfiguring ‘Capacity’ in Law and the Challenges of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities” (2016) 22 *International Journal of Mental Health and Capacity Law* 7, 11.

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

42. 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) [20]-[21].

43. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-3(2); ACT Law Reform Advisory Council, *Guardianship Report* (2016) [7.3.1]; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [17.121]-[17.122]. See also *My Health Records Act 2012* (Cth) s 7A(6).

people with disability, the objective of the NDIS is to provide people with greater choice and control over the services and support they receive.⁴⁴

- 3.37 Under the NDIS, eligible individuals receive allocated funding for disability supports, rather than that funding going directly to providers of supports:

[E]ligible people will talk to a planner about their goals and what supports they need to meet their goals. An individual support plan will be drawn up and the person with disability, their guardian or nominee then chooses who will provide their supports and how, when and where they get delivered.⁴⁵

- 3.38 Ageing, Disability and Homecare (“ADHC”), a NSW government agency that provides services and support to around 78,000 older people and people with disability, and their families and carers, will transfer all their disability support services to the non-government sector by July 2018.⁴⁶ Non-government organisations will provide clinical and allied health services, accommodation, respite, and in-home support services funded by the NDIS.⁴⁷

- 3.39 According to NDIS transition data (as of 30 June 2017), autism and intellectual disability account for two-thirds of NDIS participants.⁴⁸ This suggests a significant proportion of NDIS participants could have limited or fluctuating decision-making ability. Important questions therefore arise about how the NDIS regime and NSW guardianship laws interact. The Tribunal has been dealing with some of these questions since the beginning of the NDIS rollout. It estimates that between July 2016 and March 2017, it listed at least 100 matters for hearing that were prompted by the introduction of the NDIS.⁴⁹

- 3.40 Some of the questions about the interaction between the NDIS and NSW guardianship laws have been resolved. For example, it is now clear that a person does not need a guardian in order to access the NDIS. However, there may be other reasons they need a guardian, such as to advocate for them during the NDIS planning process.⁵⁰

- 3.41 Other areas of crossover are more uncertain. For example, if a person already has a guardian, it is not clear if it will be necessary for them to appoint a financial manager to manage funding of their supports under a NDIS plan. This is because it is likely that the National Disability Insurance Agency will manage the funding for

44. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(2); *National Disability Insurance Scheme Act 2013* (Cth) s 17A(1).

45. Australia, Disability Reform Council, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, Consultation Paper (2015) 2.

46. NSW Auditor-General, *Building the Readiness of the Non-Government Sector for the NDIS*, Performance Audit Report (2017) 2.

47. NSW, National Disability Insurance Scheme, “Transfer of NSW Disability Services”, <[www.http://ndis.nsw.gov.au/about-ndis-nsw/transfer-of-nsw-disability-services/](http://ndis.nsw.gov.au/about-ndis-nsw/transfer-of-nsw-disability-services/)> (accessed 26 April 2018).

48. Australia, Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs*, Position Paper (2017) 17, Fig 4.

49. C Fougere, “Guardianship, Financial Management and the NDIS: NCAT’s experience”, (Paper presented at the Australian Guardianship and Administration Council Heads of Tribunal meeting, Hobart, 23 March 2017) [14].

50. C Fougere, “Guardianship, Financial Management and the NDIS: NCAT’s experience”, (Paper presented at the Australian Guardianship and Administration Council Heads of Tribunal meeting, Hobart, 23 March 2017) [44].

supports once a guardian has made decisions about those supports. However, it appears that each case will need to be considered on its own merits.⁵¹

- 3.42 With the NDIS operating within NSW, it is also important to ensure that State and Commonwealth oversight mechanisms interact effectively to guarantee the safety of people with disabilities and prevent abuse. The Productivity Commission has identified groups that are at risk of facing challenges with the NDIS; for example, having difficulty choosing and accessing appropriate supports and navigating the system. These include people with psychosocial disabilities and people with complex and multiple disabilities.⁵²
- 3.43 The shift of services from ADHC to the non-government sector has also raised concerns about the risk of service gaps for people with complex support or access needs.⁵³ The NSW Auditor-General has observed that there are particular problems with ensuring that Aboriginal people, Torres Strait Islanders and people from culturally and linguistically diverse backgrounds receive appropriate decision-making support to access the services they need.⁵⁴

Elder abuse

- 3.44 There are ongoing and increasing concerns relating to elder abuse in NSW and Australia more broadly.⁵⁵ The term “elder abuse” can encompass a range of abusive behaviours towards older people, including “physical abuse, psychological or emotional abuse, financial abuse, sexual abuse and neglect”.⁵⁶
- 3.45 Victims of elder abuse are often vulnerable because they have a disability or cognitive impairment.⁵⁷ According to the Australian Institute of Health and Welfare, more than 80% of people aged 85 years or over have some disability.⁵⁸ Elder abuse could include a guardian or financial manager making inappropriate decisions or taking advantage of an older person they are supposed to be supporting.⁵⁹

-
51. C Fougere, “Guardianship, Financial Management and the NDIS: NCAT’s experience”, (Paper presented at the Australian Guardianship and Administration Council Heads of Tribunal meeting, Hobart, 23 March 2017) [112].
52. Australia, Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs*, Position Paper (2017) 38.
53. NSW Auditor-General, *Building the Readiness of the Non-Government Sector for the NDIS*, Performance Audit Report (2017) 3.
54. NSW Auditor-General, *Building the Readiness of the Non-Government Sector for the NDIS*, Performance Audit Report (2017) 15.
55. See, eg, Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Final Report 131 (2017).
56. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Final Report 131 (2017) [1.8].
57. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Final Report 131 (2017) [1.4]-[1.5].
58. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Final Report 131 (2017) [1.4] quoting Australian Institute of Health and Welfare, *Australia’s Welfare 2011* (2011) 11.
59. See, eg, Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Final Report 131 (2017) [10.10]-[10.14].

- 3.46 The ALRC report on elder abuse recommends a variety of safeguards in response to the risks identified. We discuss some of these recommendations where relevant within this Report.

4. A new assisted decision-making framework

In brief

This Chapter provides an overview of the policy that we believe should underpin a new assisted decision-making framework. It includes recommendations for a contemporary and accessible Act, and argues for education, data and resourcing to support the new framework.

A contemporary and accessible Act.....	25
Language and structure	26
Key terms.....	26
Policy underpinning the new framework.....	30
A wide range of decision-making assistance	30
A less restrictive approach.....	31
Maximising participation in decision-making	31
A more realistic view of decision-making ability	32
A preference for personal appointments	32
Tribunal orders as a last resort	33
Enhanced support for fair and effective informal arrangements.....	33
Accountability and safeguards	33
Interaction with other relevant laws.....	34
Uniformity within Australia.....	34
Special provision for Aboriginal people and Torres Strait Islanders.....	35
What is needed to support the new framework	36
Education and training	36
Data collection	38
Resourcing.....	39

4.1 We are recommending a new framework for assisted decision-making laws in NSW. The proposed framework represents a significant departure from the existing framework. It accommodates the principles of the United Nations *Convention on the Rights of Persons with Disabilities* (“UN Convention”) and draws upon contemporary understandings of decision-making.

4.2 In this Chapter, we set out:

- our recommendations to ensure the law is contemporary and accessible
- the policy underpinning the new framework, and
- the education, data and resourcing required to support the new framework.

A contemporary and accessible Act

4.1 A new Act

- (1) There should be a new Act to provide for supported decision-making and substitute decision-making called the Assisted Decision-Making Act (“the new Act”).

- (2) The new Act should replace the *Guardianship Act 1987* (NSW) and the enduring power of attorney provisions in the *Powers of Attorney Act 2003* (NSW).
- (3) The new Act should include:
 - (a) statutory objects and general principles that reflect the values upon which the Act is based and guide its interpretation and implementation
 - (b) principles to guide the assessment of decision-making ability
 - (c) assisted decision-making arrangements and the mechanisms for putting these in place, including processes for personal appointments, court and tribunal appointments and default arrangements
 - (d) principles to guide people acting under the new Act
 - (e) the roles and responsibilities of people acting under the new Act
 - (f) safeguards that ensure accountability of people acting under the new Act, including monitoring and review of orders and decisions, and
 - (g) the functions and powers of a new Public Advocate role.

Language and structure

4.2 Language and structure of the Act

The new Act should contain language and a structure that are as simple and as accessible as possible.

- 4.3 The language and terminology of the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) reflects the attitudes and understandings of the time when it came into force. Since then, in Australia and around the world, approaches to disability and decision-making have evolved and the language used to describe decision-making ability and related concepts has evolved with it.
- 4.4 We are proposing a fundamental change in the approach to decision-making, and what we recommend cannot be described as guardianship. The terminology of the proposed new framework, and the drafting of the new Assisted Decision-Making Act (“the new Act”), should reflect this substantive shift in plain English, and in a structure that is simple to follow. We also recommend streamlining some existing *Guardianship Act* provisions and aligning them, where appropriate, with the different decision-making arrangements provided in the new Act.

Key terms

4.3 Key terms

The new Act should provide:

- (1) The Guardianship Division of the NSW Civil and Administrative Tribunal is to be renamed the **Assisted Decision-Making Division** (“the Tribunal”).

- (2) When someone appoints another person to make personal, financial, healthcare and/or restrictive practices decisions on their behalf, that person is to be referred to as an “**enduring representative**” and the person on whose behalf they act as a “**represented person**”.
- (3) A person appointed by the Supreme Court or Tribunal to make personal, financial, healthcare and/or restrictive practices decisions on behalf of someone else is to be referred to as a “**representative**” and the person on whose behalf they act as a “**represented person**”.
- (4) A person appointed by the Tribunal or under a support agreement to support someone else make decisions is to be referred to as a “**supporter**” and the person they support as a “**supported person**”.
- (5) The NSW Trustee and Guardian is to be renamed the **NSW Trustee**.
- (6) The Public Guardian is to be renamed the **Public Representative**.

4.4 Personal decisions

The new Act should provide:

- (1) A “**personal decision**” is a decision that relates to personal or lifestyle matters.
- (2) The following are examples of personal decisions:
 - (a) where a person lives
 - (b) who a person lives with
 - (c) whether a person works and, if a person works, where and how the person works
 - (d) what education and training a person undertakes
 - (e) what kind of personal services the person receives (for example, in-home care, respite services, or occupational therapy)
 - (f) whether a person applies for a licence or permit
 - (g) day-to-day decisions about, for example, dress and diet
 - (h) whether to consent to a forensic examination of a person
 - (i) whether a person will go on a holiday and where, and
 - (j) legal matters relating to a person’s personal care.

4.5 Financial decisions

The new Act should provide:

- (1) A “**financial decision**” is a decision about one or more aspects of a person’s property.
- (2) The following are examples of financial decisions:

- (a) paying maintenance and accommodation expenses (including future expenses) for a person and the person's dependants
- (b) paying a person's debts and expenses
- (c) receiving and recovering money payable to a person
- (d) carrying on a person's trade or business
- (e) performing contracts entered into by a person
- (f) discharging a mortgage over a person's property
- (g) paying rates, taxes and other outgoings for a person's property
- (h) insuring a person or their property
- (i) preserving or improving a person's property
- (j) buying and disposing of property
- (k) dealing with land for a person
- (l) making or continuing investments for a person
- (m) making gifts and donations
- (n) executing documents (for example, contract for sale of goods or property, signing a lease, and authorising bank payments)
- (o) undertaking a transaction for a person involving the use of the person's property as security for the benefit of the person
- (p) withdrawing money from, or depositing money into, a person's account with a financial institution
- (q) taking up the rights to the issue of new shares to which the person is entitled, and
- (r) making decisions on legal matters relating to a person's finances or property (for example, bankruptcy, signing contracts or deeds, and retaining a lawyer for legal advice).

4.6 Healthcare decisions

The new Act should provide:

- (1) A "**healthcare decision**" is a decision about a person's healthcare.
- (2) "**Healthcare**" has the meaning set out in **Recommendation 10.4**.

4.7 Restrictive practices decisions

The new Act should provide that:

- (a) A "**restrictive practices decision**" is a decision to approve or disapprove the use of restrictive practices on a person.
- (b) "**Restrictive practice**" means any practice or intervention that has the effect of restricting the rights or freedom of movement of a person.

- 4.5 Recommendation 4.3 updates key terms in the legislation.
- 4.6 We recommend that the new Act be called the Assisted Decision-Making Act.¹ This describes in plain English what the Act is concerned with and moves away from the paternalistic language of “guardian” and “guardianship”. Similar titles have been adopted in other parts of the world.² It follows that the title of the Guardianship Division of the NSW Civil and Administrative Tribunal should be changed to the “Assisted Decision-Making Division”.
- 4.7 In place of “guardian” and “financial manager”, we recommend that NSW adopts the term “representative” to describe a person who has the authority to make decisions on another person’s behalf. One submission did not favour this term because of its wide use in different contexts.³ However, the term “guardianship” is used in different contexts as well — notably in the context of both child guardianship and adult guardianship.
- 4.8 The term “representative” is used elsewhere including in Commonwealth legislation such as the *My Health Records Act 2012* (Cth).⁴ A number of submissions favour the use of the term.⁵ Our recommendation to change the title of Public Guardian to Public Representative is consistent with this. We also recommend that the NSW Trustee and Guardian be renamed the NSW Trustee to make clear it has a separate role to the Public Representative (currently the Public Guardian).
- 4.9 Formal supported decision-making features in an increasing number of laws around the world, and these laws typically use the terms “supporter” and “supported person” to describe the roles of people in a supported decision-making arrangement.⁶ Submissions largely favour these terms.⁷
- 4.10 Recommendations 4.4 to 4.7 define the types of decisions that can be made under a formal assisted decision-making arrangement. These definitions, which draw upon comparable definitions used in other Australian jurisdictions,⁸ apply across all arrangements, and provide clarity where the current law is patchy and inconsistent. We recommend that the definition of “restrictive practices”, which is absent from the existing law, is consistent with the definition to be inserted in the *National Disability*

1. Recommendation 4.1

2. See, eg, *Assisted Decision-Making (Capacity) Act 2015* (Ireland); *Adult Capacity and Decision-Making Act 2017* (Nova Scotia).

3. Australian Association of Gerontology, *Submission GA146*, 2.

4. See also *Representation Agreement Act 1996* (British Columbia); *Adult Capacity and Decision-Making Act 2017* (Nova Scotia) s 3(q).

5. Mental Health Commission of NSW, *Submission GA116C*, 6; NSW Trustee and Guardian, *Submission GA117*, 12; Seniors Rights Service, *Submission GA90C*, 2.

6. See, eg, *Powers of Attorney Act 2014* (Vic) pt 7; *Adult Guardianship and Trusteeship Act 2008* (Alberta) pt 2 div 1.

7. See, eg, Legal Aid NSW, *Submission GA109C*, 4; Seniors Rights Service, *Submission GA90C*, 2.

8. For comparable definitions of “personal decision” see *Powers of Attorney Act 2014* (Vic) s 3 definition of “personal matter”; *Guardianship and Administration Act 2000* (Qld) sch 2 pt 2 cl 2 definition of “personal matter”; *Powers of Attorney Act 2006* (ACT) s 11 definition of “personal care matter”. For comparable definitions of “financial decision” see *Powers of Attorney Act 2014* (Vic) s 3 definition of “financial matter”; *Guardianship and Administration Act 2000* (Qld) sch 2 pt 1 cl 1 definition of “financial matter”; *Powers of Attorney Act 2006* (ACT) s 10 definition of “property matter”.

Insurance Scheme Act 2013 (Cth).⁹ The only difference we recommend is that the definition includes a restrictive practice or intervention on any person, not just on a person with a disability.

Policy underpinning the new framework

4.11 In this section, we set out the key policies underpinning our recommendations.

A wide range of decision-making assistance

4.12 Our recommendations propose that the new Act provides for a wide range of decision-making assistance. This will ensure more people can participate in making decisions that affect their lives, and that help can be tailored to the needs of the individual.

4.13 The range of decision-making assistance we recommend includes:

- **New supported decision-making arrangements** that enable people to make their own decisions with the help of a supporter. The help that a supporter may provide should include accessing information held by third parties, communicating information in appropriate ways and helping people communicate and implement the decisions they make. The person themselves or the Tribunal (with the person's consent) should be able to appoint supporters.¹⁰
- **Improved substitute decision-making arrangements** that allow, as a last resort, a representative to make decisions on behalf of a person, according to that person's will and preferences. It should continue to be possible for the person or the Tribunal to make these arrangements.¹¹ Arrangements for healthcare decisions to be made where a person is unable to consent to treatment should also continue.¹²
- **Recognition of suitable informal arrangements** by which family, friends and carers can help a person gather information, make decisions and implement them. The new Act should explicitly recognise these types of arrangements¹³ and be designed to ensure that informal arrangements which are working fairly and effectively, continue.

4.14 In broadening the range of available decision-making arrangements, our recommendations are designed to promote decision-making autonomy wherever possible, while recognising that some people need more assistance than others. Even in cases where substitute decision-making is the only option, representatives will have to consider the person's will and preferences. This will ensure that our

9. *National Disability Insurance Scheme Act 2013* (Cth) s 9 definition of "restrictive practice" to be inserted by *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Cth) sch 1 cl 13.

10. Chapter 7.

11. Chapter 8-9.

12. Chapter 10.

13. Recommendation 5.2(k).

laws are not solely a protective mechanism that restricts decision-making freedom but a means of promoting a person's autonomy and participation.

A less restrictive approach

- 4.15 Substitute decision-making orders are at the heart of the current guardianship framework. When a court or tribunal makes a substitute decision-making order, a person effectively loses the legal right to make or participate in decisions that affect them.
- 4.16 The new framework moves away from this approach, by giving primacy to the principle that a person's autonomy should be restricted as little as possible. This principle is commonly known as the "principle of least restriction". It is embodied in the general principles that we recommend guide the actions of everyone exercising functions under the new Act.¹⁴
- 4.17 In keeping with this principle, the only restrictions we recommend on a person's autonomy are those that are necessary to protect them from neglect and abuse. This principle is also behind our recommendations for a wide range of decision-making assistance to provide flexible options so that people who need help may still participate in decision-making.
- 4.18 The principle of least restriction also informs our recommendations that:
- require Tribunal orders to specify the types of decisions they apply to, and any conditions or limitations on a representative's authority¹⁵
 - prevent the Tribunal from making representation orders except where less restrictive measures are either unavailable or not suitable. This ensures that substitute decision-making is a last resort¹⁶
 - require the periodic review of all representation orders, including those relating only to financial decision-making, to ensure the order is still necessary,¹⁷ and
 - establish an Office of the Public Advocate with mediation functions and a role in providing decision-making advice and assistance, to reduce the need for formal assisted decision-making arrangements.¹⁸

Maximising participation in decision-making

- 4.19 The UN *Convention* represents a shift away from past approaches to decision-making, when people in need of decision-making assistance were viewed as "objects" of charity, medical treatment and social protection, rather than as subjects with rights.¹⁹ Specifically, Article 12 of the UN *Convention* recognises the right of

14. Recommendation 5.2(l).

15. Recommendation 9.1.

16. Recommendation 9.3.

17. Recommendation 9.16, 9.17.

18. Recommendation 13.1.

19. United Nations, "Persons with Disabilities" < <http://www.un.org/en/sections/issues-depth/persons-disabilities/index.html> > retrieved 27 April 2018).

people with disability to be recognised as people before the law, the right to enjoy legal capacity on an equal basis with others, and the right to the support and assistance necessary to exercise their legal capacity.²⁰

- 4.20 While protecting vulnerable people remains an important goal of the new framework, the framework also seeks to promote the participation of people in decisions that affect them.
- 4.21 We have therefore included a statutory presumption of decision-making ability.²¹ The new general principles require that a person's autonomy should be restricted as little as possible.²² The new supported decision-making arrangements allow a person to be assisted while still making decisions for themselves.²³ Our representative arrangements ensure that even where a person does not have decision-making ability, their will and preferences must be given effect where possible.²⁴ Our recommendations about consent to healthcare ensure a person's will and preferences are given effect where possible, including in situations when wishes are expressed in an advance care directive.²⁵

A more realistic view of decision-making ability

- 4.22 The concept of decision-making ability (sometimes referred to as “decision-making capacity”) is at the heart of legal frameworks concerned with assisted decision-making everywhere. A finding that a person does not have decision-making ability can have a significant impact upon that person's autonomy to make decisions that affect them. Despite this, the *Guardianship Act* does not have a clear or consistent definition of decision-making ability.
- 4.23 We therefore recommend that the new Act defines decision-making ability,²⁶ and provides guidance on how to assess decision-making ability.²⁷ We particularly recommend that a person's decision-making ability not be defined by reference to disability status or diagnosis, but by reference to their ability to make a particular decision at a particular time. These provisions should recognise that a person's ability to make decisions is not static. It can depend on what type of decision needs to be made, and can fluctuate or change from time to time. The person making the assessment should take into account any practicable and appropriate decision-making supports.

A preference for personal appointments

- 4.24 Existing NSW law provides for enduring powers of attorney and enduring guardianship, which are personally appointed substitute decision-making arrangements that come into effect when a person no longer has decision-making

20. *Convention on the Rights of Persons with Disabilities* 2515 UNTS 3 (entered into force 3 May 2008) art 12(1)-(3).

21. Recommendation 6.2.

22. Recommendation 5.2(l).

23. Chapter 7.

24. Recommendation 5.2(a), 5.4.

25. Chapter 10.

26. Recommendation 6.1.

27. Recommendation 6.3.

ability. Personal appointments arguably provide greater autonomy for people who need decision-making assistance because they have chosen a trusted person who they think is in a good position to know and implement their wishes.

- 4.25 Our new framework therefore seeks to encourage people to make their own personal appointments of supporters and representatives where possible and to ensure that the arrangements for doing so are simple, accessible and have appropriate safeguards attached to them.

Tribunal orders as a last resort

- 4.26 The effect of the framework we recommend under the new Act is that the Tribunal should only make support or representation orders as a last resort. In particular:
- The Tribunal can only make a support order with the consent of the supported person and the supporter where less intrusive and restrictive measures are unavailable or unsuitable.²⁸
 - The Tribunal can only make a representation order where there is a need for an order and less intrusive and restrictive measures have been considered and found to be unavailable or unsuitable.²⁹

Enhanced support for fair and effective informal arrangements

- 4.27 While formal arrangements are sometimes necessary, for example, where institutions like banks, hospitals or government entities require proof of a decision-making arrangement, or where parties want to access formal safeguards, we see a continuing and important role for informal arrangements operating alongside the new laws.
- 4.28 Informal arrangements, with family, friends or carers, that are operating fairly and effectively should be allowed to continue, as is currently the case. The new general principles specifically provide that a person's "existing informal supportive relationships should be recognised".³⁰ When considering the need for a representation order, the Tribunal must take into account the adequacy of existing or available informal arrangements in meeting the person's decision-making needs.³¹

Accountability and safeguards

- 4.29 The 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".³²

28. Recommendation 7.7(1).

29. Recommendation 9.3(1)(c).

30. Recommendation 5.2(k).

31. Recommendation 9.3(2)(a).

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

- 4.30 Submissions vary widely on the accountability and safeguard mechanisms of the current framework. Some people want to see additional safeguards introduced, citing in particular the prevalence of elder abuse. Others are of the view that imposing heavy-handed safeguards will discourage people from becoming supporters or representatives, and from making personal arrangements, leading to more tribunal orders, and more appointments of the Public Guardian and NSW Trustee and Guardian.
- 4.31 Our recommendations seek to balance these concerns, and to apply consistent accountability and safeguard mechanisms across different types of decision-making arrangements, to the extent that is appropriate. Examples of strengthened safeguards include:
- requiring the Tribunal to review all representation orders periodically, including those involving a financial decision-making function³³
 - requiring representatives to know and acknowledge their responsibilities,³⁴ and
 - establishing an Office of the Public Advocate with broad powers to investigate suspected abuse, neglect and exploitation of people in need of decision-making assistance.³⁵

Interaction with other relevant laws

- 4.32 The success of the new framework depends in part, on how it interacts with existing legislation. Our recommendations are designed to ensure that the new framework operates effectively alongside other relevant laws, such as *NSW Trustee and Guardian Act 2009* (NSW), *Powers of Attorney Act 2003* (NSW), *Mental Health Act 2007* (NSW), *Mental Health (Forensic Provisions) Act 1990* (NSW), *Aged Care Act 1997* (Cth) and *National Disability Insurance Scheme Act 2013* (Cth).

Uniformity within Australia

- 4.33 When framing our recommendations, we have paid close attention to developments in other Australian states and territories, particularly those that are moving towards the principles that we have adopted. For example, together with recent reviews elsewhere in Australia,³⁶ we have looked at recent legislative developments in Victoria³⁷ and at the Federal level.³⁸
- 4.34 We view this exercise as important for two reasons. First, it is worthwhile considering the success or otherwise of provisions tested in similar environments. Second, there is value in having consistent laws in a country where people travel widely and have family connections and financial interests across interstate borders,

33. Recommendation 9.16(2)(a).

34. Recommendation 8.7(3), 9.13(3).

35. Recommendation 13.1.

36. See [3.7]-[3.14].

37. *Powers of Attorney Act 2014* (Vic); *Medical Treatment Planning and Decisions Act 2016* (Vic); *Guardianship and Administration Bill 2018* (Vic).

38. *My Health Records Act 2012* (Cth).

and where third parties affected by the laws, such as banks and service providers, operate nationally.

Special provision for Aboriginal people and Torres Strait Islanders

- 4.35 While there is limited research about the relationship of Aboriginal and Torres Strait Islander people with the guardianship system, West Australian research suggests that Aboriginal and Torres Strait Islander people face barriers in accessing the guardianship system effectively. These include:
- language barriers
 - a lack of access to information about the system
 - the system's lack of cultural relevance, and
 - an inherent distrust of state-run systems because of the negative impact of previous government systems on Aboriginal and Torres Strait Islander people.³⁹
- 4.36 There does not appear to be comparable research about the NSW guardianship system. However, it is reasonable to assume that these factors apply in NSW. Of equal concern are statistics from the NSW Trustee and Guardian that suggest that in some parts of the system Aboriginal and Torres Strait Islander people might be overrepresented. For example, approximately 3.8% of people under financial management in NSW are Aboriginal people or Torres Strait Islanders,⁴⁰ although they make up 2.9% of the NSW population. Additionally, approximately 7.3% of those for whom the Public Guardian is guardian are Aboriginal people or Torres Strait Islanders.⁴¹ We do not have figures for private guardianship arrangements.
- 4.37 In light of the available research and our consultation with Indigenous people and organisations, we have reached the following conclusions:
- It is appropriate to require people who are exercising functions under the new framework to consider the specific circumstances of Aboriginal and Torres Strait Islander people and the systemic disadvantage they experience when making decisions that affect them.⁴²
 - It is appropriate to require people who are assessing the decision-making ability of an Aboriginal or Torres Strait Islander person to consider circumstances specific to Aboriginal and Torres Strait Islander people.⁴³
 - To avoid overrepresentation of Aboriginal and Torres Strait Islander people in the system, in particular, under restrictive orders, the Tribunal should be

39. N Clements, J Clapton and L Chenoweth, "Indigenous Australians and Impaired Decision-Making Capacity" (2010) 45 *Australian Journal of Social Issues* 383.

40. NSW Trustee and Guardian, *Annual Report 2016-17* (2017) 12; Information provided by NSW Trustee and Guardian, 2 August 2017.

41. Information provided by NSW Public Guardian, 23 August 2017.

42. Recommendation 5.3.

43. Recommendation 6.4.

required to take into account additional considerations before making an order for an Aboriginal or Torres Strait Islander person.⁴⁴

- A formal supported decision-making regime may provide a more culturally appropriate form of decision-making assistance for Aboriginal people and Torres Strait Islanders than substitute decision-making currently does.⁴⁵
- The definition of “relative” should specifically include a relative according to an indigenous kinship system and the definition of “spouse” should include spouses married according to customary law.⁴⁶

What is needed to support the new framework

Education and training

- 4.38 The changes we are recommending represent a significant shift in how society thinks about decision-making and how we support people who need decision-making assistance. Educating people about the new laws will be crucial to their success.
- 4.39 Currently, the Public Guardian has a limited educative function. The Public Guardian must provide information to members of the public about its own functions, practices and procedures, the appointment and functions of guardians, and the rights of people in relation to the exercise of the Public Guardian’s functions.⁴⁷
- 4.40 Throughout our review of the *Guardianship Act*, many submissions have drawn attention to the importance of education and training about the assisted decision-making system, people’s rights within the system, and the roles and responsibilities of all participants.⁴⁸ A number of submissions highlight the need to improve the knowledge of medical professionals about the operation of the healthcare provisions⁴⁹ and about disability generally.⁵⁰

44. Recommendation 7.8, 9.4.

45. [7.46]-[7.48].

46. Recommendation 10.21.

47. *Guardianship Act 1987* (NSW) s 79.

48. Council on the Ageing NSW, *Preliminary Submission PGA10*, 8; Mental Health Review Tribunal, *Preliminary Submission PGA21*, 2; People With Disability Australia Inc, *Preliminary Submission PGA23*, 4, 5; Confidential, *Preliminary Submission PGA33*, 4; NSW Trustee and Guardian, *Preliminary Submission PGA50*, 8; NSW Disability Network Forum, *Submission GA39*, 7, 10; NSW Council of Social Service, *Submission GA45*, 2; Carers NSW, *Submission GA48*, 4; NSW Public Guardian, *Submission GA108*, 5; Being, *Submission GA119A*, 3; Living with Disability Research Centre, *Submission GA139*, 2; Mental Health Commission of NSW, *Submission GA148*, 3; Medical Insurance Group Australia, *Submission GA153*, 3, 4; People with Disability Australia Inc, *Submission GA154*, 5, 11, 12-13; Cognitive Decline Partnership Centre, *Submission GA156*, 1; Justice Connect, *Submission GA159*, 12-13; Carers NSW, *Submission GA161*, 1; Law Society of NSW, *Submission GA164*, 1.

49. Cognitive Decline Partnership Centre, *Submission GA63*, 4; Avant Mutual Group Ltd, *Submission GA97*, 3; Royal Australian College of General Practitioners, *Submission GA135*, 1; Medical Insurance Group Australia, *Submission GA115*, 12. See also Public Guardian staff, *Consultation GAC08*; Service Providers, *Consultation GAC14*; Peak Bodies, *Consultation GAC11*.

- 4.41 Several submissions identify the need to train and educate supporters, representatives and organisations that provide services and support to people in need of decision-making assistance.⁵¹ In particular, submissions emphasise the need to train supporters in the process of assisting a person to build their decision-making skills.⁵² One submission raises the need to provide clear guidance and support to people who operate under the new Act as well as several other systems, such as the National Disability Insurance Scheme, and the *Mental Health Act 2007* (NSW).⁵³
- 4.42 The Australian Law Reform Commission, in proposing a system of supported decision-making, also identified that a key safeguard to protect people from abuse and neglect is to provide guidance and training for those people, their supporters and representatives, and the departments and agencies interacting with them.⁵⁴
- 4.43 Submissions draw attention to the need for community education about assisted decision-making⁵⁵ and about the human rights of people with disabilities.⁵⁶ The UN *Convention* supports the raising of community awareness, calling on governments to:
- adopt immediate, effective and appropriate measures:
- (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
- (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.⁵⁷
- 4.44 Furthermore, some submissions emphasise the need to provide education for people with disability in order to enhance their decision-making skills.⁵⁸ The UN *Convention* supports the rights of people with disability to education, particularly as directed to:

50. House with No Steps, *Submission GA85*, 9, 13.

51. Seniors Rights Service, *Preliminary Submission PGA07*, 10; Council on the Ageing NSW, *Preliminary Submission PGA10*, 8; Confidential, *Preliminary Submission PGA33*, 3; NSW Disability Network Forum, *Submission GA39*, 7, 10; NSW Council of Social Service, *Submission GA45*, 2; Carers NSW, *Submission GA48*, 4; Living with Disability Research Centre, *Submission GA139*, 2; Mental Health Commission of NSW, *Submission GA148*, 3.

52. NSW Disability Network Forum, *Submission GA39*, 7; NSW Council of Social Service, *Submission GA45*, 2; Mental Health Coordinating Council, *Submission GA138*, 2; Living with Disability Research Centre, *Submission GA139*, 2; Physical Disability Council of NSW, *Submission GA143*, 6. See also People With Disability Australia Inc, *Preliminary Submission PGA23*, 4; NSW Trustee and Guardian,

53. Mental Health Review Tribunal, *Preliminary Submission PGA21*, 2.

54. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [4.90], [4.158]-[4.165], rec 4-11, rec 4-12.

55. People With Disability Australia Inc, *Preliminary Submission PGA23*, 5; Mental Health Coordinating Council, *Submission GA34*, 3; NSW Justice Connect, *Submission GA159*, 6.

56. Disability Council NSW, *Preliminary Submission PGA26*, 5, 15; People With Disability Australia Inc, *Preliminary Submission PGA23*, 5; NSW Trustee and Guardian, *Preliminary Submission PGA50*, 5.

57. *Convention on the Rights of Persons with Disabilities* 2515 UNTS 3 (entered into force 3 May 2008) art 8(1).

58. NSW Disability Network Forum, *Submission GA39*, 7; Physical Disability Council of NSW, *Submission GA143*, 6.

- (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
 - (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
 - (c) Enabling persons with disabilities to participate effectively in a free society.⁵⁹
- 4.45 Submissions consider that education and training will be vital in implementing the new regime successfully⁶⁰ and facilitating a cultural shift towards supported decision-making.⁶¹ This is supported by the experience of other jurisdictions. Insufficient provision of education and training has compromised the success of similar reforms implemented elsewhere. For example, in 2014 the UK House of Lords found that the implementation of the *Mental Capacity Act 2005* had not met expectations due to a lack of awareness and understanding of the Act.⁶² In its 2017 report on guardianship laws, the Ontario Law Commission found a lack of understanding of guardianship law led to systemic shortfalls in the implementation of the law.⁶³
- 4.46 We recommend new functions to be carried out by a proposed new entity, called the Public Advocate.⁶⁴ One of the functions of the Public Advocate will be to undertake systemic advocacy for people in need of decision-making assistance through educating the community and public agencies about the decision-making framework and the role of family and friends. Several submissions support this recommendation.⁶⁵
- 4.47 Overall, the widespread support for an educational function of the Public Advocate indicates that such a function must be properly resourced and recognised as an essential component of the new assisted decision-making scheme in NSW.

Data collection

- 4.48 The collection of reliable data about the operation of our laws enhances the possibility of evidence-based law reform. It is vital that appropriate data collection

59. *Convention on the Rights of Persons with Disabilities* 2515 UNTS 3 (entered into force 3 May 2008) art 24(1).

60. NSW Trustee and Guardian, *Preliminary Submission PGA50*, 8; Royal Australian College of General Practitioners, *Submission GA135*, 1; Carers NSW, *Submission GA161*, 1.

61. Disability Council NSW, *Preliminary Submission PGA26*, 15; Mental Health Commission of NSW, *Submission GA148*, 3; Justice Connect, *Submission GA159*, 12. See also Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 10-11; Dementia Australia, *Submission GA141*, 5; People with Disability Australia Inc, *Submission GA154*, 5, 12-13; Cognitive Decline Partnership Centre, *Submission GA156*, 1.

62. House of Lords, *Mental Capacity Act 2005: Post-legislative Scrutiny*, HL Paper 139 (2014) 6, 23.

63. Ontario Law Commission, *Legal Capacity, Decision-making and Guardianship*, Final Report (2017) 346.

64. Recommendation 13.1.

65. See, eg, NSW Public Guardian, *Submission GA108*, 7; NSW Department of Family and Community Services, *Submission GA125*, 13; People with Disability Australia Inc, *Submission GA154*, 20; Carers NSW, *Submission GA161*, 1. See also NSW Trustee and Guardian, *Submission GA117*, 9; NSW Ombudsman, *Submission GA136*, 1; Australian Association of Gerontology, *Submission GA146*, 1.

practices accompany any legislative changes so that future reviews can properly evaluate their impact.

- 4.49 Key agencies such as the Public Guardian, the Guardianship Division of the NSW Civil and Administrative Tribunal and the NSW Trustee and Guardian currently collect and publish data about their operations. We were able to draw upon this data for our review. Any expanded functions resulting from changes to the law should be accompanied by the collection of relevant data, including:
- the number, duration and types of Tribunal orders made
 - the areas of decision-making with respect to which Tribunal orders are made
 - the relationship of the supporter or representative to the person
 - the details of the people in respect of whom orders are made, and
 - the outcomes of reviews.
- 4.50 If established, the Office of the Public Advocate should keep data on its activities, including the numbers and details of mediation, training and advice services provided, and the number and type of investigations conducted.

Resourcing

- 4.51 We heard from key agencies about the cost of implementing our proposed reforms.⁶⁶ We agree that full implementation of our recommendations is likely to result in a net increase in the cost to NSW of providing an assisted decision-making scheme, especially for the first few years of operation.
- 4.52 However, the costs should decrease over time as more people take up the alternative assisted decision-making options proposed, rather than seeking representation orders from the Tribunal.
- 4.53 The areas likely to require significant additional resourcing, at least initially, include:
- the introduction of supported decision-making, and the Tribunal resources and community and professional education associated with this
 - the introduction of regular Tribunal reviews of representation orders where a representative has a financial function, and
 - the new advocacy and investigative functions, including establishing an Office of the Public Advocate.
- 4.54 The recommendations that offer potential cost savings include:

66. See, eg, NSW Civil and Administrative Tribunal, *Submission GA101A*, 3, 5, 9; NSW Trustee and Guardian, *Submission GA140*, 3, 8-9.

- The recommendation for a Public Advocate to provide additional mediation, education, training, advice and support at an early stage.⁶⁷ This should reduce the need for formal orders and reduce the Tribunal's caseload in the long term.
- The recommendation to introduce a discretion for the Tribunal not to order NSW Trustee supervision of all orders involving financial decision-making.⁶⁸ This should reduce the caseload of the NSW Trustee (although this saving will be offset to some degree by the loss of associated management fees).

67. Recommendation 13.1.

68. Recommendation 9.19.

5. Objects and principles

In brief

We recommend new statutory objects and general principles to underpin the new Act. They align with the United Nations *Convention on the Rights of Persons with Disabilities*, accord with contemporary understandings of decision-making ability, and seek to ensure that a person's will and preferences are given effect to wherever possible.

Statutory objects	41
New general principles.....	42
Additional general principles for Aboriginal people and Torres Strait Islanders	46
Will and preferences	48
The operation of the will and preferences model	51

- 5.1 The recommendations in this Chapter set out the objects and principles that underpin the new Assisted Decision-Making Act (“the new Act”). The statutory objects and the revised general principles that we recommend will align the new Act with the United Nations *Convention on the Rights of Persons with Disabilities* (“UN *Convention*”), and accord with contemporary understandings of decision-making ability and other changes in society since the passing of the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”).
- 5.2 Key changes include a move away from a focus on “disability” and objective “welfare and interests”, towards a requirement to give effect to a person’s will and preferences, wherever possible, and promote their personal and social wellbeing.

Statutory objects

5.1 Statutory objects

The new Act should include a statement of statutory objects that sets out that:

- (a) the Act is founded on the principle that people in need of decision-making assistance have the same human rights as all members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights, and (b) the objects of the Act are accordingly to:
- (i) implement the purposes and principles of the United Nations *Convention on the Rights of Persons with Disabilities*, and
 - (ii) promote the independence and personal and social wellbeing of people in need of decision-making assistance and provide safeguards in relation to the activities governed by the Act.

- 5.3 We recommend a new statutory objects clause that emphasises the rights of people in need of decision-making assistance and the importance of the purposes and principles of the UN *Convention*.

- 5.4 Statutory objects provide guidance to courts and others interpreting legislation, on what the government wants a law to achieve.¹ The *Guardianship Act* does not have a list of general objects to guide interpretation. However, it does have a specific objects clause in part 5 relating to medical and dental treatment.
- 5.5 Submissions initially made little comment when we asked about statutory objects. Those that did tend to favour objects in either the *Disability Inclusion Act 2014* (NSW) (“*Disability Inclusion Act*”)² or the Victorian *Guardianship and Administration Act 1986*.³ The emphasis of these submissions is on the recognition of human rights and the principles in the UN *Convention*. When we included the above statutory objects as part of our Draft Proposals, however, we received submissions expressly supporting their inclusion.⁴
- 5.6 In referring to “the same human rights as all members of the community”, we intend this to include such rights as the right to recognition as a person before the law and the right to equality before the law and equal protection of the law.⁵ An underlying object of the new Act is, therefore, to recognise the legal status of all people in need of decision-making assistance.
- 5.7 By expressly stating that an object of the Act is to implement the purposes and principles of the UN *Convention*, the new Act is flagging that the UN *Convention* is important. This is not only of significance generally, but also has implications when the Supreme Court is exercising its inherent jurisdiction. In a case involving the exercise of the Court’s inherent jurisdiction with respect to a child, the Court considered that, because a statute that overlaps with the Court’s jurisdiction refers to the need to protect the rights of children, the provisions of the United Nations *Convention on the Rights of the Child* could be relevant, although not necessarily conclusive.⁶

New general principles

5.2 General principles

The new Act should provide that it is the duty of everyone exercising functions under the Act to observe the following principles with respect to people in need of decision-making assistance:

- (a) Their will and preferences should be given effect wherever possible, in accordance with **Recommendation 5.4**.

-
1. See, eg, *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359; *Lynn v State of New South Wales* [2016] NSWCA 57, 91 NSWLR 636 [54].
 2. *Disability Inclusion Act 2014* (NSW) s 3.
 3. *Guardianship and Administration Act 1986* (Vic) s 4(2).
 4. Physical Disability Council of NSW, *Submission GA143*, 3; Cognitive Decline Partnership Centre, *Submission GA156*, 2; Law Society of NSW, *Submission GA164*, 7.
 5. UN General Assembly, *Universal Declaration of Human Rights*, GA Res 217A(III) (10 December 1948) art 6, art 7. See also *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 5.1.
 6. *Director-General, Department of Community Services; Re Thomas* [2009] NSWSC 217 [37].

- (b) They have an inherent right to respect for their worth and dignity as individuals.
- (c) Their personal and social wellbeing should be promoted.
- (d) They have the right to participate in and contribute to social and economic life.
- (e) They have the right to make decisions that affect their lives (including decisions involving risk) to the full extent of their ability to do so and to be assisted in making those decisions if they want or require assistance.
- (f) They have the right to respect for their age, sex, gender, sexual orientation, cultural and linguistic circumstances, and religious beliefs.
- (g) They should be supported to develop and enhance their skills and experience.
- (h) They have the right to privacy and confidentiality.
- (i) They have the right to live free from neglect, abuse and exploitation.
- (j) Their relationships with their families, carers and other significant people should be recognised.
- (k) Their existing informal supportive relationships should be recognised.
- (l) Their rights and autonomy should be restricted as little as possible.

- 5.8 The *Guardianship Act* currently contains a list of general principles.⁷ Recommendation 5.2 proposes a revised list of general principles to be observed by everyone exercising functions under the new Act. It brings the new Act into line with contemporary human rights and disability rights principles.
- 5.9 These principles are important because they set out, in a positive way, the approach that people should take when exercising functions under the new Act. This includes someone acting as a person's supporter, representative or "person responsible". It also includes the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal ("the Tribunal") when it is deciding whether to make an order.
- 5.10 We found widespread support for having a set of general principles and many submissions indicate how useful they are as a tool. However, few submissions expressly support the s 4 principles in their current, or similar, form.⁸ Other submissions identify the need to include consideration of the person's human rights,⁹ or the rights and principles in the UN *Convention*.¹⁰ There is general agreement that the existing principles need updating.¹¹

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

8. See, eg, Capacity Australia, *Submission GA23*, 15.

9. NSW Council for Intellectual Disability, *Submission GA7*, 6; Legal Aid NSW, *Submission GA18*, 13.

10. B Pace, *Submission GA8*, 1; *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) particularly art 5, art 14, art 15, art 17, art 18, art 19, art 22, art 23, art 29.

11. See, eg, Seniors Rights Service, *Submission GA90C*, 1; Legal Aid NSW, *Submission GA109C*, 3.

- 5.11 In order to modernise and expand the general principles, we have adapted a number of the principles in Recommendation 5.2 from the list of general principles in the *Disability Inclusion Act*. These were, in turn, developed with regard to the UN *Convention*. The purpose of the UN *Convention* is stated to be “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.¹²
- 5.12 We recommend that everyone exercising functions under the Act should observe the new general principles with respect to people who need decision-making assistance. The new general principles are as follows:
- (a) **Their will and preferences should be given effect wherever possible.** This replaces the current requirement that a person’s views should merely be taken into consideration.¹³ We expand upon how to give effect to a person’s will and preferences below.¹⁴
 - (b) **They have an inherent right to respect for their worth and dignity as individuals.** This is a new provision. It is consistent with a principle in the *Disability Inclusion Act* and a similar principle in the Queensland *Guardianship and Administration Act 2000*.¹⁵ The UN *Convention* also recognises the inherent dignity and worth of all people.¹⁶ Although some submissions consider that the existing general principles uphold people’s dignity and worth,¹⁷ many submissions support express statements that people performing functions under the Act should respect a person’s dignity.¹⁸
 - (c) **Their personal and social wellbeing should be promoted.** This in part replaces the current requirement that people give “paramount consideration” to the person’s “welfare and interests”.¹⁹ Personal and social well-being is discussed further in the context of determining a person’s will and preferences.²⁰
 - (d) **They have the right to participate in and contribute to social and economic life.** This is consistent with one of the general principles in the *Disability*

12. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 1.

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

14. Recommendation 5.4.

15. *Disability Inclusion Act 2014* (NSW) s 4(2); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 3.

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

17. See, eg, Law Society of NSW Young Lawyers Civil Litigation Committee, *Submission GA27*, 14-15.

18. Mental Health Coordinating Council, *Submission GA34*, 10; NSW Disability Network Forum, *Submission GA39*, 13; Mental Health Carers NSW Inc, *Submission GA44*, 18; Justice Health and Forensic Mental Health Network, *Submission GA50*, 10; J Quinlan, *Submission GA52*, 43; Legal Aid NSW, *Submission GA58*, 14; NSW Council for Intellectual Disability, *Submission GA59*, 4; NSW Department of Family and Community Services, *Submission GA77*, 9; NSW Trustee and Guardian, *Submission GA78*, 8; Mental Health Coordinating Council, *Submission GA87*, 3. See also B Pace, *Submission GA42*, 9; Royal Australian and New Zealand College of Psychiatrists NSW Branch, *Submission GA53*, 4.

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

20. Recommendation 5.4.

*Inclusion Act*²¹ and replaces the current requirement that people should be encouraged, as far as possible, to live a “normal life in the community”.²² We prefer this formulation because it refers to a person’s right to participate in and contribute to the community rather than being limited to activity consistent with a “normal” life.

- (e) **They have the right to make decisions that affect their lives (including decisions involving risk) to the full extent of their ability to do so and to be assisted in making those decisions if they want or require assistance.** This is consistent with one of the general principles in the *Disability Inclusion Act*.²³ This principle directs focus away from ideas of restriction (and by extension, disability) and towards the person making their own decision to the full extent of their ability to do so.
- (f) **They have the right to respect for their age, sex, gender, sexual orientation, cultural and linguistic circumstances, and religious beliefs.** This expands on the current requirement to recognise the importance of preserving cultural and linguistic environments.²⁴ It is consistent with provisions in the *Disability Inclusion Act*.²⁵ In our view, the current requirement is potentially too limiting for those who may live differently to their original cultural and linguistic environments. This formulation provides scope to recognise that people’s needs and circumstances will differ depending on factors such as age, sex, gender and sexual orientation.
- (g) **They should be supported to develop and enhance their skills and experience.** This replaces the current requirement to encourage, as far as possible, people to be self-reliant in matters relating to their personal, domestic and financial affairs.²⁶ It is consistent with one of the general principles in the *Disability Inclusion Act*.²⁷ This formulation aims to encourage actions that support a person’s growth and development, rather than encouraging a person to meet an ideal of self-reliance that may not be possible or desirable.
- (h) **They have the right to privacy and confidentiality.** A number of submissions support recognising the right to privacy and confidentiality. This is consistent with a provision in the *Disability Inclusion Act*.²⁸ The guardianship legislation in Queensland similarly includes a general principle recognising the right to confidentiality of information.²⁹
- (i) **They have the right to live free from neglect, abuse and exploitation.** This replaces the current requirement that people should be protected from neglect, abuse and exploitation.³⁰ It is consistent with a principle in the *Disability*

21. *Disability Inclusion Act 2014* (NSW) s 4(3).

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

23. *Disability Inclusion Act 2014* (NSW) s 4(5).

24. *Guardianship Act 1987* (NSW) s 4(e). See also s 14(2)(c).

25. *Disability Inclusion Act 2014* (NSW) s 4(6).

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

27. *Disability Inclusion Act 2014* (NSW) s 4(3).

28. *Disability Inclusion Act 2014* (NSW) s 4(7).

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

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

Inclusion Act.³¹ This formulation is preferred because it does not cast people in need of decision-making assistance as passive recipients of protection from others.

- (j) **Their relationships with their families, carers and other significant people should be recognised.** This expands on the current requirement to recognise the importance of preserving a person's family relationships.³² It recognises that some people have family-like relationships by choice or by circumstance that are as important as traditional family relationships. This formulation is consistent with a principle in the *Disability Inclusion Act*.³³
- (k) **Their existing informal supportive relationships should be recognised.** This new provision is broadly consistent with principles existing or proposed elsewhere that require consideration be given to the adequacy of existing informal arrangements and the desirability of not disturbing them; for example, the Australian Law Reform Commission's ("ALRC") proposed support guidelines.³⁴
- (l) **Their rights and autonomy should be restricted as little as possible.** This expands the principle that a person's freedom of decision and freedom of action should be restricted as little as possible.³⁵ Several submissions expressly advocate for a principle of least restriction.³⁶

5.13 We have not recommended that the new Act contain a principle that the Tribunal must, when deciding whether to make an order, have regard to the views of a person's spouse or carer.³⁷ Such a provision would be inconsistent with the general principle that a person's will and preferences should be given effect to wherever possible. A person's family, carers and other significant people should have a role in helping to determine the person's likely will and preferences in cases where their will and preferences are not expressed.

31. *Disability Inclusion Act 2014* (NSW) s 4(8).

32. *Guardianship Act 1987* (NSW) s 4(e). See also s 14(2)(b).

33. *Disability Inclusion Act 2014* (NSW) s 4(11).

34. *Guardianship and Administration Act 1993* (SA) s 5(c). See also Guardianship and Administration Bill 2018 (Vic) cl 31(d); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-2(1)(c) [3.34], [4.50]-[4.54].

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

36. Intellectual Disability Rights Service, *Submission GA16*, 5; Legal Aid NSW, *Submission GA18*, 13-14; NSW Council for Intellectual Disability, *Submission GA7*, 6; NSW Trustee and Guardian, *Submission GA28*, 9.

37. *Guardianship Act 1987* (NSW) s 14(2)(a).

Additional general principles for Aboriginal people and Torres Strait Islanders

5.3 Additional general principles for Aboriginal people and Torres Strait Islanders

The new Act should provide that everyone exercising functions under this Act with respect to a person in need of decision-making assistance who is an Aboriginal person or Torres Strait Islander must:

- (a) to the extent that it is practicable and appropriate to do so, act in accordance with that person's customary law, culture, values and beliefs
- (b) recognise that Aboriginal people and Torres Strait Islanders have a right to respect and acknowledgment as the first peoples of Australia and for their unique history, culture and kinship relationships and connection to their traditional land and waters
- (c) recognise that many Aboriginal people and Torres Strait Islanders may face multiple disadvantages
- (d) address that disadvantage and the needs of Aboriginal people and Torres Strait Islanders, and
- (e) work in partnership with Aboriginal people and Torres Strait Islanders in need of decision-making assistance to enhance their lives.

- 5.14 Recommendation 5.3 sets out additional principles that should apply when the person in need of decision-making assistance is an Aboriginal person or Torres Strait Islander. This recommendation aims to ensure that people exercising functions under the new Act specifically consider the circumstances of Aboriginal people and Torres Strait Islanders.
- 5.15 There are no provisions in either the *Civil and Administrative Tribunal Act 2013* (NSW) or the *Guardianship Act* that relate specifically to the cultural needs of Aboriginal people and Torres Strait Islanders.
- 5.16 There are strong reasons for having further principles that deal with the needs of Indigenous communities in addition to the principles that apply to other cultural communities to whom the principles outlined in Recommendation 5.2(f) would be relevant. These reasons are based on Australia's history of colonisation and dispossession and the systemic disadvantage Aboriginal people and Torres Strait Islanders experience. As we discuss in Chapter 4, there is some evidence of overrepresentation of Aboriginal people and Torres Strait Islanders in guardianship systems around Australia.³⁸
- 5.17 Recommendation 5.3(a) is consistent with provisions in Western Australia and Queensland.³⁹ The Mental Health Commission of NSW supports a provision of this

38. [4.35]-[4.37].

39. *Mental Health Act 2014* (WA) s 50; *Guardianship and Administration Act 2000* (Qld) sch 1 cl 9(2).

nature.⁴⁰ We have included specific mention of customary law so that any applicable customary law can be considered where relevant.

- 5.18 Recommendation 5.3(b)-(e) is consistent with a provision in the *Disability Inclusion Act*.⁴¹ There is strong support in submissions for including this provision in the general principles.⁴²

Will and preferences

5.4 Determining a person's will and preferences

The new Act should state that anyone exercising functions under it should approach the task of giving effect to a person's will and preferences wherever possible, as follows:

- (a) First, to be guided by the person's expressed will and preferences (including a valid advance care directive) wherever possible.
- (b) If these cannot be determined, to be guided by the person's likely will and preferences. These may be determined by the person's previously expressed will and preferences, and by consulting people who have a genuine and ongoing relationship with the person and who may be or have been aware of the person's will and preferences.
- (c) If these too cannot be determined, to make decisions that promote the person's personal and social wellbeing.
- (d) If giving effect to a person's will and preferences creates an unacceptable risk to the person (including the risk of criminal or civil liability), to make decisions that promote the person's personal and social wellbeing.
- (e) Regardless, a person's decision to refuse healthcare in a valid advance care directive must be respected if that refusal is clear and extends to the situation at hand.

- 5.19 Recommendation 5.4 guides people to determine a person's will and preferences when applying the first of the general principles.

- 5.20 Our recommended approach is a structured will and preferences model, consistent with those models contained in *My Health Records Act 2012* (Cth)⁴³ and the ALRC's recommendations.⁴⁴ In broad outline, our model:

- requires decision-makers to give effect to a person's will and preferences

40. Mental Health Commission of NSW, *Submission GA116C*, 4-5.

41. *Disability Inclusion Act 2014* (NSW) s 5(2).

42. See, eg, Seniors Rights Service, *Submission GA90C*, 2; NSW Department of Family and Community Services, *Submission GA125*, 26-27; NSW Disability Network Forum, *Submission GA128*, 5-6.

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

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

- explains how to determine a person’s likely will and preferences if a person’s actual will and preferences cannot be determined
 - requires decision-makers to promote a person’s personal and social wellbeing if their likely will and preferences cannot be determined, and
 - allows a decision-maker to override a person’s will and preferences in circumstances where there is an unacceptable risk to the person.
- 5.21 This step-by-step approach will help to address some of the difficulties associated with determining, and giving effect to, a person’s will and preferences.
- 5.22 Currently, those exercising functions under the *Guardianship Act*, including the Tribunal, must give paramount consideration to a person’s “welfare and interests”.⁴⁵ While they are required to consider a person’s views, they are not required to give effect to those views.⁴⁶
- 5.23 One approach to modernising the existing provisions would be simply to update the language of the *Guardianship Act*. However, in our view, a more fundamental change is required to comply with the UN *Convention*. At the very least, the UN *Convention* signals that the way guardians and financial managers exercise their functions needs to change. Among other things, the UN *Convention* emphasises that the “rights, will and preferences” of people with disability must be respected.⁴⁷ The United Nations Committee on the Rights of Persons with Disabilities (“UN *Convention* Committee”) has called on governments to implement laws and policies to assist people to exercise their will and preferences.⁴⁸
- 5.24 This suggests that decision-makers should not make decisions based on their understanding of the person’s best interests.⁴⁹ Instead, decision-makers should respect the person’s rights, and give effect to their will and preferences.
- 5.25 We are recommending a model that requires decision-makers to give effect to the person’s will and preferences wherever possible. Decision-makers should know how to determine a person’s will and preferences as well as what to do if they cannot determine the person’s will and preferences or if giving effect to these views would risk unacceptable harm. This gives effect to the general principle that people have the right to live free from neglect, abuse and exploitation.⁵⁰ We have expressly included the risk of criminal or civil liability within the definition of unacceptable risk. This is to ensure that a person who needs decision-making assistance is not exposed to criminal or civil sanctions and, incidentally, others are protected from the possibility of harm, arising from a person’s will and preferences being implemented.
- 5.26 In cases of an unacceptable risk of harm, people should act in accordance with a fall back standard — that the decision promotes the person’s personal and social

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

46. *Guardianship Act 1987* (NSW) s 4(d), s 14(2)(a)(i).

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

48. 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].

49. 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].

50. Recommendation 5.2(i).

wellbeing. We have adopted this standard as a conscious move away from the “welfare and interests” approach to a more person-centred approach. One submission observes:

Some financial managers interpret their duty to act in the person’s best interests to mean that their overriding purpose was to preserve the person’s assets. Thus, we have examples where they denied permission for discretionary spending on things that the person wanted but didn’t need, such as cosmetics, outings and holidays. Many were well-meaning and conscientious and just didn’t understand that their obligation was broader than merely conserving the person’s money.⁵¹

- 5.27 Using a “personal and social wellbeing” standard should emphasise to decision-makers that money is to be used for the person’s overall welfare, including spending on items that make the person’s life more enjoyable.⁵² Ultimately, the question of what is meant by “personal and social wellbeing” will depend on each individual’s circumstances.
- 5.28 This recommendation is a departure from the current “welfare and interests” test, which is widely seen as a version of the “best interests” standard. A significant concern is that the current standard takes attention away from the person’s wishes. Legal Aid NSW describes the term “welfare and interests” as being “somewhat out-dated” and “reminiscent of the welfare-based approach to disability”.⁵³ The NSW Council for Intellectual Disability submits that the standard “carries a paternalistic flavour in view of the history of its use in many spheres”.⁵⁴ The Intellectual Disability Rights Service observes that the emphasis on welfare and interests disadvantages people because “decisions are not being made in accordance with a person’s will and preferences wherever reasonably possible”.⁵⁵ Similarly, the Law Society of NSW submits that the standard encourages a protective view that relies on one person’s judgement of another’s objective interests, rather than what the person might like for themselves.⁵⁶
- 5.29 Numerous submissions support replacing the welfare and interests standard with a framework that emphasises the importance of respecting a person’s will and preferences.⁵⁷ We see this as a way to clearly signal a new approach to decision-making.
- 5.30 Some submissions say that a key benefit of this change would be to promote the person’s autonomy.⁵⁸ According to the NSW Council for Intellectual Disability, the change would ensure “maximum focus on the autonomy of the individual, which

51. Seniors Rights Service, *Submission GA158*, 6.

52. Seniors Rights Service, *Submission GA158*, 6.

53. Legal Aid NSW, *Submission GA58*, 12.

54. NSW Council for Intellectual Disability, *Submission GA59*, 3.

55. Intellectual Disability Rights Service, *Submission GA71*, 11.

56. Law Society of NSW, *Submission GA75*, 8.

57. See, eg, L Barry, *Preliminary Submission PGA02*, 1-2; NSW Disability Network Forum, *Preliminary Submission PGA05*, 2-3; NSW Trustee and Guardian, *Preliminary Submission PGA50*, 2; NSW Public Guardian, *Submission GA72*, 6; The NSW Council of Social Service, *Submission GA46*, 2; The Disability Council NSW, *Submission GA47*, 11; Legal Aid NSW, *Submission GA58*, 12-13; NSW Council for Intellectual Disability, *Submission GA59*, 4; Seniors Rights Service, *Submission GA62*, 7.

58. See, eg, NSW Council for Intellectual Disability, *Submission GA59*, 4; Intellectual Disability Rights Service, *Submission GA71*, 11.

historically has received inadequate focus under the welfare and interests approach”.⁵⁹ According to Legal Aid NSW, “foregrounding the wishes of the person in the decision-making model would require guardians to do more to engage with their clients”.⁶⁰ This would give people “back their human right to be heard”.⁶¹

- 5.31 The UN *Convention* Committee has noted that it may not always be possible to determine a person’s will and preferences even “after significant efforts have been made”.⁶² The Committee considered that the “best interpretation” of the person’s will and preferences should be used in this situation.⁶³ Our recommendation seeks to achieve the “best interpretation” of a person’s will and preferences by resorting to a person’s “likely will and preferences”, determined by reference to previous expressions of will and preferences.

The operation of the will and preferences model

- 5.32 Our recommended will and preferences model will operate in a myriad of different circumstances; for example, where a person lacks the relevant decision-making ability and their representative is considering whether they need to leave their current home and enter a care facility.
- 5.33 Under our model, if the person says they want to remain in their home, the representative would give effect to the person’s wish unless doing so would lead to an unacceptable risk to the person. An unacceptable risk might arise, for example, if the person has insufficient resources to pay for the required care in their current home. In that case, the representative would have to identify options for accommodation that best promote the person’s personal and social wellbeing. One option could be to sell the existing home, buy a smaller home and pay for in-home care. Another option could be to sell or rent the home to pay for residence in an appropriate care facility. The representative would seek to determine the person’s will and preference about each of these options, and find out, for example, which care facility they would like. In many cases the options will be constrained (sometimes significantly constrained) by the person’s available resources.
- 5.34 In cases where the person cannot express a view about their future care and residence, the representative would seek evidence of past expressions of the person’s will and preferences. This might include written instructions or information from other people, such as close family members or friends or the person’s accountant or business advisor. If the representative cannot identify the person’s will and preferences, either directly, or through other evidence, the representative would make a decision that promotes the person’s personal and social wellbeing.
- 5.35 Not all decisions will be as significant as deciding that a person should move out of their current home into care. Many decisions can be made relatively easily by seeking a person’s will and preferences when they can express it. For example, a person who lacks the decision-making ability to manage their own finances may

59. NSW Council for Intellectual Disability, *Submission GA59*, 4.

60. Legal Aid NSW, *Submission GA58*, 14.

61. NSW Trustee and Guardian, *Submission GA79*, 10.

62. 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].

63. 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].

want to bet on sporting events. A representative could accommodate this wish unless it would lead to an unacceptable risk to the person, for example, depleting their resources so that they could no longer pay for food or accommodation.

- 5.36 A shift to implementing a person's will and preferences may well be challenging for those who are accustomed to making decisions based on a person's "welfare and interests". One submission observes:

Implementing this new approach will not be without challenges; it requires a significant shift in cultural attitudes and traditional ways of thinking about supported and substitute decision-making after years of best interest principles underpinning guardianship frameworks.⁶⁴

- 5.37 Those who have to exercise functions under the new Act, such as representatives, will need support and training in applying the will and preferences model. For example, some guidance will be required to explain "personal and social wellbeing".⁶⁵ Specialist information may be required for different decision-making contexts such as in the area of healthcare.

- 5.38 The Tribunal, NSW Trustee and Guardian, and NSW Public Guardian will need to adapt their practice and procedure and train staff in applying the new test.⁶⁶ Fortunately, these concepts are already familiar to those working in the field of assisted decision-making. For example, the NSW Public Guardian currently leads a supported decision-making training project and therefore has expertise to build upon. However, it is likely additional resourcing to these key agencies will be required to expand upon existing knowledge, and develop resources to support staff.

64. Dementia Australia, *Submission GA141*, 5.

65. Medical Insurance Group Australia, *Submission GA153*, 2; NSW Trustee and Guardian, *Submission GA140*, 3; Dementia Australia, *Submission GA141*, 5.

66. NSW Trustee and Guardian, *Submission GA140*, 3.

6. Decision-making ability

In brief

This Chapter defines “decision-making ability”, a concept central to the new Act; recommends a statutory presumption of decision-making ability; and describes the principles that should guide an assessment of a person’s decision-making ability.

Current law.....	54
Defining decision-making ability.....	56
Statutory presumption of decision-making ability.....	57
Determining decision-making ability.....	58
Circumstances of an assessment.....	59
Relevant considerations to determining decision-making ability.....	60
What should not lead to a finding of a lack of decision-making ability.....	62
Determining decision-making ability of Aboriginal people and Torres Strait Islanders.....	64

- 6.1 The concept of “decision-making ability” is a key element of our recommendations. Many of the arrangements in the new Assisted Decision-Making Act (“the new Act”) turn upon the question of whether a person has decision-making ability for a relevant decision. For example, a person can only make a personal support agreement or enduring representation agreement if they have the decision-making ability to do so.¹ The Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal (“Tribunal”) may make a representation order only when a person does not have decision-making ability for a decision.² A person responsible may make a healthcare decision only when a person does not have decision-making ability for that decision.³
- 6.2 We are using the expression “decision-making ability” to refer to what is commonly called “decision-making capacity” or “mental capacity”, because these terms can be too easily confused with the concept of legal capacity. Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*⁴ (“UN Convention”) requires governments to ensure that people with disability “enjoy legal capacity on an equal basis with others in all aspects of life”. The United Nations Committee on the Rights of Persons with Disabilities (“UN Convention Committee”) has commented that under article 12 of the UN *Convention*, “perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity”.⁵

-
1. Recommendation 7.1, 8.2.
 2. Recommendation 9.3.
 3. See Chapter 10.
 4. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(2).
 5. United Nations, Committee on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, General Comment No 1, CRPD/C/GC/1 (2014) [13].

Current law

- 6.3 There is no clear or consistent definition of decision-making ability (referred to as “capacity”) in the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”). This is despite the fact that a finding that a person lacks decision-making ability can have serious consequences for their autonomy.
- 6.4 Before making a guardianship order or a financial management order, the Tribunal must find that the person is “incapable of managing his or her own person or his or her own affairs”.⁶ For a guardianship order, the incapacity may be total or partial.⁷ However, unlike the laws in other jurisdictions, the *Guardianship Act* does not explain the concept of capacity any further than this.
- 6.5 The Supreme Court has provided some guidance in determining whether a person is capable of managing their own affairs:
- [A] person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:
- (a) that he or she appears incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and
- (b) that, by reason of that lack of competence there is shown to be a real risk that either
- (i) he or she may be disadvantaged in the conduct of such affairs; or
- (ii) that such moneys or property which he or she may possess may be dissipated or lost. ...
- [I]t is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner.⁸
- 6.6 The Supreme Court has also said:
- [I]t is not a question of whether ... somebody else could manage the affairs of the applicant better, or that if the applicant was left on her own the likelihood would be that her funds would soon be dissipated. One cannot be too paternalistic. People have the right to manage their affairs, unless they fall below the level that is prescribed by the Act.⁹
- 6.7 Critics of this guidance say that it does not recognise that there can be variations in capacity. They suggest that it takes an “all or nothing” approach to capacity, which includes people who may only be in need of decision-making assistance.¹⁰

6. *Guardianship Act 1987* (NSW) s 3(1) definition of “person in need of a guardian”, s 25G(a).

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

8. *PY v RJS* [1982] 2 NSWLR 700, 702.

9. *Re C (TH) and the Protected Estates Act* [1999] NSWSC 456 [10].

10. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [4.15]-[4.18].

- 6.8 Additionally, the *Guardianship Act* does not explain how to assess a person's decision-making ability. The NSW Department of Justice's Capacity Toolkit ("the Capacity Toolkit") contains some guidance on decision-making ability. The Capacity Toolkit advises that a person has decision-making ability if he or she can:
- understand the facts involved
 - understand the main choices
 - weigh up the consequences of the choices
 - understand how the consequences affect them
 - communicate their decision.¹¹
- 6.9 The Capacity Toolkit also explains a number of important points, including, for example, that ability:
- is decision-specific, except in some rare cases, for example, where a person is unconscious or has a severe cognitive disability
 - is not the same all the time for a variety of reasons, and
 - can be regained or increased.¹²
- 6.10 It also sets out the following assessment principles:
1. Always presume a person has capacity
 2. Capacity is decision specific
 3. Don't assume a person lacks capacity based on appearances
 4. Assess the person's decision-making ability — not the decision they make
 5. Respect a person's privacy
 6. Substitute decision-making is a last resort.¹³
- 6.11 In addition, the Capacity Toolkit contains advice on how to carry out an assessment of decision-making ability¹⁴ in specific areas of life, including personal life, health, and money and property. It describes the legal tests for enduring guardianship, advance directives, medical and dental treatment, powers of attorney, entering a contract and making a will.¹⁵ Finally, it provides advice on how to assist or support someone to make a decision.¹⁶

11. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 18. Compare *Mental Capacity Act 2005* (UK) s 3(1).

12. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 19-23.

13. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 27-49.

14. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 61-70.

15. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 72-144.

16. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 147-163.

Defining decision-making ability

6.1 Definition of decision-making ability

The new Act should provide that a person has decision-making ability for a particular decision if they can, when the decision needs to be made:

- (a) understand the relevant information
- (b) understand the nature of the decision and the consequences of making or failing to make that decision
- (c) retain the information to the extent necessary to make the decision
- (d) use the information or weigh it as part of the decision-making process, and
- (e) communicate the decision in some way.

- 6.12 We recommend a new definition of decision-making ability that is consistent with similar provisions in the *Mental Capacity Act 2005* (UK), the Capacity Toolkit, and recommendations of the Victorian Law Reform Commission (“VLRC”).¹⁷ This fills a gap in the *Guardianship Act*.
- 6.13 Most submissions agree that the *Guardianship Act* should provide further detail to explain what is meant by decision-making ability. Many support criteria for decision-making ability that are similar to those contained in our recommendation.¹⁸
- 6.14 The definition of decision-making ability is relevant to all circumstances covered by the new Act. This includes the entry into, and continued operation of, personal support agreements and enduring representation agreements, the making and continued operation of support orders and representation orders, and making decisions about healthcare. There are various expressions in existing laws that deal with questions of decision-making ability, including, for example, “incommunicate” under the *Powers of Attorney Act 2003* (NSW),¹⁹ and a person who “is totally or partially incapable of managing his or her person” for guardianship under the *Guardianship Act*.²⁰ Only a small number of submissions oppose having a definition of decision-making ability that applies consistently to all circumstances under the new Act.²¹

17. *Mental Capacity Act 2005* (UK) s 3; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 24-25.

18. Mental Health Coordinating Council, *Submission GA1*, 1-2; Seniors Rights Service, *Submission GA4*, 1; Aged and Community Services NSW and ACT, *Submission GA5*, 2; NSW Disability Network Forum, *Submission GA6*, 2-3; NSW Council for Intellectual Disability, *Submission GA7*, 2-3; Combined Pensioners and Superannuants Association of NSW Inc, *Submission GA9*, 3-4; Alzheimer’s Australia NSW, *Submission GA11*, 1-2; Intellectual Disability Rights Service, *Submission GA16*, 2; Physical Disability Council of NSW, *Submission GA17*, 3; Legal Aid NSW, *Submission GA18*, 3; Synapse, *Submission GA21*, 1-2; Law Society of NSW Young Lawyers Civil Litigation Committee, *Submission GA27*, 2-3; NSW Trustee and Guardian, *Submission GA28*, 1-2; Law Society of NSW, *Submission GA29*, 2.

19. *Powers of Attorney Act 2003* (NSW) s 4.

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

21. Seniors Right Service, *Submission GA4*, 2; Capacity Australia, *Submission GA23*, 15; Law Society of NSW, *Submission GA29*, 5; Mid North Coast Community Legal Centre, *Submission GA30*, 6.

- 6.15 The recommendation is framed in terms of ability, rather than disability. This is part of a move away from the language of disability and other discriminatory aspects of the *Guardianship Act*.
- 6.16 By specifically referring to decision-making ability “for a particular decision”, our recommended definition acknowledges the reality that a person’s decision-making ability can vary depending on the circumstances. This reflects several submissions that acknowledge that decision-making ability can vary over time and depend on the decision required.²²
- 6.17 In practice, we envisage that a person might have two or more different assisted decision-making arrangements in place at any one time; for example, both a support agreement and an enduring representation agreement. The person’s decision-making ability for the decision at hand will determine which one applies.
- 6.18 Submissions also call for clear guidelines that illustrate the different contexts in which the question of decision-making ability will arise.²³ The Capacity Toolkit currently contains case studies that usefully illustrate the issues raised when a person’s decision-making ability is in question.²⁴ Likewise, in England and Wales, the *Mental Capacity Act 2005 Code of Practice* sets out scenarios that illustrate issues arising under the *Mental Capacity Act 2005* (UK).²⁵ We encourage the development of similar materials to illustrate the operation of the new Act.

Statutory presumption of decision-making ability

6.2 Presumption of decision-making ability

The new Act should include a rebuttable presumption that a person has decision-making ability.

- 6.19 We recommend an express statutory presumption of decision-making ability. This is consistent with a number of laws elsewhere that expressly provide that a person is presumed to have decision-making ability unless proved otherwise.²⁶
- 6.20 The starting point for assessing whether a person has decision-making ability is to presume that they have decision-making ability. While the presumption of decision-

22. NSW Disability Network Forum, *Submission GA6*, 2-3; NSW Council for Intellectual Disability, *Submission GA7*, 2-3; B Pace, *Submission GA8*, 2; Carers NSW, *Submission GA12*, 3-4; Capacity Australia, *Submission GA23*, 6-7; NSW Trustee and Guardian, *Submission GA28*, 1-2; Family and Community Services, *Submission GA167*, 3.

23. Royal Australasian College of Physicians, *Submission GA2*, 2; See also Law Society of NSW, *Submission GA29*, 4.

24. See, eg, NSW Attorney General’s Department, *Capacity Toolkit* (2009) 20, 22-23, 24, 31, 33.

25. See, eg, UK, Department for Constitutional Affairs, *Mental Capacity Act 2005: Code of Practice* (2007) 21, 23, 24, 25, 26, 28.

26. *Guardianship and Administration Act 1990* (WA) s 4(3); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1; *Mental Capacity Act 2005* (UK) s 1(2); *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 2(a); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(2).

making ability exists at common law²⁷ and is included in the Capacity Toolkit,²⁸ there is no statutory presumption in NSW.

6.21 Submissions generally support the introduction of a statutory presumption of decision-making ability (or capacity)²⁹ on the basis that an express provision will:

- help ensure that the regime aligns with article 12 of the UN *Convention* and facilitate a human rights approach to decision-making³⁰
- perform an educative function³¹
- provide an additional safeguard against inappropriate application of the law,³² and
- assist people with particular types of mental illness and physical disability who are commonly presumed to lack decision-making ability.³³

Determining decision-making ability

6.3 Determining decision-making ability

The new Act should provide that:

- (1) Anyone who must determine whether a person lacks decision-making ability for the purposes of the new Act must be satisfied that the person is or has been assessed at a time and in an environment in which their decision-making ability can be assessed most accurately.
- (2) Anyone determining whether a person lacks decision-making ability should consider that:
 - (a) decision-making ability is specific to the decision being made

27. *Borthwick v Carruthers* (1787) 1 Term Reports 648; 99 ER 1300; *Re Cumming* (1852) 1 De G M & G 537, 42 ER 660, 668; *Erdogan v Ekici* [2012] VSC 256, 36 VR 579 [49].

28. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 27-31.

29. Royal Australasian College of Physicians, *Submission GA2*, 2; Justice Health and Forensic Mental Health Network, *Submission GA3*, 1; Seniors Right Service, *Submission GA4*, 3; Aged and Community Services NSW and ACT, *Submission GA5*, 4; Mental Health Carers NSW Inc, *Submission GA10*, 5; Alzheimer's Australia NSW, *Submission GA11*, 3; Schizophrenia Fellowship of NSW, *Submission GA15*, 7; Intellectual Disability Rights Service, *Submission GA16*, 3; Legal Aid NSW, *Submission GA18*, 6; Synapse, *Submission GA21*, 3; Royal Australian and New Zealand College of Psychiatrists, *Submission GA24*, 3; Medical Insurance Group Australia, *Submission GA26*, 3; NSW Trustee and Guardian, *Submission GA28*, 4-5; Law Society of NSW, *Submission GA29*, 5.

30. NSW Disability Network Forum, *Submission GA6*, 6; Physical Disability Council of NSW, *Submission GA17*, 4; Mental Health Commission of NSW, *Submission GA25*, 4.

31. NSW Disability Network Forum, *Submission GA6*, 6; NSW Council for Intellectual Disability, *Submission GA7*, 4.

32. Mental Health Commission of NSW, *Submission GA25*, 6; Law Society of NSW Young Lawyers Civil Litigation Committee, *Submission GA27*, 7-8.

33. Capacity Australia, *Submission GA23*, 18. See also Mid North Coast Community Legal Centre, *Submission GA30*, 6-7.

- (b) inability to make a decision may be temporary or permanent and may fluctuate over time
 - (c) decision-making ability may be different at different times
 - (d) a person may develop, gain or regain decision-making ability, and
 - (e) a person has decision-making ability for a matter if it is possible for the person to make the decision with practicable and appropriate support.
- (3) Anyone making a determination cannot conclude that a person does not have decision-making ability only because of one or more of the following:
- (a) the person's age
 - (b) the person's appearance
 - (c) an aspect of the person's behaviour (or manner)
 - (d) the person's political, religious, or philosophical beliefs
 - (e) the fact that people may disagree with the person's decisions (on any grounds, including moral, political or religious) or think the person's decisions are unwise
 - (f) the fact that the person has a physical or mental condition
 - (g) the fact that a person is a forensic patient, or may become a forensic patient
 - (h) the person's methods of communication
 - (i) the person's sex, gender, sexual preference or sexual conduct
 - (j) the person's cultural and linguistic circumstances, or
 - (k) the person's history of drug or alcohol use.

6.22 These recommended provisions guide anyone who bears the onus of deciding whether a person lacks the relevant decision-making ability for the decision at hand. This would include the Tribunal, any representative, supporter, person responsible, or any witness to an agreement. We do not intend to place an obligation on, or otherwise affect, for example, medical professionals who report on matters relevant to the determination of a person's decision-making ability.

Circumstances of an assessment

6.23 Recommendation 6.3(1) seeks to ensure an accurate assessment of a person's decision-making ability. This is consistent with submissions³⁴ and with a principle recommended by the VLRC.³⁵

6.24 The VLRC noted that the time of day and environment may affect the assessment of a person's decision-making ability. For example, a person may demonstrate

34. Seniors Right Service, *Submission GA4*, 2; NSW Disability Network Forum, *Submission GA6*, 5; Alzheimer's Australia NSW, *Submission GA11*, 2; Schizophrenia Fellowship of NSW, *Submission GA15*, 5-6; Legal Aid NSW, *Submission GA18*, 5; Royal Australian and New Zealand College of Psychiatrists, *Submission GA24*, 2-3; NSW Trustee and Guardian, *Submission GA28*, 3; Law Society of NSW, *Submission GA29*, 4-5.

35. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 27(f).

better decision-making ability in their home environment rather than a hospital, and in the morning rather than the afternoon.³⁶

Relevant considerations to determining decision-making ability

- 6.25 Recommendation 6.3(2) sets out considerations that are relevant to determining a person's decision-making ability. It recognises that people can have changing abilities and strengths (as they grow and age) but also recognises the possibility of fluctuating and changing abilities that are not necessarily related to the progress of time. This should bring the law, which has been criticised for being inflexible and limited,³⁷ in line with the widely held view that a person's decision-making ability can change and fluctuate over time and can differ depending on the subject matter.
- 6.26 For example, the UN *Convention* Committee has observed:
- Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.³⁸
- 6.27 Recent reviews of guardianship laws have acknowledged that a person's decision-making ability can vary depending on the circumstances. For example:
- The NSW Legislative Council Standing Committee on Social Issues recommended acknowledging “the fact that a person's decision-making capacity varies from domain to domain and from time to time”.³⁹
 - The VLRC noted the need to “accommodate different levels of cognitive ability and decision-making needs” through flexibility in the law and an “individualised approach to assessment”.⁴⁰
 - The Queensland Law Reform Commission acknowledged that any consideration of capacity should take into account that impaired capacity may be partial, temporary or fluctuating.⁴¹
- 6.28 Submissions also generally agree that it is important for the law to acknowledge that decision-making ability can vary over time and depend upon the subject matter of the decision.⁴²

36. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [7.160].

37. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [4.15]-[4.17].

38. United Nations, Committee on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, General Comment No 1, CRPD/C/GC/1 (2014) [13].

39. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 1.

40. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [7.4], [7.6].

41. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [7.60].

42. Mental Health Coordinating Council, *Submission GA1*, 2-3; Royal Australasian College of Physicians, *Submission GA2*, 2; Seniors Right Service, *Submission GA4*, 2; Aged and Community Services NSW and ACT, *Submission GA5*, 3; NSW Disability Network Forum, *Submission GA6*, 4; Carers NSW, *Submission GA12*, 3-4; Schizophrenia Fellowship of NSW, *Submission GA15*, 5; Intellectual Disability Rights Service, *Submission GA16*, 2-3; Legal Aid NSW, *Submission GA18*, 5; Synapse, *Submission GA21*, 2; Royal Australian and New Zealand

- 6.29 The considerations we recommend are based on similar considerations proposed by the VLRC and the Australian Law Reform Commission (“ALRC”).⁴³
- 6.30 Recommendation 6.3(2)(e) deals with the important question of how the Tribunal and others should account for the support and assistance that a person could access to help them make a decision. Submissions generally agree that support and assistance should be a relevant consideration.⁴⁴ People With Disability Australia submit that the assessment should not be of decision-making ability itself but rather “the quality and appropriateness of support available”.⁴⁵
- 6.31 The VLRC recommended, as one of its capacity assessment principles, that someone “should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support”.⁴⁶ Similarly, the ALRC recommended that “a person’s decision-making ability must be considered in the context of available supports”.⁴⁷
- 6.32 Our recommendation draws upon both of these approaches. However, we have avoided using the term “available” because of concerns raised about the impact on people in under resourced communities.⁴⁸ For example, such a formulation might leave a person without a Tribunal order or the necessary support if a support is technically available but practically unattainable because it is too expensive.
- 6.33 Our recommendation does not place an obligation on any person or entity to provide the required support. People With Disability Australia submits that in order to comply with the UN *Convention*, the State must ensure appropriate and quality supports are available to everyone.⁴⁹ However, we recognise that the State’s resources are limited, and that a specific obligation to provide unlimited support in each individual case would be overly burdensome. Instead, we have included in our suite of recommendations potential avenues of support: recognition of informal support relationships,⁵⁰ a formal system of supporters,⁵¹ and a new Office of the

College of Psychiatrists, *Submission GA24*, 2; Mental Health Commission of NSW, *Submission GA25*, 6-7; Medical Insurance Group Australia, *Submission GA26*, 2; NSW Trustee and Guardian, *Submission GA28*, 3; Law Society of NSW, *Submission GA29*, 4-5.

43. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 27; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-2(2).
44. Mental Health Coordinating Council, *Submission GA1*, 5; Royal Australasian College of Physicians, *Submission GA2*, 2; Justice Health and Forensic Mental Health Network, *Submission GA3*, 1; Seniors Right Service, *Submission GA4*, 3; Aged and Community Services NSW and ACT, *Submission GA5*, 4; NSW Disability Network Forum, *Submission GA6*, 7-8; NSW Council for Intellectual Disability, *Submission GA7*, 4-5; Alzheimer’s Australia NSW, *Submission GA11*, 4; Carers NSW, *Submission GA12*, 4; Schizophrenia Fellowship of NSW, *Submission GA15*, 8; Intellectual Disability Rights Service, *Submission GA16*, 3-4; Physical Disability Council of NSW, *Submission GA17*, 5; Legal Aid NSW, *Submission GA18*, 7; People with Disability Australia Inc, *Submission GA20*, 8-9; Synapse, *Submission GA21*, 3; Capacity Australia, *Submission GA23*, 20-21; Mental Health Commission of NSW, *Submission GA25*, 7; Law Society of NSW Young Lawyers Civil Litigation Committee, *Submission GA27*, 9-10; Law Society of NSW, *Submission GA29*, 6; NSW Family and Community Services, *Submission GA31*, 11-12.
45. People with Disability Australia Inc, *Submission GA154*, 4.
46. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 27(e).
47. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-2(2)(c).
48. Mental Health Carers NSW Inc, *Submission GA10*, 6.
49. People with Disability Australia Inc, *Submission GA154*, 7.
50. Recommendation 5.2(k).

Public Advocate, which will be responsible for providing various services to people in need of decision-making assistance.⁵²

What should not lead to a finding of a lack of decision-making ability

- 6.34 Recommendation 6.3(3) establishes a non-exhaustive list of factors that should not, by themselves, lead to a conclusion that a person lacks decision-making ability for a particular decision. Submissions generally support making clear what factors should not alone result in a finding of a lack of decision-making ability.⁵³
- 6.35 The *Guardianship Act* is silent on the issue of what should not lead to a finding of lack of capacity. The Capacity Toolkit includes among its capacity assessment principles the following:
3. Don't assume a person lacks capacity based on appearances
 4. Assess the person's decision-making ability — not the decision they make.⁵⁴
- 6.36 The law in other jurisdictions specifies that certain behaviours, conditions and outcomes will not, by themselves, lead to a conclusion that a person lacks capacity. These can be grouped broadly as follows:
- the person's appearance, behaviour and beliefs
 - the fact that people may think the person's decisions are unwise, and
 - the person's methods of communication.
- 6.37 Many submissions support versions of the following characteristics as being irrelevant to a finding that a person lacks decision-making ability:
- the person's age⁵⁵
 - the person's appearance⁵⁶
 - any aspect of the person's behaviour (or manner)⁵⁷

51. Chapter 7.

52. Chapter 13.

53. See, eg, NSW Family and Community Services, *Submission GA167*, 3. See also [6.37]

54. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 27, 33-37.

55. Mental Health Coordinating Council, *Submission GA1*, 4; Seniors Right Service, *Submission GA4*, 3; NSW Disability Network Forum, *Submission GA6*, 6; Intellectual Disability Rights Service, *Submission GA16*, 3; Legal Aid NSW, *Submission GA18*, 6; NSW Trustee and Guardian, *Submission GA28*, 5; Law Society of NSW, *Submission GA29*, 6; Mid North Coast Community Legal Centre, *Submission GA30*, 7.

56. Mental Health Coordinating Council, *Submission GA1*, 4; Seniors Right Service, *Submission GA4*, 3; Aged and Community Services NSW and ACT, *Submission GA5*, 4; NSW Disability Network Forum, *Submission GA6*, 6; Intellectual Disability Rights Service, *Submission GA16*, 3; Physical Disability Council of NSW, *Submission GA17*, 4; Legal Aid NSW, *Submission GA18*, 6; Royal Australian and New Zealand College of Psychiatrists, *Submission GA24*, 3; NSW Trustee and Guardian, *Submission GA28*, 5; Law Society of NSW, *Submission GA29*, 6; Mid North Coast Community Legal Centre, *Submission GA30*, 8.

- the person's beliefs⁵⁸
 - that the person is known to have a disability, illness or other medical condition (whether physical or mental)⁵⁹
 - the fact that people may think the person's decisions are unwise⁶⁰
 - the person's methods of communication.⁶¹
- 6.38 Our other recommended provisions — the definition of decision-making ability and the statutory presumption of decision-making ability — should be sufficient to ensure that people are not wrongly found to lack decision-making ability. However, Recommendation 6.3(3) will support these provisions as well as serve an educative function in drawing people's attention to what should not, by itself, lead to a conclusion that a person does not have decision-making ability.
- 6.39 The list in Recommendation 6.3(3) draws on parts of the Capacity Toolkit, relevant provisions in NSW mental health law,⁶² as well as provisions (both actual and recommended) in the guardianship laws of other jurisdictions.⁶³
- 6.40 Our recommendation specifies that a finding on decision-making ability should not be made based "only" on one of the characteristics listed. This is because some of the characteristics might be relevant to matters that do impact on decision-making ability, for example cognitive decline associated with age, or past alcohol or drug dependencies.

-
57. Mental Health Coordinating Council, *Submission GA1*, 4; Seniors Right Service, *Submission GA4*, 3; Aged and Community Services NSW and ACT, *Submission GA5*, 4; NSW Disability Network Forum, *Submission GA6*, 6; Intellectual Disability Rights Service, *Submission GA16*, 3; Physical Disability Council of NSW, *Submission GA17*, 4; Royal Australian and New Zealand College of Psychiatrists, *Submission GA24*, 3; NSW Trustee and Guardian, *Submission GA28*, 5; Law Society of NSW, *Submission GA29*, 6; Mid North Coast Community Legal Centre, *Submission GA30*, 8.
58. Mental Health Coordinating Council, *Submission GA1*, 4; Aged and Community Services NSW and ACT, *Submission GA5*, 4; Physical Disability Council of NSW, *Submission GA17*, 4; Royal Australian and New Zealand College of Psychiatrists, *Submission GA24*, 3.
59. Mental Health Coordinating Council, *Submission GA1*, 4; Royal Australasian College of Physicians, *Submission GA2*, 2; Seniors Right Service, *Submission GA4*, 3; Alzheimer's Australia NSW, *Submission GA11*, 3; Intellectual Disability Rights Service, *Submission GA16*, 3; Physical Disability Council of NSW, *Submission GA17*, 5; Capacity Australia, *Submission GA23*, 18; Mental Health Commission of NSW, *Submission GA25*, 5; NSW Trustee and Guardian, *Submission GA28*, 5; Law Society of NSW, *Submission GA29*, 6; Mid North Coast Community Legal Centre, *Submission GA30*, 7.
60. Mental Health Coordinating Council, *Submission GA1*, 4; Seniors Right Service, *Submission GA4*, 3; Aged and Community Services NSW and ACT, *Submission GA5*, 4; NSW Disability Network Forum, *Submission GA6*, 6; Alzheimer's Australia NSW, *Submission GA11*, 3; Intellectual Disability Rights Service, *Submission GA16*, 3; Physical Disability Council of NSW, *Submission GA17*, 4; S Travers, *Submission GA22*, 9; Law Society of NSW Young Lawyers Civil Litigation Committee, *Submission GA27*, 9; NSW Trustee and Guardian, *Submission GA28*, 5.
61. Mental Health Coordinating Council, *Submission GA1*, 4; Aged and Community Services NSW and ACT, *Submission GA5*, 4; Physical Disability Council of NSW, *Submission GA17*, 4; Legal Aid NSW, *Submission GA18*, 6; NSW Trustee and Guardian, *Submission GA28*, 5; Mid North Coast Community Legal Centre, *Submission GA30*, 3.
62. *Mental Health Act 2007* (NSW) s 16(1).
63. *Guardianship and Management of Property Act 1991*(ACT) s 6A; *Guardianship of Adults Act* (NT) s 5(6); *Mental Capacity Act 2005* (UK) s 2(3); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 3(3); *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 46(6); Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 27.

- 6.41 We have excluded age and physical or mental condition as factors which can alone determine decision-making ability. This is in contrast to the current definition of disability in the *Guardianship Act*, which includes being “of advanced age” or “a mentally ill person within the meaning of the *Mental Health Act 2007*”.⁶⁴
- 6.42 In a similar vein, we have sought to clarify that the fact that a person has been dealt with under the *Mental Health (Forensic Provisions) Act 1990* (NSW) does not mean that the person lacks decision-making ability for *all* purposes.⁶⁵ In such cases, the Tribunal should assess whether the person has decision-making ability for *the decision that needs to be made*. The Tribunal currently takes a case-by-case approach to considering guardianship orders for forensic patients.⁶⁶ Clearly, there will be cases where it is appropriate and necessary to provide decision-making assistance to a forensic patient,⁶⁷ but this should happen only where the person meets the criteria under the new Act.

Determining decision-making ability of Aboriginal people and Torres Strait Islanders

6.4 Determining decision-making ability of Aboriginal people and Torres Strait Islanders

The new Act should provide that, to the extent that it is appropriate and practicable to do so, anyone who must determine the decision-making ability of an Aboriginal person or Torres Strait Islander should have regard to:

- (a) any cultural or linguistic factors that may impact on an assessment of the person’s decision-making ability, and
- (b) any other relevant considerations pertaining to the person’s culture.

- 6.43 This recommendation applies when determining the decision-making ability of Aboriginal people and Torres Strait Islanders.
- 6.44 Recommendation 6.4(a) is consistent with material used by Australian courts to direct juries about the assessment of evidence of witnesses who are Aboriginal people or Torres Strait Islanders.⁶⁸ For example, the NSW *Equality Before the Law Bench Book* suggests that judges inform jurors about:
- cultural factors that may impact on the way in which an Indigenous person engages in verbal or non-verbal communication; and

64. *Guardianship Act 1987* (NSW) s 3(2)(b)-(c).

65. See Recommendation 6.3(3)(g).

66. *ERC* [2015] NSWCATGD 14 [54]-[55].

67. See, eg, Legal Aid NSW, *Submission GA18*, 11-12.

68. See, eg, D Eades, “Communication with Aboriginal Speakers of English in the Legal Process” (2012) 32 *Australian Journal of Linguistics* 473, 478; Australia, Productivity Commission, *Disability Care and Support*, Inquiry Report 54 (2011) vol 2, 541-542.

- an Indigenous person's "communication style", which may be influenced by cultural or linguistic factors.⁶⁹

69. See, eg, Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) [2.3.3.3]-[2.3.3.4].

7. Supported decision-making

In brief

We recommend, as a new component to NSW’s assisted decision-making laws, introducing a formal supported decision-making scheme. Supported decision-making is where a “supporter” assists a person to make decisions about various areas of their life.

Our recommendations.....	71
Two methods to appoint a supporter.....	71
Support agreements	72
Eligibility to appoint a supporter under a support agreement.....	72
Eligibility for appointment as a supporter under a support agreement.....	73
A personal support agreement should be in a prescribed form.....	75
The Tribunal may declare that an appointment has effect.....	76
Tribunal support orders.....	76
Making a Tribunal support order.....	77
Eligibility for appointment as a supporter by the Tribunal.....	79
Suitability for appointment as a supporter by the Tribunal.....	79
A support order suspends any support agreement.....	81
Key features of supported decision-making.....	81
Functions of supporters	81
Responsibilities of supporters.....	83
Support for a full range of life’s decisions	84
The supported person should have decision-making ability with support	85
Supported people may have more than one supporter.....	86
Reserve supporters	86
A supporter may resign with notice or Tribunal approval.....	86
Ending or suspending support	87
The Tribunal may review support agreements and orders.....	87
Exclusions from our supported decision-making model.....	89
Co-decision-making	89
Monitors.....	90
Registration.....	90
Supported decision-making in the broader framework.....	91
Handling personal information	91
The National Disability Insurance Scheme	91

- 7.1 In this Chapter, we recommend establishing a framework for formal supported decision-making. We have drawn on the principles of the United Nations *Convention on the Rights of Persons with Disabilities* (“UN Convention”),¹ including the rights of people with a disability to autonomy and active participation in society.
- 7.2 Supported decision-making involves a “supporter” assisting a person to make decisions in various areas of their life. Support can take different forms depending

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

on the decision-making and communication style of the supported person.² It may include presenting options, explaining the nature and context of the decision using language or non-verbal cues that the person understands, or creating a structure for them to express their will and preferences.³ Supported people should be able to seek assistance in a wide range of areas, from financial and legal affairs to employment and education.

- 7.3 In supported decision-making arrangements, the supported person retains their legal capacity and makes their own decisions. The supporter assists them to make and communicate their decision. Importantly, supported decision-making recognises that decision-making ability can change depending on a variety of factors, including the nature and complexity of the decision. It is a way to help someone understand a situation without taking away their authority to make a decision.⁴ We see supported decision-making as empowering people who need decision-making assistance to build a fulfilling life.
- 7.4 Supported decision-making has been implemented in other jurisdictions⁵ and pilot programs in Australia have produced positive outcomes, such as increased confidence among supported people.⁶ Currently in NSW, supported decision-making already occurs informally. People rely on the help and advice of family, friends or others to make important decisions without any formal structures to guide this process. However, in some cases, informal arrangements fail to provide adequate protection for supported people. It can also be unclear who is expected to undertake what roles and responsibilities in the decision-making process.
- 7.5 A formal supported decision-making framework is one way to ensure that people's rights and interests are protected. There was broad support among submissions for the introduction of formal supported decision-making.⁷ Reasons to formalise supported decision-making include:
- to provide legal backing for supporters to engage with third parties, making it easier for a supporter to access information and services⁸

-
2. R Harding and E Tascioglu, *Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment* (University of Birmingham, 2017) 23.
3. See R Harding and E Tascioglu, *Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment* (University of Birmingham, 2017) 23-25.
4. Scotland, *Adults with Incapacity Act 2000: Proposals for Reform* (2018) 21.
5. See, eg, *Adult Guardianship and Trusteeship Act 2008* (Alberta) pt 2 div 1; *Representation Agreement Act 1996* (British Columbia); *Powers of Attorney Act 2014* (Vic) pt 7.
6. See C Bigby and others, "Delivering Decision Making Support to People with Cognitive Disability – What has been learned from Pilot Programs in Australia from 2010 to 2015" (2017) 52 *Australian Journal of Social Issues* 222 [3.8]. See also K B Glen, "Piloting Personhood: Reflections from the First Year of a Supported Decision-Making Project" (2017) 39 *Cardozo Law Review* 495, 506-507.
7. Shopfront Youth Legal Centre, *Submission GA96*, 2; Multicultural NSW, *Submission GA82*, 3; Royal Australian College of General Practitioners, *Submission GA135*, 3; NSW Ombudsman, *Submission GA136*, 1; Mental Health Coordinating Council, *Submission GA138*, 1; NSW Trustee and Guardian, *Submission GA140*, 4; National Mental Health Commission, *Submission GA142*, 1; Physical Disability Council of NSW, *Submission GA143*, 2; Mental Health Commission of NSW, *Submission GA148*, 2; Combined Pensioners and Superannuants Association of NSW Inc, *Submission GA150*, 1; Medical Insurance Group Australia, *Submission GA153*, 3; Justice Connect, *Submission GA159*, 7; Carers NSW, *Submission GA161*, 1.
8. NSW Disability Network Forum, *Submission GA39*, 3; Carers NSW, *Submission GA48*, 3; Being, *Submission GA51*, 6; Legal Aid NSW, *Submission GA58*, 3-4; Seniors Rights Service,

- to provide an alternative to formal substitute decision-making arrangements⁹
 - to provide adequate protections for people who require support
 - to clarify the role and responsibilities of supporters¹⁰
 - to promote transparency in the supported decision-making process,¹¹ and
 - to provide flexibility in decision-making options to cater to individual needs.¹²
- 7.6 Some submissions express concern that formalising supported decision-making might discourage informal decision-making arrangements that are working well.¹³ This is not the intention of our recommendations or, in our view, a likely outcome. One of the general principles of our framework is that existing informal decision-making arrangements should continue to be recognised.¹⁴ Our framework encourages the least restrictive method of decision-making assistance and in many cases, this will be an informal arrangement.
- 7.7 We do not anticipate that our recommendations will encourage an influx of formal decision-making arrangements at the expense of informal arrangements. The introduction of formal supported decision-making in other jurisdictions has not had this effect.¹⁵ Importantly, we are not mandating the creation of formal supported decision-making arrangements. Our model contemplates both formal and informal options for supported decision-making, depending on a person's support needs.
- 7.8 We have also carefully considered the impact of our recommendations on interactions with third parties. Many people receive informal support when engaging with doctors or banks, for example. This may be in the form of having an informal supporter attend consultations or act as a proxy in financial transactions. While in most situations this works well, in some situations, third parties who are constrained by their own privacy, confidentiality and liability policies will require a formal arrangement to be in place.¹⁶ Currently, a substitute decision-making arrangement

Submission GA61, 1-2; Cognitive Decline Partnership Centre, *Submission GA63*, 2; NSW Mental Health Commission, *Submission GA68*, 5; Public Agencies, *Consultation GAC09*; Peak Bodies, *Consultation GAC11*. See also People with Disability Australia Inc, *Submission GA64*, 3-4.

9. Legal Aid NSW, *Submission GA58*, 3-4; Public Agencies, *Consultation GAC09*.
10. Royal Australian and New Zealand College of Psychiatrists NSW Branch, *Submission GA53*, 2; Cognitive Decline Partnership Centre, *Submission GA63*, 2; Peak Bodies, *Consultation GAC11*.
11. Cognitive Decline Partnership Centre, *Submission GA63*, 2.
12. B Pace, *Submission GA41*, 4; Carers NSW, *Submission GA48*, 3; Being, *Submission GA51*, 6; Royal Australian and New Zealand College of Psychiatrists NSW Branch, *Submission GA53*, 1-2; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 2; Legal Aid NSW, *Submission GA58*, 3-4; NSW Mental Health Commission, *Submission GA68*, 4-5; NSW Public Guardian, *Submission GA72*, 3-4.
13. NSW Mental Health Commission, *Submission GA68*, 4; Intellectual Disability Rights Service, *Submission GA70*, 2; Royal Australasian College of Physicians, *Submission GA66*, 2; NSW Council of Social Service, *Submission GA45*, 2; Being, *Submission GA51*, 6; Public Agencies, *Consultation GAC09*; Peak Bodies, *Consultation GAC12*; NSW Council for Intellectual Disability, *Submission GA144*, 1; Legal Aid NSW, *Submission GA163*, 3.
14. Recommendation 5.2(k).
15. See M Browning, *Report by Michelle Browning 2010 Churchill Fellow to Investigate New Models of Guardianship and the Emerging Practice of Supported Decision Making* (Winston Churchill Memorial Trust, 2010) 23, 29, 31.
16. Law Commission of Ontario *Legal Capacity, Decision-making and Guardianship*, Final Report (2017) 46, 318; R Harding and E Tascioglu, *Everyday Decisions Project Report: Supporting*

such as a financial management or guardianship order may be the only formal option. A formal supported decision-making framework should provide an alternative, less restrictive option.¹⁷

- 7.9 Formal support arrangements will also provide a mechanism by which people can be supported to make arrangements for their future care, particularly if they anticipate losing decision-making ability.¹⁸
- 7.10 Another concern that submissions raise about formalising supported decision-making is the potential for abuse of supported people by supporters, particularly if a supportive arrangement wrongly takes the form of substitute decision-making. This is a risk in all assisted decision-making schemes, including those that already exist. Although it is impossible to eradicate this risk altogether, we have included a number of safeguards in our recommended framework that seek to protect supported people from abuse while still allowing for an appropriate degree of autonomy and independence. These safeguards include mechanisms for tribunal review of support arrangements and an explicit list of supporter responsibilities.
- 7.11 Submissions are also concerned about avoiding a cumbersome or overly prescriptive model.¹⁹ With this in mind, we have sought to create a framework that is flexible and easy to use, with options to cater to different support needs.
- 7.12 Our model allows a person to appoint a supporter through an agreement, known as a “support agreement”, or have a supporter appointed for them with their consent by the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal (“Tribunal”) under a “support order”. Most submissions favour accommodating both Tribunal and personal appointment of supporters.²⁰ We recommend the characteristics of the support relationship be the same in each case.
- 7.13 We see supported decision-making as being one of a suite of decision-making options. It will be appropriate for people who have some decision-making ability but, at times, need assistance; for example, an elderly person who cannot communicate a decision, or someone with a mental illness that causes their decision-making ability to fluctuate. It will not suit every circumstance. For example, it may not be appropriate for a person with advanced dementia or a severe brain injury. For this reason, we recommend in Chapter 8 that substitute decision-making is retained as an option of last resort for situations where supported decision-making is not appropriate.

Legal Capacity through Care, Support and Empowerment (University of Birmingham, 2017) 32-33.

17. K B Glen, “Piloting Personhood: Reflections from the First Year of a Supported Decision-Making Project” (2017) 39 *Cardozo Law Review* 495, 518.
18. Law Commission of Ontario, *Understanding the Lived Experiences of Supported Decision-making in Canada*, Background Paper (2014) 72.
19. NSW Council of Social Service, *Submission GA45*, 2; Carers NSW, *Submission GA48*, 3; NSW Civil and Administrative Tribunal, *Submission GA55*, 4; Cognitive Decline Partnership Centre, *Submission GA63*, 2-3; People with Disability Australia Inc, *Submission GA64*, 4.
20. Mental Health Coordinating Council, *Submission GA34*, 4; NSW Disability Network Forum, *Submission GA39*, 5; Mental Health Carers NSW Inc, *Submission GA44*, 3; Carers NSW, *Submission GA48*, 4; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 4; Seniors Rights Service, *Submission GA61*, 3-4; Cognitive Decline Partnership, *Submission GA63*, 5; Intellectual Disability Rights Service, *Submission GA70*, 4; NSW Trustee and Guardian, *Submission GA78*, 4; Justice Connect, *Submission GA159*, 9, 12.

Our recommendations

- 7.14 Our recommendations seek to provide supporters and supported people with maximum flexibility and choice. A flexible framework with minimal restrictions will enable more people to access formal supported decision-making and its safeguards.

Two methods to appoint a supporter

- 7.15 The majority of submissions favour a model that accommodates both Tribunal and personal appointment of supporters.²¹ This should allow the model to cater to a broad range of circumstances. For example, people with a wide network of family and friends may opt for personal appointment. On the other hand, people with minimal community ties or people who do not feel confident enough to choose a supporter, may benefit from Tribunal assistance.
- 7.16 There are currently no supported decision-making programs in NSW that make supporters broadly available, either on a paid or voluntary basis, to people in need of support who cannot source their own supporter. We do not want the new Assisted Decision-Making Act (“the new Act”) to preclude this possibility. Under the proposed framework, the Tribunal would be able to appoint a supporter from such a future program, where appropriate.
- 7.17 Not all submissions agree with Tribunal appointments of supporters.²² They express concern about this would lead to a “truly supportive agreement”²³ and the potential for abuse of power by potential supporters.²⁴ As an alternative, some propose that an “independent body” is established to assist with the appointment of supporters and oversee the appointment process.²⁵ One suggestion is that the appointment of supporters include a mandate for consulting family and carers.²⁶
- 7.18 In our view, Tribunal appointments are beneficial for the following reasons:
- They provide an alternative to the appointment of a substitute decision-maker where a person needs some decision-making assistance. If, for example, a family member makes an application to the Tribunal for a representation order, the Tribunal will have the discretion to make a less restrictive support order where appropriate.²⁷

21. Mental Health Coordinating Council, *Submission GA34*, 4; NSW Disability Network Forum, *Submission GA39*, 5; Mental Health Carers NSW Inc, *Submission GA44*, 3; Carers NSW, *Submission GA48*, 4; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 4; Cognitive Decline Partnership Centre, *Submission GA63*, 5; Intellectual Disability Rights Service, *Submission GA70*, 3; NSW Trustee and Guardian, *Submission GA78*, 4; Justice Connect, *Submission GA159*, 9, 12.

22. Legal Aid NSW, *Submission GA58*, 5; L Anderson, *Submission GA37*, 5.

23. Legal Aid NSW, *Submission GA58*, 5.

24. L Anderson, *Submission GA37*, 5.

25. Mental Health Coordinating Council, *Submission GA34*, 4; People with Disability Australia Inc, *Submission GA64*, 3-5.

26. Mental Health Carers NSW Inc, *Submission GA44*, 4.

27. NSW Disability Network Forum, *Submission GA39*, 5; NSW Trustee and Guardian, *Submission GA78*, 4.

- They allow formal support arrangements to be made in situations where the person wants support but cannot enter into a supported decision-making agreement themselves, does not have an appropriate supporter in mind, there is conflict between potential supporters, or there is a potential conflict of interest with the proposed supporter.²⁸
- 7.19 The Victorian Law Reform Commission (“VLRC”) recommended Tribunal support orders in its report on Victoria’s guardianship laws²⁹ and the proposal is included in a bill currently before Victorian Parliament.³⁰
- 7.20 Some submissions say that Tribunal appointment should only occur if personal appointment is not possible.³¹ Our recommended model supports this. Before appointing a supporter, the Tribunal must consider less restrictive means of providing support;³² for example, informal support arrangements or personal support agreements. The Tribunal also has the option of referring parties to the Public Advocate to facilitate the development of a support agreement.³³
- 7.21 Importantly, Tribunal appointments and appointments by agreement both require the supporter and the supported person to consent to the arrangement. Additionally, regardless of their method of appointment, we recommend that all supporters have the same responsibilities and functions.

Support agreements

- 7.22 Support agreements allow people requiring support to elect someone to assist them with making decisions. They mirror, where appropriate, our recommended enduring representation arrangements.

Eligibility to appoint a supporter under a support agreement

7.1 Eligibility to appoint a supporter under a support agreement

The new Act should provide that a person may appoint a supporter through a support agreement if the person making the appointment:

- (a) is at least 18 years of age
- (b) has decision-making ability to enter the agreement, and
- (c) is making the agreement voluntarily.

28. Carers NSW, *Submission GA48*, 4, Seniors Rights Service, *Submission GA61*, 3-4; Cognitive Decline Partnership Centre, *Submission GA63*, 5; Intellectual Disability Rights Service, *Submission GA70*, 4.

29. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.78]-[8.87], rec 35.

30. Guardianship and Administration Bill 2018 (Vic) pt 4.

31. NSW Disability Network Forum, *Submission GA39*, 5; Carers NSW, *Submission GA48*, 4; Cognitive Decline Partnership Centre, *Submission GA63*, 5.

32. Recommendation 7.7(1)(e).

33. Recommendation 7.4.

- 7.23 Recommendation 7.1 establishes the eligibility criteria that a person must meet before they can appoint a supporter. Most submissions agree that these criteria are appropriate.³⁴
- 7.24 Recommendation 7.1(b) acknowledges that support agreements are not suitable where the person requiring assistance does not have sufficient decision-making ability to appoint a supporter.³⁵ Support agreements rely on the supported person making their own decisions, with the assistance of another person. For this relationship to work effectively, the supported person needs to understand what to expect from the agreement and how they will be supported. A supported person's decision-making ability should be determined according to the principles set out in Recommendation 6.3.
- 7.25 Supported people should make their choice to enter into a support agreement freely.³⁶ If there is doubt that they entered the agreement freely, an interested person can apply to the Tribunal to review the agreement.³⁷

Eligibility for appointment as a supporter under a support agreement

7.2 Eligibility for appointment as a supporter under a support agreement

The new Act should provide that a person is not eligible to be appointed as a supporter if:

- (a) the person is under 16 years of age
- (b) they are to assist with financial decision-making and they have been bankrupt or been found guilty of an offence involving dishonesty, unless they have recorded this in the support agreement, or
- (c) they are the Public Representative or the NSW Trustee.

- 7.26 Recommendation 7.2 sets out the eligibility requirements that apply to supporters appointed under a support agreement.
- 7.27 We have kept limitations to a minimum. Unlike the current enduring guardian provisions, we do not intend to prohibit the appointment of people involved in the provision of medical services, accommodation, or other daily support services.³⁸
- 7.28 Most submissions acknowledge it is appropriate to allow both paid workers and volunteers to be supporters, particularly where the person requiring support lacks

34. NSW Disability Network Forum, *Submission GA39*, 7-8; Mental Health Carers NSW Inc, *Submission GA44*, 6; Seniors Rights Service, *Submission GA61*, 9; People with Disability Australia Inc, *Submission GA64*, 6; Intellectual Disability Rights Service, *Submission GA70*, 6; NSW Trustee and Guardian, *Submission GA78*, 7.

35. See further, B D Kelly, "The Assisted Decision-Making (Capacity) Act 2015: What it is and Why it Matters" (2017) 186 *Irish Journal of Medical Science* 351, 355.

36. NSW Disability Network Forum, *Submission GA39*, 7-8; Seniors Rights Service, *Submission GA61*, 9; People with Disability Australia Inc, *Submission GA64*, 6; Intellectual Disability Rights Service, *Submission GA70*, 6.

37. Recommendation 7.20.

38. See *Guardianship Act 1987* (NSW) s 6B.

- other community ties.³⁹ This includes employees of government and non-government service providers and agencies. Other submissions consider that an employee of a person's accommodation provider should be excluded from appointment as their supporter.⁴⁰
- 7.29 We have decided not to adopt this exclusion because we do not want to limit the supported person's autonomy to decide who is appropriate to be their supporter. Additionally, we want to provide people looking for support with as many options as possible to suit their circumstances.
- 7.30 Submissions express concerns about the potential conflicts of interest that may arise.⁴¹ There may well be such situations, particularly with paid supporters. This is why we are requiring supporters to respond appropriately to conflicts of interest as part of their stated responsibilities.⁴² We recommend that a cause of action in the Supreme Court lies for any breach of supporter responsibilities or powers.⁴³ The Tribunal can review a support agreement if an interested person with concerns about its operation makes an application.⁴⁴
- 7.31 Some advocate for supporters to be at least 18 years old.⁴⁵ Submissions more broadly suggest that a supporter should have a trusting relationship with the supported person.⁴⁶ We recognise that for some people who need support, their preferred supporter might be under 18 years of age, for example, their child. In the interests of balancing this with the need for supporters to be able to understand their responsibilities, Recommendation 7.2(1) requires that a supporter is at least 16 years old.
- 7.32 Recommendation 7.2(2) requires supporters who have been bankrupt or convicted of dishonesty offences to disclose this in their support agreements.⁴⁷ Some

39. Mental Health Coordinating Council, *Submission GA34*, 8; Mental Health Carers NSW Inc, *Submission GA44*, 7-8; Carers NSW, *Submission GA48*, 7; Being, *Submission GA51*, 16; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 10-11; Legal Aid NSW, *Submission GA58*, 6-7; NSW Public Guardian, *Submission GA72*, 8; National Disability Services, *Submission GA155*, 3.

40. NSW Disability Network Forum, *Submission GA39*, 9; Mental Health Carers NSW Inc, *Submission GA44*, 7; Seniors Rights Service, *Submission GA61*, 11; Intellectual Disability Rights Service, *Submission GA70*, 7.

41. NSW Department of Family and Community Services, *Submission GA76* 6-7; People with Disability Australia Inc, *Submission GA64*, 8; NSW Disability Network Forum, *Submission GA39*, 9-10; Carers NSW, *Submission GA48*, 7; Royal Australian College of General Practitioners, *Submission GA135*, 4; NSW Council of Social Service, *Submission GA137*, 3; Physical Disability Council of NSW, *Submission GA143*, 4.

42. Recommendation 7.13(d).

43. See [14.66]-[14.81].

44. Recommendation 7.20.

45. Royal Australian College of General Practitioners, *Submission GA35*, 6; Mental Health Carers NSW Inc, *Submission GA44*, 6; Intellectual Disability Rights Service, *Submission GA70*, 7.

46. L Anderson, *Submission GA37*, 6; NSW Disability Network Forum, *Submission GA39*, 8; NSW Council of Social Services, *Submission GA45*, 2; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 9; People with Disability Australia Inc, *Submission GA64*, 7; Intellectual Disability Rights Service, *Submission GA70*, 7; NSW Trustee and Guardian, *Submission GA78*, 8.

47. A provision in similar terms exists in the *Powers of Attorney Act 2014* (Vic) s 91(c).

submissions say this will do little to mitigate risks for supported people.⁴⁸ However, we can envisage situations where a person's history of bankruptcy or dishonesty will not be relevant to their supporter role. In such circumstances, people should be able to make an informed choice about who to appoint.

- 7.33 We have not excluded from appointment supporters with other types of convictions, since we are not convinced that the protections should outweigh the right of a person to choose their supporter. It is likely that people with criminal convictions are already informally supporting others. If the supported person has the option of formalising such an arrangement, they will at least be able to access the safeguards that the formal scheme provides.
- 7.34 We recommend against allowing public agencies such as the NSW Trustee and the Public Representative to be appointed as supporters. Submissions generally say that a public agency should only be appointed as a last resort.⁴⁹ Submissions identify that a significant barrier for public agencies in this context would be building the necessary relationship of trust with the supported person in light of limited time and resources.⁵⁰ However, we see public agencies as having an important role in educating supporters and the public about supported decision-making.
- 7.35 In Chapter 13, we recommend that NSW establish a new independent statutory position known as the Public Advocate to, amongst other things, provide information, advice and assistance about decision-making and establish guidelines for supporters. We see the Public Advocate as playing a key role in safeguarding supported people. For example, a supporter might seek advice from the Public Advocate about a conflict of interest in a support relationship.

A personal support agreement should be in a prescribed form

7.3 Making a support agreement

The new Act should provide:

- (1) that a support agreement must be in a prescribed form and be signed by the person making the appointment and the proposed supporter accepting the appointment (although not necessarily at the same time or in the presence of each other)
- (2) for an eligible signer, where required, to sign for the person in the person's presence and at their direction, and
- (3) for eligible witnesses to witness the signature, and certify that:

48. NSW Ombudsman, *Submission GA136*, 2. See also Mental Health Coordinating Council, *Submission GA138*, 3; Physical Disability Council of NSW, *Submission GA143*, 4; National Disability Services, *Submission GA155*, 10.

49. Royal Australian College of General Practitioners, *Submission GA35*, 8; Mental Health Carers NSW Inc, *Submission GA44*, 7; Carers NSW, *Submission GA48*, 7; Being, *Submission GA51*, 16; Royal Australian and New Zealand College of Psychiatrists NSW Branch, *Submission GA53*, 3; Cognitive Decline Partnership Centre, *Submission GA63*, 10; Intellectual Disability Rights Service, *Submission GA70*, 8; NSW Public Guardian, *Submission GA72*, 8; Law Society of NSW, *Submission GA74*, 6; NSW Trustee and Guardian, *Submission GA78*, 10.

50. Mental Health Carers NSW Inc, *Submission GA44*, 7; Carers NSW, *Submission GA48*, 6-7; Being, *Submission GA51*, 16; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 9; NSW Trustee and Guardian, *Submission GA78*, 10.

- (a) they explained the effect of the agreement to the person making the agreement before it was signed, and
- (b) the person making the agreement signed voluntarily and appeared to have decision-making ability in relation to the agreement.

7.36 We recommend that personal support agreements are in a prescribed form and subject to the same formal requirements as enduring representation agreements.⁵¹ These formal requirements are drawn from the requirements that apply currently to enduring guardianship⁵² and powers of attorney arrangements.⁵³

7.4 Referral to the Public Advocate

The Tribunal may refer parties to the Public Advocate to facilitate the development of a support agreement.

7.37 This recommendation acknowledges that there will be situations where potential parties to a support agreement need help to make the agreement. The Public Advocate should be able to facilitate the drafting of an agreement in such circumstances. We anticipate that this process will involve discussion with the parties about support needs, the nature of the relationship and possible terms of the agreement. While we envisage that parties should be able to approach the Public Advocate directly for such assistance, there may be circumstances in which the Tribunal thinks it appropriate to make a referral itself.

The Tribunal may declare that an appointment has effect

7.5 Tribunal may declare appointment has effect

The new Act should provide that a supporter, a supported person, or other person with a genuine interest in the personal and social wellbeing of the supported person, may apply to the Tribunal for a declaration that an appointment under a person support agreement is valid.

7.38 This recommendation provides that, where there is doubt about the validity of a personal support agreement, the Tribunal can review the agreement and declare it valid. This mirrors a similar recommendation about enduring representation agreements.⁵⁴

Tribunal support orders

7.39 A Tribunal support order involves the Tribunal appointing a supporter to assist a person requiring support, rather than that person making their own appointment.

51. See Recommendation 8.4.

52. *Guardianship Act 1987* (NSW) s 6C.

53. *Powers of Attorney Act 2003* (NSW) s 19(1)(c).

54. See Recommendation 8.9.

- 7.40 While we encourage people who need support to make support agreements, we recognise that this might not always be possible. We see Tribunal support orders being used in a variety of situations; for example, where a person does not have a network of potential supporters; where the parties seek input on the appropriateness of the arrangement in light of a potential conflict of interest; or where there is family conflict about who should be appointed as a supporter.
- 7.41 Perhaps the most significant advantage of a Tribunal support order is that it will enable the Tribunal to make a support order as an alternative to a representation order on an application for a representation order or on review of one.

Making a Tribunal support order

7.6 Application for a Tribunal support order

The new Act should provide:

- (1) An application to the Tribunal for a support order may be made by:
 - (a) the person to whom the order will apply
 - (b) the Public Representative or the Public Advocate, or
 - (c) a person with a genuine interest in the personal and social wellbeing of the person who is the subject of the application.
- (2) An application must specify the grounds upon which there is a need for an order.
- (3) As soon as practicable after making the application, the applicant must serve the application on each of the parties.
- (4) Before conducting a hearing into the application, the Tribunal must notify each party of the hearing's time, date and location.
- (5) Failing to serve a copy of the application or a notice does not invalidate the Tribunal's decision on the application.
- (6) The Tribunal may treat an application for a representation order, review of a support order, support agreement or enduring representation agreement as an application for a support order.

- 7.42 We recommend that a broad range of people should be able to apply to the Tribunal for a support order. An application for an order must include the reasons why it is necessary. While an application should specify the type of order sought, it should be open to the Tribunal to make the type of order it considers most appropriate; for example, they may decide the person would be better assisted by a representation order or a support agreement.
- 7.43 We recommend that the notification and service requirements are the same as those for Tribunal review of enduring representation agreements.⁵⁵

55. See Recommendation 8.10(3).

7.7 Making a support order

- (1) The new Act should provide that, after conducting a hearing into an application, the Tribunal may appoint a supporter to assist the person if:
 - (a) the person needing support (“the person”) is of or above the age of 18
 - (b) there are one or more decisions to be made
 - (c) an eligible and suitable supporter is available
 - (d) the person would have decision-making ability in relation to the decision(s) covered by the order if assisted by the proposed supporter
 - (e) less intrusive and restrictive measures have already been considered and are either unavailable or not suitable
 - (f) the proposed supporter consents to the appointment, and
 - (g) the person consents to the appointment.
- (2) A support order must set out the supporter’s functions and any limits on those functions.

7.44 This recommendation sets out the considerations the Tribunal must take into account before appointing a supporter. A support order should operate as the last resort supported decision-making option. The Tribunal should not make an order if an informal arrangement or personal support agreement is already operating effectively.

7.45 Several submissions suggest that, before making an appointment, the Tribunal should be satisfied that less intrusive and restrictive measures have been exhausted.⁵⁶ Recommendation 7.7(1)(e) is intended to ensure that a support order is only made in circumstances where it will be effective, noting that it is open to the Tribunal to make representation orders. Importantly, Tribunal appointment of a supporter requires consent from both the proposed supporter and the supported person. Submissions support this requirement.⁵⁷

7.8 Additional Tribunal considerations for orders about Aboriginal people and Torres Strait Islanders

The new Act should provide that, to the extent that it is appropriate and practicable to do so, the Tribunal must, when determining whether a support order should be made for an Aboriginal person or Torres Strait Islander, have regard to:

- (a) the likely impact of the order on the person’s culture, values, beliefs (including religious beliefs) and linguistic environment

56. NSW Disability Network Forum, *Submission GA39*, 4; Mental Health Carers NSW Inc, *Submission GA44*, 6; Carers NSW, *Submission GA48*, 6; Intellectual Disability Rights Service, *Submission GA70*, 6.

57. Mental Health Coordinating Council, *Submission GA34*, 6-7; Carers NSW, *Submission GA48*, 6; NSW Disability Network Forum, *Submission GA39*, 8; Intellectual Disability Rights Service, *Submission GA70*, 6; Mental Health Carers NSW Inc, *Submission GA44*, 6.

- (b) the likely impact of the order on the person's standing or reputation in their indigenous community, and
- (c) any other relevant consideration pertaining to the person's culture.

- 7.46 This recommendation relates to support orders regarding Aboriginal people and Torres Strait Islanders. Decision-making in indigenous communities is often a collaborative and communal process.⁵⁸ Supported decision-making aligns closely with this style of decision-making, particularly where there are multiple supporters; although an individual's decision is often thought of as a decision by and for their whole family or community group.⁵⁹
- 7.47 Aboriginal people and Torres Strait Islanders have reported feeling apprehensive about guardianship for fear that they will have to give up all of their decision-making power even if they have some decision-making ability.⁶⁰
- 7.48 Where Aboriginal people and Torres Strait Islanders choose to have a Tribunal support order, we recommend that the Tribunal consider the additional factors listed above to ensure that any order it makes is culturally appropriate.

Eligibility for appointment as a supporter by the Tribunal

7.9 Eligibility for appointment as a supporter under a support order

The new Act should provide that the Tribunal may not appoint a person as a supporter under a support order if:

- (a) the person is under 16 years of age, or
- (b) they are the Public Representative or the NSW Trustee.

- 7.49 This recommendation sets out the eligibility criteria for appointment under a support order. These are similar to the criteria for appointment by support agreement. We recommend a minimally restrictive set of criteria. The Tribunal should be able to appoint supporters as available and appropriate.
- 7.50 These criteria do not have the exclusion relating to financial decision-making that our personal support agreements have. We expect such concerns to be taken into account when the Tribunal is considering the supporter's suitability, as required by Recommendation 7.10.

Suitability for appointment as a supporter by the Tribunal

7.10 Suitability for appointment as a supporter under a support order

The new Act should provide:

58. Confidential, *Preliminary Submission PGA46*; Confidential, *Consultation GAC15*.

59. Confidential, *Preliminary Submission PGA46*; Confidential, *Consultation GAC15*.

60. V Pascoe and K Radel, "Indigenous Queenslanders and Impaired Decision Making Capacity" in J Clapton and others, *Impaired Decision-Making Capacity and Indigenous Queenslanders*, Final Report (Office of the Public Advocate Queensland, 2011) 12.

- (1) In deciding whether a proposed supporter is suitable, the Tribunal must take into account:
 - (a) the will and preferences of the person in need of decision-making assistance (“the person”), determined as set out in **Recommendation 5.4**
 - (b) the nature of the relationship between the proposed supporter and the person
 - (c) the abilities and availability of the proposed supporter
 - (d) whether the proposed supporter will be likely to act honestly, diligently and in good faith in the role
 - (e) whether the proposed supporter has or may have a conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any conflicts
 - (f) whether the supporter would promote the person’s personal and social wellbeing
 - (g) the person’s cultural identity, and
 - (h) where the proposed supporter will assist with financial decision-making, whether they have been bankrupt or been convicted of a dishonesty offence.
- (2) A person should not be prohibited from appointment as a supporter on the basis that they will receive financial remuneration for their appointment.

7.51 Recommendation 7.10 proposes that the new Act expressly set out those matters to which the Tribunal must have regard when appointing a supporter. The aim is to provide transparency and clarity for members of the Tribunal, applicants and parties.

7.52 Submissions support many of these criteria. In particular, submissions consider it important that the proposed supporter take into account the will and preferences of the supported person,⁶¹ have a trusting relationship with that person⁶² and not have any conflict of interest in the appointment.⁶³

7.53 Other submissions suggest that the criteria should exclude people who have a domestic violence conviction or a history of violence.⁶⁴ We expect that the Tribunal will consider the proposed supporter’s criminal history, particularly convictions for dishonesty or violence, where relevant, in deciding whether they are likely to act honestly, diligently and in good faith as per Recommendation 7.10(1)(d).

61. See, eg, NSW Disability Network Forum, *Submission GA39*, 8; Mental Health Carers NSW Inc, *Submission GA44*, 6.

62. See, eg, NSW Disability Network Forum, *Submission GA39*, 8; NSW Council of Social Service, *Submission GA45*, 2; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 9; NSW Trustee and Guardian, *Submission GA78*, 8.

63. Legal Aid NSW, *Submission GA58*, 6. See also NSW Disability Network Forum, *Submission GA39*, 8; NSW Council of Social Service, *Submission GA45*, 2; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 9.

64. See, eg, Seniors Rights Service, *Submission GA158*, 12; Law Society of NSW, *Submission GA164*, 18.

- 7.54 As with personal support agreements, we recommend that paid workers and volunteers should be entitled to act as supporters.

A support order suspends any support agreement

7.11 Effect of order on other appointments

The new Act should provide that a support order (including an order of the Supreme Court to like effect) operates to suspend any support agreement in its entirety, unless the Tribunal or Court allows limited operation of the agreement.

- 7.55 This recommendation gives primacy to a support order over a support agreement. This is similar to the way guardianship orders currently have primacy over enduring guardianship arrangements.⁶⁵

Key features of supported decision-making

Functions of supporters

7.12 Functions of supporters

The new Act should provide:

- (1) A supporter's functions are determined by the support agreement or order and are limited to the following:
 - (a) to communicate or assist the supported person in communicating their decisions to other people, and advocate for the implementation of the decision where necessary, and
 - (b) to access, collect or obtain, or assist the supported person in accessing, collecting or obtaining any relevant personal information (including financial and health information) about the supported person in order to assist the supported person to understand the information.
- (2) A supporter is not authorised to:
 - (a) make decisions on behalf of the supported person
 - (b) exercise their functions without the supported person's knowledge and consent, or
 - (c) access, collect or obtain personal information about the supported person that the supported person would not be entitled to access or collect, or obtain personal information beyond that permitted by the agreement or order (as applicable).
- (3) Unless otherwise specified in the agreement or order, a supporter may, on behalf of a supported person, sign and do all such things as are necessary to give effect to any function under the agreement or order.

65. *Guardianship Act 1987* (NSW) s 61.

- 7.56 Recommendation 7.12 proposes that the new Act set out, in express terms, the functions a supporter may undertake. Similar provisions exist in supported decision-making legislation in other jurisdictions.⁶⁶ A supported person may choose to give one or more of the possible functions to their supporter. We recommend that support orders and agreements specify the particular functions given to a supporter so that they understand their role.⁶⁷
- 7.57 Submissions identify that the central functions of a supporter should be to access relevant information and/or give effect to the will and preference of the supported person.⁶⁸ Submissions also suggest that supporters should be explicitly prohibited from making decisions on behalf of the supported person and/or from acting without the supported person's consent.⁶⁹ Our recommendation reflects these views.
- 7.58 The function described in Recommendation 7.12(1)(a) is intended to include describing decisions to a supported person using a communication style they understand, such as through non-verbal cues, plain language or asking specific questions. This function would include a supporter explaining a healthcare decision to a supported person, for example, or prompting a supported person to decide on a leisure activity. It is also intended to include a supporter assisting a supported person to communicate their decision to third parties.
- 7.59 The supporter's information function at Recommendation 7.12(1)(b) is intended to include helping the supported person to access the information they need to make a decision. For example, a supporter may ask the supported person's doctor for a copy of their prescriptions or their banker for their bank statement. However, a supporter does not have authority to obtain or share personal information about the supported person without the supported person's consent.⁷⁰
- 7.60 Some submissions say that there should be restrictions on supporters acting in significant financial transactions.⁷¹ However, financial decision-making can be complex and may be one of the main areas in which people need support.⁷² Currently, this support is likely to be informal. We see this as a gap in the current framework that will continue if formal support for financial decision-making is restricted. Ideally, formal support for financial decision-making will not only provide access to formal safeguards but will facilitate supported people learning about their

66. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 4(2); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14; *Powers of Attorney Act* (Vic) s 87-89.

67. See, eg, Mental Health Carers NSW Inc, *Submission GA44*, 9.

68. NSW Disability Network Forum, *Submission GA39*, 10; Mental Health Carers NSW Inc, *Submission GA44*, 9; Carers NSW, *Submission GA48*, 7; Being, *Submission GA51*, 16-17; Legal Aid NSW, *Submission GA58*, 7; Cognitive Decline Partnership Centre, *Submission GA63*, 11-12; People with Disability Australia Inc, *Submission GA64*, 8; Intellectual Disability Rights Service, *Submission GA70*, 10; NSW Trustee and Guardian, *Submission GA78*, 12.

69. Mental Health Carers NSW Inc, *Submission GA44*, 9; Mental Health Coordinating Council, *Submission GA34*, 9; Seniors Rights Service, *Submission GA61*, 14; People with Disability Australia Inc, *Submission GA64*, 8-9; Intellectual Disability Rights Service, *Submission GA70*, 10; NSW Trustee and Guardian *Submission GA78*, 12. See also Peak Bodies, *Consultation GAC11*.

70. Recommendation 7.12(2)(c), Recommendation 14.3(e).

71. NSW Disability Network Forum, *Submission GA39*, 11; Royal Australian and New Zealand College of Psychiatrists NSW Branch, *Submission GA53*, 2-3; Seniors Rights Service, *Submission GA61*, 14.

72. See, eg, M Schindler and M Segal-Reich, "Supported Decision-Making for Older Persons in Israel: The 2015 Precedent and the Following 2016 Regulation" (2016) 10 *Elder Law Review* 1, 11.

financial affairs. This may enable them to make independent decisions in the future.⁷³

Responsibilities of supporters

7.13 Responsibilities of supporters

The new Act should provide:

(1) Supporters must:

- (a) observe the Act's general principles
- (b) act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the supported person
- (c) act within the conditions or limitations of the agreement or order
- (d) ensure that they identify and respond to situations where their interests conflict with those of the supported person, ensure the supported person's interests are always the paramount consideration, and seek external advice where necessary
- (e) treat the supported person and important people in their life with dignity and respect
- (f) if they are assisting with financial decision-making, keep accurate records and accounts
- (g) respect the supported person's privacy and confidentiality by:
 - (i) only collecting personal information to the extent necessary for carrying out the supporter's role, and
 - (ii) only disclosing such information in circumstances permitted by **Recommendation 14.3**, and
- (h) notify the Public Representative, if the supported person no longer has the decision-making ability to be supported to make the relevant decision.

(2) Supporters must sign an acknowledgement that they have read and understood these responsibilities.

7.61 This recommendation sets out the responsibilities of supporters. Submissions suggest that supporters should assist the supported person to make decisions that reflect their will and preference even if others might disagree with that decision or it might involve some risk.⁷⁴ This is in line with the UN *Convention*.⁷⁵ Submissions

73. R Harding and E Tascioglu, *Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment* (University of Birmingham, 2017) 30.

74. Mental Health Coordinating Council, *Submission GA34*, 10; NSW Disability Network Forum, *Submission GA39*, 12; Mental Health Carers NSW Inc, *Submission GA44*, 9; Carers NSW, *Submission GA48*, 8; Legal Aid NSW, *Submission GA58*, 8; Intellectual Disability Rights Service, *Submission GA70*, 11.

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

note that it is important for parties to have a committed and ongoing relationship for this to be achieved.⁷⁶

- 7.62 Our recommended approach is a significant shift from the current “best interests” model. Changing people’s attitudes and long held beliefs will be key to the success of supported decision-making.⁷⁷ A recent NSW Department of Family and Community Services pilot decision-making program found that supporters often struggle to distinguish between providing support and making decisions in the “best interests” of another person.⁷⁸ Supporters will benefit from training on the importance of allowing supported people to make their own choices even where the supporter might disagree with the choice or consider it to be risky. They will need to learn about how their biases and decision-making style can affect their abilities as a supporter.⁷⁹ Another challenge for supporters will be learning how to manage conflict with the other people in the supported person’s life.⁸⁰
- 7.63 Submissions support the requirements that supporters respect the supported person’s confidentiality,⁸¹ act in good faith⁸² and not have a conflict of interest.⁸³
- 7.64 The VLRC recommended that the law impose a fiduciary duty on supporters.⁸⁴ We have not adopted this approach. Fiduciary relationships are generally categorised as ones of trust and confidence in which one party acts for, on behalf of, or in the interests of another party. Importantly, one party often has the opportunity to exercise power to the detriment of the other party.⁸⁵
- 7.65 We do not see all support relationships as having these characteristics. While trust and confidentiality are central to a support relationship, whether a particular support relationship should be considered a fiduciary one will depend on the circumstances of the case. As supporters do not make decisions on behalf of supported people, we do not think it appropriate to make them liable for a supported person’s decisions.

76. See, eg, Physical Disability Council of NSW, *Submission GA143*, 4.

77. NSW Department of Family and Community Services, *Submission GA76*, 5.

78. NSW Department of Family and Community Services, *Submission GA76*, 3-4.

79. See also Shih Ning Then, “Evolution and Innovation in Guardianship Laws: Assisted Decision-Making” (2013) 35 *Sydney Law Review* 133, 165.

80. See C Bigby and others, “Delivering Decision Making Support to People with Cognitive Disability – What Has Been Learned from Pilot Programs in Australia from 2010 to 2015” (2017) 52 *Australian Journal of Social Issues* 222, 235; A Meltzer and others, *Literature and Practice Review: Support to make Decisions that Promote Personal Safety and Prevent Harm* (UNSW, 2017) 14.

81. Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 13; Legal Aid NSW, *Submission GA58*, 7. See also People with Disability Australia Inc, *Submission GA64*, 8.

82. Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 13; Mental Health Carers NSW Inc, *Submission GA44*, 7.

83. See, eg, Intellectual Disability Rights Service, *Submission GA70*, 7. See also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-1.

84. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 59 [8.130]. See also Justice Connect, *Submission GA159*, 9.

85. *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96.

*Support for a full range of life's decisions***7.14 Types of decisions that can be made under a support arrangement**

The new Act should provide that a supporter may assist a person to make decisions including those about personal matters, financial matters, healthcare and restrictive practices. The support agreement or order should specify what decisions or types of decisions the supporter may make as well as any conditions or limitations.

- 7.66 We recommend that people requiring support should be able to appoint a supporter, or have a supporter appointed, to assist with a wide range of decisions.
- 7.67 Some submissions express concern about supporters assisting with financial matters.⁸⁶ In our view, it is important to facilitate a broad range of decisions and respect the supported person's choice of support. Further, certain types of matters might not be mutually exclusive,⁸⁷ for example, a decision about where to live is likely to involve both financial and personal decision-making.
- 7.68 Other jurisdictions have also allowed a broad range of decision-making. In Victoria, "supportive attorneys" can assist with "any personal or financial or other matters specified in the appointment".⁸⁸ Similarly, in British Columbia, people providing support can help make personal, health or financial decisions.⁸⁹
- 7.69 As a safeguard, we recommend that a support agreement or order can include conditions or limitations. For example, if a supported person does not want a supporter to help them with financial decision-making, this can be excluded from the support agreement or order. The supported person may also place limitations on the duration of the appointment.

*The supported person should have decision-making ability with support***7.15 When support agreement or order has effect**

The new Act should provide that a support agreement or order has effect in relation to a decision to which it applies except for any period during which:

- (a) the supported person does not have decision-making ability for that decision even when assisted by the supporter, or
- (b) the agreement or order is terminated or suspended or has lapsed.

- 7.70 We recommend that the support agreement or order has no effect if the supported person no longer has decision-making ability even when supported. We also recommend that a support agreement or order is prohibited from having effect when it is terminated, suspended or has lapsed.

86. See, eg, Justice Health and Forensic Mental Health Network, *Submission GA50*, 4; Royal Australian College of General Practitioners, *Submission GA35*, 10.

87. Mental Health Carers NSW Inc, *Submission GA44*, 9.

88. *Powers of Attorney Act 2014* (Vic) s 85(1).

89. *Representation Agreement Act 1996* (British Columbia) s 7(1).

- 7.71 Where a supported person can no longer make decisions, even when assisted, the supporter should notify the Public Representative who will consider the next appropriate steps. This might include seeking Tribunal orders for representation.

Supported people may have more than one supporter

7.16 Appointment of multiple supporters

The new Act should allow a person or the Tribunal to appoint more than one supporter to assist a person, either together or separately, in relation to one or more functions.

- 7.72 This recommendation allows for the appointment of multiple supporters. Each supporter may assist on the same or different functions. We note that a person may often reach out to multiple people for assistance⁹⁰ and that multiple supporters could share tasks and skills.⁹¹ “Supportive attorney” arrangements in Victoria similarly allow for multiple appointments.⁹²

Reserve supporters

7.17 Appointment of reserve supporters

The new Act should allow a person or the Tribunal to appoint one or more reserve supporters to act if the original supporter dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the agreement or order.

- 7.73 This recommendation enables a supported person to elect one or more reserve supporters to adopt the functions of the original supporter if the original supporter dies, resigns or loses decision-making ability. This serves a different purpose from having multiple supporters who assist someone together or separately. We have made a similar recommendation for enduring representatives.⁹³

A supporter may resign with notice or Tribunal approval

7.18 Resignation of a supporter

The new Act should provide that a supporter may resign their appointment:

- (a) if the supported person understands the nature and consequences of the resignation, by giving notice in writing to the supported person, or
- (b) if the supported person does not understand the nature and consequences of the resignation, with the approval of the Tribunal.

90. NSW Disability Network Forum, *Submission GA39*, 9.

91. Carers NSW, *Submission GA48*, 6.

92. *Powers of Attorney Act 2014* (Vic) s 92.

93. Recommendation 8.5.

- 7.74 This recommendation ensures that a supporter can resign from their position. The process should not be overly complex, as this could discourage people from entering into support arrangements. Where a supporter resigns, it is important for the supported person to understand the effect of this. We are therefore requiring Tribunal oversight in circumstances where, in the supporter's view, the supported person does not understand the nature and consequences of the resignation.

Ending or suspending support

7.19 End or suspension of a support agreement or order

The new Act should provide that:

- (1) A supported person may terminate, in writing, an appointment under a support agreement if the supported person:
 - (a) has decision-making ability in relation to the agreement and its termination, and
 - (b) terminates the agreement voluntarily.
- (2) A supported person may seek approval from the Tribunal to terminate a support order, if the supported person:
 - (a) has decision-making ability in relation to the termination of the order, and
 - (b) seeks the termination of the order voluntarily.
- (3) A support agreement or order lapses if the sole supporter appointed to carry out a function dies, or the end date is reached, or in any other circumstances specified in the agreement or order.
- (4) A support agreement or order does not lapse when a supporter dies if there is another supporter appointed to carry out the functions.
- (5) A support agreement or order is suspended, so far as it appoints a supporter, if the supporter becomes a person who does not have the decision-making ability to act as a supporter.
- (6) If a supported person becomes subject to a Tribunal representation order, any support agreement or order is suspended for the duration of the order, unless the Tribunal orders otherwise.

- 7.75 This recommendation is intended to provide a simple and flexible method for removing a supporter. Like legislation in Ireland, Alberta and Texas, it would allow supported people to terminate an arrangement at any time.⁹⁴
- 7.76 In situations where there are multiple supporters who have been appointed to act in relation to the same function, and one supporter dies, the support arrangement continues. However, if a person has only one supporter and that supporter dies, the support agreement or order will no longer have effect, and it will be open to the supported person to seek another supporter or approach the Tribunal for orders.

94. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 10(3); *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).

The Tribunal may review support agreements and orders

7.20 Tribunal review of support agreements and orders

The new Act should provide:

- (1) The Tribunal may review a support agreement or order on its own motion.
- (2) The Tribunal must review a support agreement or order if requested to do so by:
 - (a) the supported person
 - (b) the supporter
 - (c) the Public Representative or Public Advocate
 - (d) a person with a proper interest in the proceedings, or
 - (e) a person with a genuine interest in the personal and social wellbeing of the supported personunless the request does not disclose grounds that warrant a review.
- (3) The Tribunal must, before carrying out the review, notify each party of the date, time and place of the review (although failure to do so will not invalidate a decision).
- (4) The Tribunal may order that the support agreement or order is suspended until the review is complete.

7.77 This recommendation provides for the Tribunal review of support arrangements. In our view, disagreements about supported decision-making should be resolved informally where possible.⁹⁵ To encourage this, we recommend in Chapter 13 that the Public Advocate have a role in facilitating mediation between parties to supported decision-making arrangements.⁹⁶ However, there may be circumstances where Tribunal intervention is required.

7.78 We recommend allowing a broad range of people to apply to the Tribunal for review of a support arrangement, including the Public Representative and Public Advocate.⁹⁷

7.79 In the interests of minimising formalisation, we do not recommend any requirement for regular review of support arrangements. Instead, the Tribunal should review arrangements when asked and be able to conduct reviews on its own motion.

7.21 Tribunal action on review

The new Act should provide:

- (1) The Tribunal, when reviewing a support agreement, should consider, where relevant:
 - (a) whether the person met the eligibility criteria for entering into the agreement, and

95. NSW Council for Civil Liberties, *Submission GA147*, 4.

96. Recommendation 13.1(3)(a)(iii).

97. See NSW Ombudsman, *Submission GA136*, 3.

- (b) if the person did meet the eligibility criteria to enter into the agreement:
 - (i) the fact that the supporter was chosen by the person
 - (ii) whether the eligibility criteria for a supporter are still met, and
 - (iii) whether the supporter is meeting their responsibilities and carrying out their required functions.
- (2) The Tribunal must, when reviewing a support order, have regard to whether:
 - (a) there is still a need for a support order
 - (b) the eligibility and suitability criteria for a supporter are still met, and
 - (c) the supporter is meeting their responsibilities and carrying out their required functions
- (3) The Tribunal may, following its review, do any of the following to the agreement or order, in whole or in part:
 - (a) confirm it (with the consent of the supported person)
 - (b) vary it, including by appointing a replacement supporter who is suitable and eligible
 - (c) suspend it, or
 - (d) terminate it.
- (4) The Tribunal may make a fresh order in accordance with the new Act, including a representation order, to supersede the support agreement or order which has been suspended or revoked.

- 7.80 This recommendation relates to what action the Tribunal may take once it has reviewed a support arrangement. The Tribunal should approach the task with a view to promoting the autonomy and decision-making ability of the supported person. It should be required to consider whether the order remains necessary, noting that a support agreement or a representation order might be more appropriate.
- 7.81 The recommendation provides the Tribunal with broad discretion on review, including the ability to appoint a replacement supporter.

Exclusions from our supported decision-making model

Co-decision-making

- 7.82 Co-decision-making is where a person who needs decision-making assistance, and another person, make decisions jointly for the person who needs assistance. This is different to supported decision-making because it requires the person needing assistance and their co-decision-maker to agree to a decision. In this type of arrangement, the person who needs assistance loses some autonomy. We have

decided against including formal co-decision-making in our model in light of concerns raised in submissions and limited support for the concept.⁹⁸

- 7.83 For example, submissions note that co-decision-making runs the risk of becoming proxy or substitute decision-making because it requires all parties to agree to the decision concerned.⁹⁹ This might increase the stress experienced by the person requiring assistance. Other concerns include: it could lead to a “stalemate” between the parties to a decision;¹⁰⁰ complications might arise with regard to liability arising from a joint decision;¹⁰¹ and it might encourage third parties to require the co-decision-maker’s signature to authorise a transaction.¹⁰²

Monitors

- 7.84 A monitor is someone appointed to supervise a supported decision-making arrangement. Some Australian pilot programs have endorsed the use of monitors.¹⁰³ Monitors are used in some other jurisdictions; for example, in British Columbia, where a monitor may visit and speak with the supported person, obtain accounts and records from the supporter, and inform the Public Trustee and Guardian if there is reason to believe the supporter is not complying with their duties.¹⁰⁴
- 7.85 On one view, a trained monitor “provides a safeguard and can reduce the potential for inadvertent exercises of undue influence or conflicts of interest”.¹⁰⁵ However, there is limited support for introducing monitors, with one submission arguing that they are a heavy-handed safeguard in circumstances where a person has not given up their legal decision-making capacity.¹⁰⁶ On balance, we agree, and have not included monitors as a component of our supported decision-making framework.

Registration

- 7.86 There is some support for a requirement that supported decision-making arrangements be registered.¹⁰⁷ We are not recommending such a requirement. Our

98. Royal Australian and New Zealand College of Psychiatrists, *Submission GA53*, 2; Legal Aid NSW, *Submission GA58*, 4; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 4-5; NSW Council for Intellectual Disability, *Submission GA59*, 3; Cognitive Decline Partnership Centre, *Submission GA63*, 5.

99. Mental Health Coordinating Council, *Submission GA34*, 4. See also Mental Health Carers NSW Inc, *Submission GA44*, 4.

100. Carers NSW, *Submission GA48*, 4.

101. Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 5; NSW Trustee and Guardian, *Submission GA78*, 5.

102. People with Disability Australia Inc, *Submission GA64*, 5.

103. 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. See also M Wallace, *Evaluation of the Supported Decision Making Project* (South Australia, Office of the Public Advocate, 2012) 43, 48.

104. Under the British Columbian legislation, a supported person is known as a “represented person” and is generally required to nominate a monitor. See *Representation Agreement Act 1996* (British Columbia) s 12, s 20.

105. ACT Law Reform Advisory Council, *Guardianship Report* (2016) [8.5].

106. Legal Aid NSW, *Submission GA109A*, 9.

107. Royal Australasian College of Physicians, *Submission GA66*, 3; Seniors Rights Service, *Submission GA61*, 5; Carers NSW, *Submission GA48*, 4; Mental Health Carers NSW Inc,

research shows that registration is unlikely to be effective as a safeguard unless it is mandatory; however, making it mandatory would overly formalise supported decision-making.¹⁰⁸ We discuss the question of registration further in Chapter 14.

Supported decision-making in the broader framework

Handling personal information

- 7.87 A supporter's ability to access a person's personal information will likely depend on various privacy and confidentiality laws, and practices and procedures that apply to the people and organisations from which the supporter is seeking the information. This might include banks, Commonwealth agencies, doctors, dentists and hospitals. We make recommendations about access to and disclosure of personal information in Chapter 14.

The National Disability Insurance Scheme

- 7.88 Our recommended framework will intersect with the operation of the National Disability Insurance Scheme ("NDIS"). The NDIS encourages informal supported decision-making, but does not currently provide for formal supported decision-making, despite a recommendation from the ALRC.¹⁰⁹
- 7.89 The NDIS includes a substitute decision-making mechanism in the form of "nominees." Nominees may prepare, review or replace the NDIS participant's plan and may manage funds under the plan.¹¹⁰ This is different to supported decision-making because a nominee can make decisions on behalf of the NDIS participant. However, a formal supporter under the new Act may also be a nominee for the purposes of the NDIS and in those circumstances, a supporter will need to navigate a different role.
- 7.90 Importantly, our recommendations do not preclude the possibility of people who need decision-making assistance using funding under the NDIS to pay their supporters, should the NDIS make funding available for such a purpose. The National Disability Service notes that supported decision-making arrangements, particularly with paid workers, could play a role in assisting NDIS users to enter into agreements with service providers.¹¹¹

Submission GA44, 4; Mental Health Coordinating Council, *Submission GA34*, 4-5; Australian Association of Gerontology, *Submission GA146*, 2; Justice Connect, *Submission GA159*, 12.

108. NSW Disability Network Forum, *Submission GA39*, 5; People with Disability Australia Inc, *Submission GA64*, 5; See also Legal Aid NSW, *Submission GA58*, 5; Intellectual Disability Rights Service, *Submission GA70*, 4.

109. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 5-2 [5.45].

110. *National Disability Insurance Scheme Act 2013* (Cth) s 78(1).

111. National Disability Services, *Submission GA155*, 3-4.

8. Personal appointments of representatives

In brief

We recommend a formal system of “enduring representation agreements” to cover personal matters, financial matters, healthcare matters and restrictive practices. These would replace the appointment of enduring guardians under the *Guardianship Act 1987* (NSW) and attorneys under the *Powers of Attorney Act 2003* (NSW).

The current law	94
Our recommendations.....	95
A single agreement.....	95
Eligibility to appoint an enduring representative.....	98
Eligibility for appointment as an enduring representative.....	98
People with a history of bankruptcy or conviction for dishonesty offences.....	99
Paid carers.....	100
Appointment process	101
Eligible witnesses	101
Number of witnesses	102
The role of the witness.....	103
Eligible signers.....	103
Multiple and reserve representatives	103
Functions of enduring representatives	104
Responsibilities	105
When appointment takes effect.....	107
Tribunal may declare appointment has effect	108
Tribunal review of appointments	109
Application for review.....	109
Tribunal action on review	110
Supreme Court review of appointments.....	111
Supreme Court review of an enduring representation agreement	111
Supreme Court may confirm functions.....	112
Ending an arrangement	112
Resignation of an enduring representative	112
End or suspension of an enduring representation agreement	113
Possession or control of a represented person’s property	114
Status of an advance care directive in an agreement that has ended	115
Effect of marriage on an enduring representation agreement.....	115

- 8.1 Enduring appointments are important tools that allow a person to choose someone to make decisions on their behalf in the event that they lose decision-making ability, and to select what types of decisions they can make. Currently, people can appoint an enduring guardian under the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) to make personal decisions for them and an attorney under the *Powers of Attorney Act 2003* (“*Powers of Attorney Act*”) to make financial and legal decisions.
- 8.2 In this Chapter, we recommend that NSW combine and align these two arrangements to create a single formal substitute decision-making system of “enduring representation agreements”. This would allow a person to make a single agreement to cover all the types of decisions that can currently be made by a guardian under the *Guardianship Act* or an attorney under the *Powers of Attorney Act*.

- 8.3 This Chapter outlines the recommended appointment process, functions and responsibilities of enduring representatives. It also recommends a number of safeguards, such as witnessing requirements and court and tribunal review of appointments. Safeguards are an important aspect of the framework — while an enduring agreement can protect a person who does not have decision-making ability from being exploited by others, it can also be vulnerable to abuse.¹ Nevertheless, we have been mindful not to limit overly a person’s ability to choose a representative. Certain risks are inevitable in any substitute decision-making framework, and placing too many restrictions on people’s choice will discourage personal appointments.

The current law

- 8.4 In NSW, a person may appoint someone to make decisions for them in the event that they lose the ability to make their own decisions. If they want someone to make decisions about their lifestyle and health, they can appoint an enduring guardian. If they want someone to make decisions about their financial and legal affairs, they can appoint an enduring power of attorney.
- 8.5 To appoint an enduring guardian or attorney, the person making the appointment must have decision-making capacity. According to the common law test, this means that they must be capable “of understanding the nature of the acts or transactions which the particular ... [document] purports to authorize”.²
- 8.6 The *Guardianship Act* lists the functions that a person can grant to an enduring guardian.³ A person can grant all or only some of these functions, and can limit the enduring guardian’s authority in relation to any of these functions.⁴ The enduring guardian must exercise their functions in accordance with “any lawful directions” contained in the appointment document, unless the Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”) directs otherwise.⁵
- 8.7 The *Guardianship Act* also specifies other powers that enduring guardians can exercise. An enduring guardian can do everything necessary to give effect to any of their functions. Among other things, they can sign documents on behalf of the person who appoints them.⁶ They also have rights to access information about the person.⁷
- 8.8 The *Powers of Attorney Act* states that the enduring attorney may “do on behalf of the principal anything that the principal may lawfully authorise an attorney to do”.⁸ However, the Act does not particularise which matters a person may authorise an attorney to do.

1. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.1]-[5.2].

2. *Gibbons v Wright* (1954) 91 CLR 423, 445.

3. *Guardianship Act 1987* (NSW) s 6E(1)–(2).

4. *Guardianship Act 1987* (NSW) s 6E(2).

5. *Guardianship Act 1987* (NSW) s 6E(3).

6. *Guardianship Act 1987* (NSW) s 6F.

7. *Guardianship Act 1987* (NSW) s 6E(2A).

8. *Powers of Attorney Act 2003* (NSW) s 9(1).

Our recommendations

A single agreement

8.1 Types of decisions an enduring representation agreement may cover

The new Act should provide that:

- (1) A person may appoint an enduring representative or representatives through an enduring representation agreement.
- (2) An enduring representation agreement may apply to decisions including those about personal matters, financial matters, healthcare and restrictive practices.
- (3) The agreement should specify what decisions or types of decisions the enduring representative or representatives may make as well as any conditions or limitations.

- 8.9 We recommend that, under a single agreement, a person should be able to appoint one or more representatives to make decisions about personal matters, financial matters, healthcare matters⁹ and/or restrictive practices.¹⁰
- 8.10 The person should have the discretion to set the scope of an enduring representative's authority, including:
- the option to choose which decision-making functions (personal matters, financial matters, healthcare and restrictive practices) a representative has, and
 - the ability to impose restrictions or conditions on a representative's decision-making functions.
- 8.11 For example, a person could appoint a representative to make decisions about any unspecified financial matters that arise. Alternatively, a person should be able to restrict their representative's decision-making power to a specific type of matter, such as paying the mortgage on their home. A person should also be able to give different powers to different representatives — for example, empowering one person to make decisions about their day-to-day activities and another person to make decisions about their living arrangements.
- 8.12 The current law requires separate agreements for personal matters on the one hand, and financial and legal matters on the other. However, the purpose of these separate systems is the same: to allow a person to arrange for others to make decisions for them when they do not have decision-making ability. There is therefore no reason why the requirements and safeguards for the two systems need to be different in content or expression.
- 8.13 The recommendation for a single regime of enduring representation agreements is consistent with our recommendation for a single regime of representation orders.¹¹

9. See Chapter 10.

10. See Chapter 12.

- 8.14 Prescribed and irrevocable power of attorney arrangements which do not relate to enduring powers of attorney will continue to be dealt with under the *Powers of Attorney Act*.¹²
- 8.15 A single regime provides an opportunity to enhance and standardise safeguards across all enduring representation arrangements in NSW and protect people from abuse and exploitation. Currently, safeguards differ under the *Guardianship Act* and the *Powers of Attorney Act*. Our recommendations enhance safeguards by:
- standardising the criteria that must be met by the person making the appointment, and the criteria that determine who can be appointed as an enduring representative¹³
 - standardising the requirements about who can witness an enduring representation agreement, how many witnesses are needed and what they must be satisfied of¹⁴
 - specifying the functions of enduring representatives in the new Assisted Decision-Making Act (“the new Act”), including what they can and cannot do¹⁵
 - requiring enduring representatives to sign and acknowledge a statement of responsibilities that they must observe when fulfilling their duties¹⁶
 - harmonising Tribunal powers to review and suspend, revoke, confirm or vary enduring representative agreements,¹⁷ and
 - standardising the processes for ending an agreement.¹⁸
- 8.16 The Australian Capital Territory (“ACT”), Victoria, and Queensland, to varying degrees, also have streamlined enduring arrangements.¹⁹
- 8.17 Giving people more choice and control over the nature and extent of the relationship with their representative(s) is consistent with a recommendation made by the Australian Law Reform Commission (“ALRC”) to protect against elder abuse.²⁰ In allowing for a wide range of decision-making under a single arrangement, we are recognising that “the reality of most people’s lives is that lifestyle and financial decisions are seldom completely separate”.²¹

11. Replacing the separate regimes of guardianship and financial management orders. See Chapter 9.

12. See *Powers of Attorney Act 2003* (NSW) pt 2, pt 3.

13. Recommendation 8.2, 8.3.

14. Recommendation 8.4.

15. Recommendation 8.6.

16. Recommendation 8.7(3).

17. Recommendation 8.10, 8.11.

18. Recommendation 8.14, 8.15.

19. *Powers of Attorney Act 2006* (ACT) s 13(2); *Powers of Attorney Act 2014* (Vic) s 22-23; *Powers of Attorney Act 1998* (Qld) s 32.

20. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) rec 5-1(a).

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

- 8.18 Many submissions support a simplified appointment process that allows people to appoint in a single agreement representatives with a full range of decision-making functions.²² The NSW Department of Family and Community Services notes that it has “received complaints about the operation of the current model, as carers are required to navigate complex systems to properly give effect to decisions they make to support their family member or other person with a disability”.²³ Other submissions note that our recommended model would “allow for more integrated decision-making”²⁴ about issues such as accommodation and medical care, that often require simultaneous decisions regarding financial matters.
- 8.19 A single agreement will also reduce the complexity of enduring arrangements. In its review of Victorian guardianship laws, the Victorian Law Reform Commission (“VLRC”) found a “widespread lack of community understanding about personal appointments”, notably regarding “the difference between the different types of personal appointments — medical, financial and guardianship”.²⁵ In its report on *Elder Abuse*, the ALRC said that a single appointment “may reduce confusion about what enduring documents have been signed, clarify the roles of attorneys and guardians, and reduce confusion as to who needs to be contacted with respect to a particular decision”.²⁶
- 8.20 Some submissions oppose a single appointment, emphasising that the skills required to make decisions for personal and financial matters are distinct.²⁷ However, under our recommended model, people will still have the choice to appoint multiple representatives with distinct decision-making functions or areas.²⁸ They will also have the option to appoint a sole representative with a broad range of powers.
- 8.21 The NSW Trustee and Guardian (“NSW Trustee”) is concerned that a single appointment could increase the potential for conflicts of interest.²⁹ For this reason, we recommend that enduring representatives have a statutory responsibility to manage conflicts of interest appropriately and ensure that they always give the represented person’s interests paramount consideration.³⁰ Under the new framework, a representative would also be required to act in accordance with the represented person’s will and preferences wherever possible.³¹

22. Seniors Rights Service, *Preliminary Submission PGA07*, 24; Institute of Legal Executives (Victoria), *Preliminary Submission PGA35*, 2; B Pace, *Submission GA42*, 7; Mental Health Carers NSW Inc, *Submission GA44*, 17; NSW Department of Family and Community Services, *Submission GA77*, 8-9; Mental Health Commission of NSW, *Submission GA148*, 4; National Disability Services, *Submission GA155*, 10; Cognitive Decline Partnership Centre, *Submission GA156*, 1; Justice Connect, *Submission GA159*, 10.

23. NSW Department of Family and Community Services, *Submission GA77*, 8.

24. Disability Council NSW, *Submission GA47*, 10.

25. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [10.67].

26. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.148].

27. Intellectual Disability Rights Service, *Submission GA71*, 10; Seniors Rights Service, *Submission GA62*, 6; *NSW Public Guardian*, *Submission GA73*, 8-9; NSW Trustee and Guardian, *Submission GA79*, 9; Legal Aid NSW, *Submission GA163*, 8-9.

28. Recommendation 8.5.

29. NSW Trustee and Guardian, *Submission GA79*, 9.

30. Recommendation 8.7(1)(d).

31. Recommendation 5.2(a), 5.4.

Eligibility to appoint an enduring representative

8.2 Eligibility to appoint an enduring representative

The new Act should provide that a person may appoint an enduring representative through an enduring representation agreement if the person making the appointment:

- (a) is at least 18 years of age
- (b) has decision-making ability to enter into the agreement, and
- (c) is making the agreement voluntarily.

- 8.22 This recommendation establishes the eligibility criteria that a person must meet before they can appoint an enduring representative. It incorporates the eligibility criteria that is currently in the *Guardianship Act*³² for enduring guardians but absent from the *Powers of Attorney Act* for attorneys.

Eligibility for appointment as an enduring representative

8.3 Eligibility for appointment as an enduring representative

The new Act should provide:

- (1) A person is not eligible to be appointed as an enduring representative if:
 - (a) they are under 18 years of age
 - (b) they (or their spouse, child, brother or sister) provide, for fee or reward, healthcare, accommodation or other support services to the appointing person
 - (c) they are to be given a financial function and they have been bankrupt or been found guilty of an offence involving dishonesty, unless they have recorded this in the enduring representation agreement, or
 - (d) they are the Public Representative.
- (2) A person may only appoint the NSW Trustee as an enduring representative in relation to financial decision-making functions.
- (3) The appointment does not lapse if an enduring representative (or their spouse, child, brother or sister) is subsequently engaged to provide for fee or reward healthcare, accommodation or other support services to the represented person.

- 8.23 We recommend maintaining the eligibility requirements in the *Guardianship Act* that apply to enduring guardians, for the appointment of enduring representatives.³³

- 8.24 The *Guardianship Act* requires that an enduring guardian must be at least 18 years old,³⁴ and not be somebody paid to provide medical services, accommodation or

32. *Guardianship Act 1987* (NSW) s 6, s 6C(1)(e).

33. *Guardianship Act 1987* (NSW) s 6B.

34. *Guardianship Act 1987* (NSW) s 6B(1).

any other support services to the person. The spouse, parents, children and siblings of service providers are also ineligible for appointment.³⁵

- 8.25 The *Powers of Attorney Act* does not contain eligibility requirements for enduring attorneys. However, we consider that the eligibility requirements in the *Guardianship Act* provide important protections that should apply to all representatives, including those with financial functions.
- 8.26 A number of submissions support maintaining the current *Guardianship Act* criteria.³⁶ The NSW Trustee proposes a blanket exclusion of “anyone who has a potential conflict of interest”.³⁷ However, we consider that such a broad exclusion would unnecessarily restrict the autonomy and choice of the person making the appointment.
- 8.27 Allowing the NSW Trustee to be appointed, but only for financial functions, is also consistent with the current law.³⁸ The NSW Trustee supports retaining this provision.³⁹

People with a history of bankruptcy or conviction for dishonesty offences

- 8.28 We recommend an additional eligibility requirement for representatives with financial functions. People who have a history of bankruptcy or have been found guilty of an offence involving dishonesty should not be eligible to act as a representative with a financial function unless they have disclosed this in the enduring representation agreement. The provisions of the *Powers of Attorney Act* currently exclude people with a history of bankruptcy from acting as attorneys.⁴⁰ Our recommendation is consistent with the approach in Victoria.⁴¹
- 8.29 Some submissions support such exclusions.⁴² Some, however, are concerned about allowing an agreement as long as the enduring representative has disclosed their history.⁴³ These submissions argue that the risks posed to the represented person “outweigh the potential benefits associated with freedom of choice”.⁴⁴

35. *Guardianship Act 1987* (NSW) s 6B(2). Note that the appointment does not lapse if the enduring guardian becomes a paid service provider for the person after the appointment has been made: s 6B(3).

36. Royal Australian College of General Practitioners, *Submission GA36*, 3; Justice Health and Forensic Mental Health Network, *Submission GA50*, 5; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA57*, 2; People with Disability Australia Inc, *Submission GA65*, 3-4; Intellectual Disability Rights Service, *Submission GA71*, 2; NSW Public Guardian, *Submission GA73*, 5; NSW Trustee and Guardian, *Submission GA79*, 1-2.

37. NSW Trustee and Guardian, *Submission GA79*, 2.

38. *NSW Trustee and Guardian Act 2009* (NSW) s 11(1)(d).

39. NSW Trustee and Guardian, *Submission GA140*, 7.

40. *Powers of Attorney Act 2003* (NSW) s 5(d).

41. *Powers of Attorney Act 2014* (Vic) s 28(1)(c)(ii).

42. B Pace, *Submission GA42*, 1; Disability Council NSW, *Submission GA47*, 6; Seniors Rights Service, *Submission GA62*, 1.

43. National Disability Services, *Submission GA155*, 10; NSW Ombudsman, *Submission GA136*, 3; Physical Disability Council of NSW, *Submission GA143*, 4.

44. NSW Ombudsman, *Submission GA136*, 3.

- 8.30 In its report on *Elder Abuse*, the ALRC acknowledged that this approach involved risk,⁴⁵ and recommended a Tribunal assessment process rather than a blanket prohibition.⁴⁶ However, we anticipate this would overly restrict the autonomy of someone with decision-making ability and would place an unnecessary resource burden on the Tribunal.
- 8.31 We can envisage situations where a person's history of bankruptcy or dishonesty will not be relevant to their decision-making functions. We are therefore of the view that people should be able to make an informed choice about who to appoint.

Paid carers

- 8.32 We recommend maintaining provisions from the *Guardianship Act* that a person is not eligible to be appointed an enduring guardian if they (or their spouse, child, brother or sister) provide, for fee or reward, healthcare, accommodation or other support services to the appointing person. This is not intended to exclude the appointment of the NSW Trustee or trust companies who manage a person's funds for a fee. Nor is it intended to exclude lawyers, who are regularly appointed as attorneys for a fee.
- 8.33 We also recommend maintaining the provisions that an enduring agreement is not revoked where an appointed representative (or their spouse, child, brother or sister) subsequently becomes engaged to provide, for fee or reward, healthcare, accommodation or other support services to the represented person.
- 8.34 One submission raises concerns about this provision.⁴⁷ However, in our view, it maximises the autonomy of the represented person to choose an enduring representative, and acknowledges that paid carers might be the best, and at times the only, person available to fulfil the role.
- 8.35 We also recommend safeguards to protect the represented person; for example:
- requiring representatives to handle conflicts of interest appropriately⁴⁸
 - allowing a represented person to end an agreement while they have decision-making ability,⁴⁹ and
 - allowing a review of the agreement to be undertaken in a range of circumstances, including where there is concern that a person did not have decision-making ability to enter into the agreement, or that an enduring representative is not acting in accordance with their responsibilities.⁵⁰

45. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.68].

46. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.69]-[5.70].

47. Royal Australian College of General Practitioners, *Submission GA135*, 4-5.

48. Recommendation 8.7(1)(d).

49. Recommendation 8.15.

50. Recommendation 8.11.

Appointment process

8.4 Making an enduring representation agreement

The new Act should provide:

- (1) that an enduring representation agreement must be in a prescribed form and be signed by the person making the appointment and the proposed enduring representative accepting the appointment (although not necessarily at the same time or in the presence of each other)
- (2) for an eligible signer, where required, to sign for the person in the person's presence and at their direction, and
- (3) for eligible witnesses to witness the signatures and certify that:
 - (a) they explained the effect of the document to the person making the agreement before it was signed, and
 - (b) the person making the agreement signed voluntarily and appeared to have decision-making ability in relation to the agreement.

8.36 We recommend that the new Act maintains the process for appointing an enduring representative currently provided for in the *Guardianship Act* in relation to enduring guardians.⁵¹

Eligible witnesses

8.37 We also recommend that the new Act incorporates:

- the current categories of “eligible witness” and “prescribed witness” in the *Guardianship Act* and *Powers of Attorney Act* respectively
- the required number of witnesses and the functions of the witnesses set out in the *Guardianship Act*,⁵² and
- the requirement in the *Powers of Attorney Act* that the witness explains the effect of the document to the person.⁵³

8.38 Under current legislation, a witness may be an Australian or foreign lawyer, a registrar of the Local Court, an employee of the NSW Trustee or certain employees of Service NSW.⁵⁴ The person being appointed as the enduring representative may not be a witness.⁵⁵

51. *Guardianship Act 1987* (NSW) s 6C, s 5 definition of “eligible witness”; *Guardianship Regulation 2016* (NSW) cl 4.

52. *Guardianship Act 1987* (NSW) s 5 definition of “eligible witness”, s 6C(1); *Guardianship Regulation 2016* (NSW) cl 4; *Powers of Attorney Act 2003* (NSW) s 19(2) definition of “prescribed witness”.

53. See *Powers of Attorney Act 2003* (NSW) s 19(1)(c)(i).

54. *Guardianship Act 1987* (NSW) s 5 definition of “eligible witness”; *Guardianship Regulation 2016* (NSW) cl 4; *Powers of Attorney Act 2003* (NSW) s 19(2) definition of “prescribed witness”.

55. *Guardianship Act 1987* (NSW) s 5(b) definition of “eligible witness”; *Powers of Attorney Act 2003* (NSW) s 19(1)(b).

- 8.39 Additional categories of prescribed witnesses in the *Powers of Attorney Act* should be able to witness the appointment of enduring representatives with financial functions only. This includes licensed conveyancers and certain employees of trustee companies.⁵⁶
- 8.40 In Victoria, a medical practitioner may witness the appointment of an enduring attorney.⁵⁷ Some submissions favour including medical practitioners as eligible witnesses in NSW.⁵⁸
- 8.41 However, other submissions argue that the current range of categories of witness should be maintained. The NSW Trustee notes that the extension of the number or categories of witnesses may result in the use of “witnesses without the necessary experience or expertise or time available to make a proper assessment of the appointor’s capacity and to ensure that they understand the nature and effect of the document”.⁵⁹
- 8.42 The Law Society of NSW submits that lawyers only should be witnesses, on the basis that they are “appropriately qualified to explain the nature and effect of the document and take adequate instructions from the person entering into the guardianship document”.⁶⁰ However, we consider that such a restriction would make the appointment of an enduring representative unduly expensive and complex, and may discourage people from entering into these agreements.⁶¹
- 8.43 We consider that the current categories of witnesses strike the appropriate balance between a flexible and accessible system, which also has appropriate safeguards and protections.

Number of witnesses

- 8.44 We recommend that only one eligible witness should be required to witness an enduring appointment. This is consistent with both the *Guardianship Act* and the *Powers of Attorney Act*.⁶²
- 8.45 Submissions support maintaining this requirement, including Legal Aid NSW which notes that a requirement for two witnesses may be unduly onerous, and may “deter people from appointing an enduring guardian”.⁶³ In our view, requiring only one eligible witness will ensure that appointing a representative remains a simple and accessible process.

56. *Powers of Attorney Act 2003* (NSW) s 19(2). A licensed conveyancer means a licensee under the *Conveyancers Licensing Act 2003* (NSW).

57. *Powers of Attorney Act 2014* (Vic) s 35(1)(b).

58. Institute of Legal Executives (Victoria), *Preliminary Submission PGA35*, 2; Cognitive Decline Partnership Centre, *Submission GA112A*, 2.

59. NSW Trustee and Guardian, *Submission GA117*, 1.

60. Law Society of NSW, *Submission GA118A*, 1.

61. See Institute of Legal Executives (Victoria), *Preliminary Submission PGA35*, 3.

62. *Powers of Attorney Act 2003* (NSW) s 19; *Guardianship Act 1987* (NSW) s 6C.

63. Legal Aid NSW, *Submission GA109A*, 3. See also NSW Trustee and Guardian, *Submission GA117*, 1; Law Society of NSW, *Submission GA118A*, 1-2.

The role of the witness

- 8.46 We recommend that a witness certify that they have explained the effect of the document to the person making the appointment; and that the person making the appointment signed the document voluntarily in their presence, and appeared to have decision-making ability for the agreement. If someone else signs on behalf of the person making the appointment, a witness should certify that the person (in the presence of the witness) instructed this other person to sign on their behalf. These requirements are consistent with recommendations made by the ALRC in its report on *Elder Abuse*⁶⁴ and are supported by submissions.⁶⁵

Eligible signers

- 8.47 Under the current provisions for enduring guardians, an eligible signer is someone who can, when a person appointing or revoking an enduring guardian appointment or accepting the resignation of an enduring guardian so instructs, sign the instrument on that person's behalf and in their presence.⁶⁶ An eligible signer must be at least 18 years of age, not be a witness to the instrument, and not be the enduring guardian or substitute enduring guardian appointed by the instrument.⁶⁷ The witness to such an instrument must certify that the person instructed the eligible signer to sign it on their behalf.⁶⁸ The current arrangements for eligible signers are appropriate and we do not recommend any change.

Multiple and reserve representatives

8.5 Appointment of multiple and reserve enduring representatives

- (1) The new Act should:
- (a) allow a person to appoint two or more enduring representatives to act jointly or severally, in relation to one or more functions, and
 - (b) provide for situations where one or more enduring representatives cannot act (by reason of death, resignation, or loss of decision-making ability).
- (2) The new Act should allow a person to appoint one or more reserve enduring representatives to act if an original enduring representative dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the agreement.

- 8.48 We recommend that the new Act allows a person to appoint multiple representatives to act jointly or severally in relation to one or more decision-making functions. We also recommend that a person be able to appoint one or more reserve representatives, for circumstances where the original enduring

64. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.46]-[5.47].

65. Law Society of NSW, *Submission GA118A*, 2; NSW Trustee and Guardian, *Submission GA117*, 1; Cognitive Decline Partnership Centre, *Submission GA112A*, 2; NSW Civil and Administrative Tribunal, *Submission GA101A*, 2-3.

66. *Guardianship Act 1987* (NSW) s 6C, s 6H, s 6HB.

67. *Guardianship Act 1987* (NSW) s 5 definition of “eligible signer”.

68. *Guardianship Act 1987* (NSW) s 6C(1)(f), s 6H(2)(c3), s 6HB(2)(d).

representative dies, resigns or cannot undertake the role. We recommend that the provisions of the new Act are consistent in this regard with current provisions in the *Guardianship Act* and the *Powers of Attorney Act*.⁶⁹

- 8.49 We considered whether to introduce a mechanism for succession planning in addition to these provisions. For example, a Bill currently before the Victorian Parliament proposes to allow relatives, primary carers, guardians and administrators (among others) to specify who should be appointed as a guardian or administrator if they can no longer act.⁷⁰ The Bill proposes that the Victorian tribunal consider such a statement when deciding if a person is suitable to act as a guardian or an administrator.⁷¹ Many submissions support such a mechanism.⁷²
- 8.50 On balance, we consider that, in the context of our recommended framework, the proposed Victorian model is unnecessary. We recommend that the represented person be able to nominate multiple representatives, as well as reserve representatives, to implement an appropriate process of succession planning. The requirement for the Tribunal to take into account a person's will and preferences when appointing a representative⁷³ should enable consultation with people close to the represented person to be consulted about an appropriate appointment when necessary.

Functions of enduring representatives

8.6 Functions of enduring representatives

The new Act should provide that:

- (1) An enduring representative's decision-making functions (and any limits or lawful conditions on them) are determined by the enduring representation agreement.
- (2) An enduring representative may sign and do all such things as are necessary to give effect to any decision-making function.
- (3) An enduring representative can access, collect or obtain personal information (including financial information and health records) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions.
- (4) The following functions cannot be given under an enduring representation agreement: making or revoking a will, making or revoking an enduring

69. *Powers of Attorney Act 2003* (NSW) s 20, s 45A, s 46(2); *Powers of Attorney Regulation 2016* (NSW) sch 2; *Guardianship Act 1987* (NSW) s 6D, s 6DA.

70. Guardianship and Administration Bill 2018 (Vic) cl 35.

71. Guardianship and Administration Bill 2018 (Vic) cl 32(6).

72. Royal Australian College of General Practitioners, *Submission GA36*, 11; L Anderson, *Submission GA38*, 11; NSW Disability Network Forum, *Submission GA40*, 5; Disability Council NSW, *Submission GA47*, 9; Carers NSW, *Submission GA49*, 2; Justice Health and Forensic Mental Health Network, *Submission GA50*, 7; D Coombridge, *Submission GA54*, 9; Seniors Rights Service, *Submission GA62*, 4; People with Disability Australia Inc, *Submission GA65*, 6; Intellectual Disability Rights Service, *Submission GA71*, 6; Law Society of NSW, *Submission GA75*, 4; NSW Department of Family and Community Services, *Submission GA77*, 6; NSW Trustee and Guardian, *Submission GA79*, 6.

73. Recommendation 9.6.

representation agreement, voting in elections, consenting to marriage, divorce, surrogacy arrangements or sexual relations, making decisions regarding the care and wellbeing or adoption of children, and managing the represented person's property after their death.

8.51 Consistent with provisions in the *Guardianship Act*, we recommend that:

- Enduring representatives' decision-making functions (and any limits or lawful conditions placed on them) should be determined by the agreement. The person making the appointment should have the discretion to set the scope of an enduring representative's authority, including their decision-making functions, and any limits or lawful conditions on their use.
- Enduring representatives should be able to sign and do all such things as are necessary to give effect to any decision-making functions.⁷⁴
- Enduring representatives should be able to access, collect or obtain personal information about the represented person that is relevant and necessary for carrying out their functions.⁷⁵ For further information on access to information and privacy, see our discussion in Chapter 14.

8.52 Recommendations 4.4 to 4.7 define the personal, financial, medical and restrictive practices functions that may be given to a representative or supporter.

8.53 Recommendation 8.6(4) is consistent with exclusions in some other Australian states and territories, as well as recommendations made by the ALRC.⁷⁶ The *Guardianship Act* and the *Powers of Attorney Act* are silent on decisions that an enduring representative cannot make; however, a number of submissions support the new Act containing an express list of exclusions,⁷⁷ including to illustrate the limits of an enduring representative's powers.⁷⁸

Responsibilities

8.7 Responsibilities of enduring representatives

The new Act should provide:

- (1) Enduring representatives must:
 - (a) observe the Act's general principles
 - (b) act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the represented person

74. *Guardianship Act 1987* (NSW) s 6F, s 6G. See also *Powers of Attorney Act 2003* (NSW) s 9.

75. *Guardianship Act 1987* (NSW) s 6E(2A).

76. *Powers of Attorney Act 2014* (Vic) s 26; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 109; *Powers of Attorney Act 2006* (ACT) s 35-37; Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) rec 5-1(f).

77. NSW Disability Network Forum, *Submission GA40*, 6-7. See also Mental Health Carers NSW Inc, *Submission GA44*, 15; People with Disability Australia Inc, *Submission GA65*, 7; Intellectual Disability Rights Service, *Submission GA71*, 7; Law Society of NSW, *Submission GA75*, 5; NSW Trustee and Guardian, *Submission GA79*, 7.

78. Law Society of NSW, *Submission GA75*, 5.

- (c) act within the conditions or limitations of the agreement
 - (d) ensure that they identify and respond to situations where their 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
 - (e) communicate with the represented person when making decisions on their behalf and explain the decisions as far as possible
 - (f) treat the represented person and important people in their life with dignity and respect
 - (g) if they have a financial decision-making function:
 - (i) keep accurate records and accounts
 - (ii) keep their money and property separate from the represented person's money and property, and
 - (iii) not gain a benefit from being a representative unless expressly authorised
 - (h) respect the represented person's privacy and confidentiality by:
 - (i) only collecting personal information to the extent necessary for carrying out the enduring representative's role, and
 - (ii) only disclosing such information when permitted by **Recommendation 14.3**.
- (2) Enduring representatives are expected, where possible, to:
- (a) develop a person's decision-making skills
 - (b) promote and maximise a person's autonomy, and
 - (c) provide decision-making support.
- (3) Enduring representatives, other than the NSW Trustee, must sign an acknowledgement that they have read and understood these responsibilities.

8.54 We recommend that the new Act contain a statement of responsibilities for enduring representatives. This is also consistent with a recommendation of the ALRC in its report on *Elder Abuse*.⁷⁹ Enduring representatives should sign an acknowledgment that they have read and understood these responsibilities.

8.55 In our view, a statement of responsibilities will serve to educate representatives and the community about what is expected of them. We agree with the ALRC that it "presents an opportunity to reiterate the nature and seriousness of the role".⁸⁰

8.56 Consistent with the recommendations of the ALRC, we recommend that the requirement to sign the acknowledgment should not apply where the NSW Trustee is appointed.⁸¹ However, it should apply to appointed trustee companies.

79. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) rec 10-1.

80. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [10.16].

- 8.57 The statement of responsibilities we recommend codifies and expands on fiduciary obligations that enduring guardians and enduring attorneys have at common law, such as the requirements to act in good faith, avoid conflicts of interest, and not make an “unsanctioned profit” from their role.⁸² It also incorporates requirements from the *Powers of Attorney Regulation 2016* (NSW).⁸³
- 8.58 Unlike the responsibilities set out in Recommendation 8.7(1), which are mandatory, those in Recommendation 8.7(2) are aspirational. We acknowledge that the ability of the NSW Trustee, for example, to undertake these responsibilities, will depend upon resourcing.⁸⁴
- 8.59 Submissions suggest that there should be additional mechanisms to ensure representatives comply with their obligations, such as criminal penalties for breach of obligations,⁸⁵ or a requirement to submit an annual declaration of compliance.⁸⁶ We consider these measures would significantly discourage people from agreeing to be an enduring representative. We further note that the Tribunal has the power to revoke the appointment or appoint a replacement representative where the representative is not complying with their obligations.

When appointment takes effect

8.8 When an enduring representation agreement has effect

- (1) The new Act should allow a person to specify a time from which, a circumstance in which, or an occasion on which the decision-making functions for all matters or the decision-making functions for a specified matter are exercisable.
- (2) If the person does not specify when the representation agreement comes into effect:
 - (a) for financial matters, the agreement shall come into effect at the time the appointment is made
 - (b) for personal, health and restrictive-practices decisions, the agreement shall come into effect when the represented person does not have decision-making ability for that decision.
- (3) A representative may exercise decision-making functions during any period when the represented person does not have decision-making ability, even if the specified time, circumstances or occasion has not arisen.

- 8.60 Currently, under the *Powers of Attorney Act*, the person making the appointment has discretion about when the attorney may start exercising their functions. It can

81. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [10-17]-[10-18].

82. *Ability One Financial Management v JB* [2014] NSWSC 245 [113].

83. *Powers of Attorney Regulation 2016* (NSW) sch 2, Form 2 [7].

84. NSW Trustee and Guardian, *Submissions GA140*, 10.

85. Seniors Rights Service, *Submission GA158*, 13-14.

86. Justice Connect, *Submission GA159*, 12.

be at a time specified by the agreement, which may be before they lose decision-making capacity.⁸⁷

8.61 We recommend that the represented person has the discretion to decide when the representative should commence exercising their functions. This could occur, for example:

- immediately on making the agreement, or
- when the represented person does not have decision-making ability for the relevant matters.

This is consistent with the principle of allowing the represented person to have as much choice as possible. It is also consistent with legislation in Victoria⁸⁸ and Queensland⁸⁹ and would avoid the inconvenience of, for example, making a power of attorney to apply while the person has decision-making ability, and an enduring representation agreement for when that ability is lost⁹⁰.

Tribunal may declare appointment has effect

8.9 Tribunal may declare appointment has effect

The new Act should provide that the Tribunal may, on application by a person appointed as an enduring representative, declare that the appointment has effect if it is satisfied that:

- (a) the represented person does not have decision-making ability for a decision covered by the enduring representation agreement, and
- (b) the appointment is valid.

8.62 Recommendation 6.3 addresses how a representative knows when the represented person has lost decision-making ability. Recommendation 8.9 provides that if the representative is still unsure, they can apply to the Tribunal to confirm that the person has lost decision-making ability and that the agreement has come into effect.

8.63 This is consistent with the Tribunal's current powers in the *Powers of Attorney Act* and the *Guardianship Act*⁹¹ and is important where the decision-making ability of the person is uncertain or contested. It also provides an important safeguard for represented people.

87. *Powers of Attorney Act 2003* (NSW) s 20.

88. *Powers of Attorney Act 2014* (Vic) s 39.

89. *Powers of Attorney Act 1998* (Qld) s 33.

90. Legal Aid NSW, *Submission GA163*, 9.

91. *Powers of Attorney Act 2003* (NSW) s 36(5); *Guardianship Act 1987* (NSW) s 6K(1)(b).

Tribunal review of appointments

Application for review

8.10 Tribunal review of enduring representation agreements

The new Act should provide:

- (1) The Tribunal may review an enduring representation agreement on its own motion.
- (2) The Tribunal must review an enduring representation agreement if requested to do so by:
 - (a) the represented person
 - (b) a person with a proper interest in the proceedings
 - (c) a person with a genuine interest in the personal and social wellbeing of the represented person, or
 - (d) the enduring representative
 unless the request does not disclose grounds that warrant a review.
- (3) The Tribunal must, before carrying out a review, notify each party of the date, time and place of the review (although failure to do so will not invalidate any decision).
- (4) The Tribunal may order that the agreement is suspended until the review is complete.

- 8.64 Recommendation 8.10 is largely consistent with the current provisions in the *Guardianship Act* and *Powers of Attorney Act* regarding the review of agreements.
- 8.65 The Tribunal should be able to review an appointment on its own motion — a power it currently has for enduring guardianship appointments but not enduring power of attorney appointments.⁹² We also recommend making it express that both the represented person and enduring representative may apply for review. This reflects provisions in the *Powers of Attorney Act*.⁹³
- 8.66 Currently, under the *Powers of Attorney Act*, the Tribunal decides whether to undertake a review.⁹⁴ However, under the *Guardianship Act*, the Tribunal *must* review an appointment when requested to do so by certain parties. We favour this approach, which in our view is consistent with the general principles of the new Act.⁹⁵
- 8.67 We recommend that the Tribunal continue to have limited discretion not to review an appointment where the application does not disclose grounds that warrant a review. Currently, the Tribunal does not have to review an agreement that it has previously reviewed. However, we have not included a recommendation to this

92. See *Guardianship Act 1987* (NSW) s 6J and *Powers of Attorney Act 2003* (NSW), s 36(1).

93. *Powers of Attorney Act 2003* (NSW) s 35.

94. *Powers of Attorney Act 2003* (NSW) s 36(1).

95. See Recommendation 5.2.

effect because it does not take into account the possibility of a change of circumstances.

Tribunal action on review

8.11 Tribunal action on review

The new Act should provide:

- (1) The Tribunal, when reviewing the agreement, should consider, where relevant:
 - (a) whether the represented person met the eligibility criteria for entering into the agreement, and
 - (b) if the represented person did meet the eligibility criteria to enter into the agreement:
 - (i) the fact that the representative was chosen by the person
 - (ii) whether the eligibility criteria for a representative are still being met, and
 - (iii) whether the representative is meeting their responsibilities and carrying out their required functions.
- (2) The Tribunal may, on reviewing an enduring representation agreement, confirm it, vary it (including appointing a replacement enduring representative who is eligible and suitable), suspend it or revoke it, in whole or in part.
- (3) Where there is doubt about the validity of an appointment, the Tribunal may confirm the appointment if the Tribunal is satisfied it was the appointment the person intended to make.
- (4) The Tribunal may make a representation order or support order in accordance with the new Act to supersede an enduring representation agreement that has been suspended or revoked, in whole or in part.

8.68 Under the *Powers of Attorney Act*, the Tribunal may make a very wide range of orders following a review,⁹⁶ including removing the person appointed as an enduring attorney.⁹⁷

8.69 By contrast, in order to remove an enduring guardian, the Tribunal must revoke the enduring appointment “as a whole”.⁹⁸ The Tribunal can only appoint a substitute enduring guardian if the original enduring guardian dies, resigns or becomes incapacitated.⁹⁹ The 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,

96. *Powers of Attorney Act 2003* (NSW) s 36; *NAU* [2014] NSWCATGD 16 [17].

97. *Powers of Attorney Act 2003* (NSW) s 36(4)(b)-(c).

98. *WBN* [2015] NSWCATGD 9 [30].

99. *Guardianship Act 1987* (NSW) s 6MA(1).

where it is satisfied that the confirmation “reflects the appointment that the person making the appointment intended to make at the time”.¹⁰⁰

- 8.70 The Tribunal does not have express powers under the *Powers of Attorney Act* to confirm an appointment in the same circumstances. However, the *Powers of Attorney Act* empowers the Tribunal to make any orders it “thinks fit” if “satisfied that it would be in the best interests of the principal to do so or that it would better reflect the wishes of the principal”.¹⁰¹
- 8.71 The majority of submissions support aligning the Tribunal’s powers of review under the *Powers of Attorney Act* and the *Guardianship Act*.¹⁰² The Tribunal notes that the policy rationale for the inconsistency is unclear.¹⁰³
- 8.72 Under the *Powers of Attorney Act*, the Tribunal has specific powers to make orders requiring an attorney to produce accounts, records and other information, to be audited, and to submit a financial management plan.¹⁰⁴ We have not recommended that these be included in the Act, as the Tribunal can request that the representative keep and produce accounts by way of directions.¹⁰⁵

Supreme Court review of appointments

Supreme Court review of an enduring representation agreement

8.12 Supreme Court review of an enduring representation agreement

The new Act should provide that the Supreme Court may review the appointment (or purported appointment) of an enduring representative under an enduring representation agreement and may make such orders as it thinks appropriate.

- 8.73 We recommend that the broad powers of the Supreme Court to review enduring appointments under the *Guardianship Act*¹⁰⁶ and *Powers of Attorney Act*¹⁰⁷ be maintained in the new Act.

100. *Guardianship Act 1987* (NSW) s 6K(4).

101. *Powers of Attorney Act 2003* (NSW) s 36(4)(g).

102. NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 7; NSW Disability Network Forum, *Submission GA126*, 3; NSW Trustee and Guardian, *Submission GA117*, 2; Cognitive Decline Partnership Centre, *Submission GA112A*, 3; Law Society of NSW, *Submission GA118A*, 2-3; Mental Health Carers NSW Inc, *Submission GA121A*, 3. See also Seniors Rights Service, *Submission GA90A*, 2; Legal Aid NSW, *Submission GA109A*, 3; Legal Roundtable, *Consultation GAC21*.

103. NSW Civil and Administrative Tribunal, *Submission GA101A*, 3.

104. *Powers of Attorney Act 2003* (NSW) s 36(4)(e).

105. See Recommendation 9.1.

106. *Guardianship Act 1987* (NSW) s 6L.

107. *Powers of Attorney Act 2003* (NSW) pt 5 div 4.

Supreme Court may confirm functions

8.13 Supreme Court may confirm any function of an enduring representative

The new Act should provide that the Supreme Court may, on application by a person appointed as an enduring representative, confirm (in whole or in part) any function under the enduring representation agreement if:

- (a) it appears that the represented person does not have decision-making ability to confirm the function, and
- (b) confirming the function is in accordance with the represented person's will and preferences.

- 8.74 We recommend that the Supreme Court be able to confirm the functions of an enduring representative in circumstances where the represented person no longer has decision-making ability, and confirming the function is in accordance with the person's will and preferences.
- 8.75 This recommendation respects the choice and autonomy of the represented person in circumstances where the validity of the appointment is in doubt, such as where the appointment may not have complied with procedural requirements.
- 8.76 This recommendation is consistent with the powers of the Supreme Court under the *Powers of Attorney Act*.¹⁰⁸

Ending an arrangement

Resignation of an enduring representative

8.14 Resignation of an enduring representative

The new Act should provide that an enduring representative may resign their appointment:

- (a) if the represented person understands the nature and consequences of the resignation — by giving notice in writing to the represented person.
- (b) if the represented person does not understand the nature and consequences of the resignation — with the approval of the Tribunal.

- 8.77 This recommendation is consistent with the process for resigning an enduring appointment under the *Guardianship Act*.
- 8.78 Currently an enduring guardian can resign before the appointment takes effect by giving written notice to the person who made the appointment, signed by the

108. *Powers of Attorney Act 2003* (NSW) pt 5 div 3.

enduring guardian and an eligible witness.¹⁰⁹ After the appointment takes effect, the enduring guardian can only resign with the Tribunal's approval.¹¹⁰

- 8.79 While our recommendation is consistent with these provisions, we have made two important changes.
- 8.80 First, an enduring representative should be able to resign by giving notice to the represented person if the represented person “understands the nature and consequences of the resignation”. Second, in response to a submission from Legal Aid NSW, we suggest that where the represented person understands the nature and consequences of the resignation, a representative should be able to resign simply by giving written notice to the represented person, rather than being required to give notice in a prescribed form that is signed and witnessed.¹¹¹
- 8.81 Legal Aid NSW also suggests that where the represented person does not understand the nature and consequences of the resignation, the representative should only “be required to notify the Tribunal, but not obtain the approval of the Tribunal”. It argues that it is too onerous to require the representative “to continue to act until approval is obtained”.¹¹² However, we consider that the requirement to obtain Tribunal approval is an important protection for people who have lost decision-making ability from being left without adequate representation for decision-making functions.

End or suspension of an enduring representation agreement

8.15 End or suspension of an enduring representation agreement

The new Act should provide that:

- (1) A represented person may, by a prescribed form that is signed and witnessed, revoke an appointment under an enduring representation agreement if the represented person:
 - (a) has decision-making ability in relation to the agreement and its revocation, and
 - (b) revokes the agreement voluntarily.
- (2) An enduring representation agreement lapses if an enduring representative dies, unless there is a joint or reserve representative to carry out the functions.
- (3) An enduring representation agreement is suspended, so far as it appoints an enduring representative, when the enduring representative does not have the decision-making ability to act under the agreement.
- (4) An enduring representation agreement is suspended, in so far as it appoints an enduring representative with a financial function, if the

109. *Guardianship Act 1987* (NSW) s 6HB(1)(a), s 6HB(2)(a). The relevant form is contained in the *Guardianship Regulation 2016* (NSW) sch 1 Form 3.

110. *Guardianship Act 1987* (NSW) s 6HB(1)(b).

111. Legal Aid NSW, *Submission GA163*, 9.

112. Legal Aid NSW, *Submission GA163*, 9.

enduring representative becomes bankrupt or is found guilty of an offence involving dishonesty.

- 8.82 A represented person should be able to revoke an appointment in writing, consistent with provisions that currently apply to enduring guardianship arrangements.¹¹³
- 8.83 We also recommend maintaining the provisions that govern the end or suspension of a guardianship order when the guardian dies.¹¹⁴ These provisions should apply to all representatives.
- 8.84 Further, Recommendation 8.15(4) makes it express that an enduring appointment is suspended where an appointed representative with a financial function is no longer eligible to act because of bankruptcy or being found guilty of an offence involving dishonesty. This is consistent with legislation in the ACT and Victoria.¹¹⁵

Possession or control of a represented person's property

8.16 Possession or control of a represented person's property

The new Act should provide that:

- (1) Nothing in the new Act operates to change the ownership of any part of a represented person's property.
- (2) An enduring representative, upon ceasing to act as such, must ensure that possession or control of any part of a represented person's property in relation to which they have functions, is transferred, as the case may require, to:
 - (a) the formerly represented person, or
 - (b) any replacement representative who has functions in relation to that part of the represented person's property.

- 8.85 This recommendation is consistent with current provisions in the *Guardianship Act* that apply to financial managers.¹¹⁶
- 8.86 However, unlike the current provision, which applies solely to financial managers, we recommend that this requirement apply to all enduring representatives and Tribunal appointed representatives.¹¹⁷

113. *Guardianship Act 1987* (NSW) s 6H, s 5 definition of "eligible witness". The relevant form is contained in the *Guardianship Regulation 2016* (NSW) sch 1 Form 2.

114. *Guardianship Act 1987* (NSW) s 22A.

115. *Powers of Attorney Act 2014* (Vic) s 54; *Powers of Attorney Act 2006* (ACT) s 62.

116. *Guardianship Act 1987* (NSW) s 25Q.

117. Recommendation 9.23

Status of an advance care directive in an agreement that has ended

8.17 Status of an advance care directive in an agreement that has ended

The new Act should provide that an advance care directive made in compliance with NSW law is valid notwithstanding that it is contained in an enduring representation agreement that has been suspended or revoked (unless revoked by the person making the appointment at a time when they have decision-making ability) or has lapsed.

- 8.87 Recommendation 8.17 seeks to address the situation where a person has made an advance care directive as part of an enduring representation agreement, but where the agreement has been suspended or revoked for a reason that should not affect the validity of the directive.
- 8.88 There is support for this approach in submissions.¹¹⁸ The Law Society of NSW submits that “an advanced care directive should not be held invalid except in limited circumstances, such as when the person does not have capacity or is under duress at the time a directive is executed”.¹¹⁹

Effect of marriage on an enduring representation agreement

8.18 Effect of marriage on an enduring representation agreement

The new Act should not provide that the marriage of a person who has made an enduring representation agreement automatically revokes the agreement.

- 8.89 It is our view that the marriage of the person who has made an enduring appointment should not automatically revoke an enduring representation agreement.
- 8.90 Under the current law, an appointment is revoked automatically if, after the appointment is made, the person who made the appointment marries or remarries someone other than the enduring guardian.¹²⁰ This happens even if the person wants the enduring arrangement to continue.
- 8.91 It is arguable that this automatic revocation procedure conflicts, at least in some cases, with the purpose of enduring guardianship — to give “people the dignity to decide who will make personal decisions for them”.¹²¹ The appointment of a person other than a future spouse should remain effective notwithstanding subsequent marriage if that is the person’s intention.¹²²
- 8.92 We recommend at Recommendation 8.1 that a person should be able to put conditions on the appointment of an enduring representative. This could include a condition that the appointment be revoked upon the marriage of the represented person, if this is the person’s wish.

118. See, eg, Medical Insurance Group Australia, *Submission GA153*, 4.

119. Law Society of NSW, *Submission GA164*, 27.

120. *Guardianship Act 1987* (NSW) s 6HA.

121. NSW, *Parliamentary Debates*, Legislative Council, 7 May 1997, 8135.

122. See P Wood, *Submission GA133*, 1.

9. Representation orders

In brief

The Tribunal should be able to make a representation order appointing one or more representatives to make decisions for someone when that person does not have decision-making ability for those decisions. Representation orders should be a last resort, and should replace guardianship and financial management orders.

The current law	118
Guardianship orders	118
Financial management orders.....	120
NSW Trustee as financial manager	120
Private managers.....	121
Our recommendations.....	121
A single, limited order	122
Applying for an order.....	124
Making a representation order	125
Age of a represented person	126
Additional considerations for orders about Aboriginal people and Torres Strait Islanders	127
Eligibility for appointment as a representative.....	128
Eligible age	128
Corporations may act as representatives.....	129
Public Representative and NSW Trustee appointed as a last resort	129
Suitability for appointment as a representative	130
People with a history of bankruptcy or criminal offences	131
Paid carers.....	132
Community volunteers as representatives	132
Remuneration of professional representatives.....	134
Operation of representation orders	135
When a representation order has effect.....	135
Emergency orders	136
Multiple representatives	138
Reserve representatives.....	138
Functions of representatives.....	139
Responsibilities of representatives	139
Effect of order on other appointments or agreements.....	141
Orders to be forwarded to Public Representative and/or NSW Trustee.....	141
Review of orders.....	142
Tribunal review upon application or own motion	142
Tribunal action on review	143
Administrative review of decisions of the Public Representative and NSW Trustee	144
Supervision and reporting requirements	145
Supervision at discretion of Tribunal.....	145
Authorisation from the Supreme Court or NSW Trustee.....	146
Reporting to the NSW Trustee.....	147
Enforcing representatives' decisions.....	147
Ending an order	149
Resignation of a representative	149
Ending or suspending a representation order	149
Return of property	150

No new offences	151
Criminal offences	151
Civil penalties.....	152

- 9.1 In this Chapter we recommend a formal substitute decision-making system of “representation orders” that would replace the current separate arrangements for guardianship and financial management under parts 3 and 3A of the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”).

The current law

- 9.2 The Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”) may make a guardianship order (in relation to personal and healthcare decisions) or a financial management order (in relation to financial decisions) for a person in need of decision-making assistance.
- 9.3 An application can be made by:
- the person who is the subject of the application
 - 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.¹
- 9.4 The *Guardianship Act* establishes different preconditions for guardianship and financial management orders. It also specifies different powers and functions that the Tribunal may grant to a guardian or financial manager.
- 9.5 The Tribunal must observe the general principles in the *Guardianship Act* when making a guardianship or financial management order with respect to people with disability. Guardians and financial managers must also observe the general principles when exercising their functions.²

Guardianship orders

- 9.6 A guardianship order enables a guardian to make decisions for, and act and give consent on behalf of, the person under guardianship. The Tribunal can appoint as a guardian a private person or, as a last resort, the Public Guardian.³ A guardian can make the same decisions, take the same action and give the same consents that the person would have been able to, if the law recognised their capacity to do so.⁴ The guardian may also do everything necessary to give effect to their functions.⁵

1. *Guardianship Act 1987* (NSW) s 9(1), s 25I(1).
2. *Guardianship Act 1987* (NSW) s 4.
3. *Guardianship Act 1987* (NSW) s 17.
4. *Guardianship Act 1987* (NSW) s 21C.
5. *Guardianship Act 1987* (NSW) s 21, s 21B, s 21C.

- 9.7 Before making an order, the Tribunal must be satisfied that a person is “in need of a guardian”⁶ — in other words, that they are “totally or partially incapable of managing his or her person” because of a disability.⁷
- 9.8 The *Guardianship Act* defines a person who has a disability as a person:
- (a) who is intellectually, physically, psychologically or sensorily disabled,
 - (b) who is of advanced age,
 - (c) who is a mentally ill person within the meaning of the *Mental Health Act 2007* (NSW), or
 - (d) who is otherwise disabled,
- and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.⁸
- 9.9 In making the order, the Tribunal must consider:
- (a) the views (if any) of:
 - (i) the person, and
 - (ii) the person’s spouse, if any, if the relationship between the person and the spouse is close and continuing, and
 - (iii) the person, if any, who has care of the person,
 - (b) the importance of preserving the person’s existing family relationships,
 - (c) the importance of preserving the person’s particular cultural and linguistic environments, and
 - (d) the practicability of services being provided to the person without the need for the making of such an order.⁹
- 9.10 The Tribunal decides how much weight or importance to give to each of these matters, depending on the case.¹⁰
- 9.11 When the Tribunal makes a guardianship order, it must say whether the order is “plenary” or “limited”.¹¹ A limited order sets out the guardian’s specific functions and powers, including the extent to which the guardian has custody of the person under guardianship (if at all).¹² Plenary guardianship orders are more extensive.¹³ They

6. *Guardianship Act 1987* (NSW) s 14.

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

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

9. *Guardianship Act 1987* (NSW) s 14(2).

10. *IF v IG* [2004] NSWADTAP 3 [26]. See also *EB v Guardianship Tribunal* [2011] NSWSC 767 [113]-[115]; *A v Public Guardian* [2006] NSWADTAP 55 [10].

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

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

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

give the guardian exclusive custody of the person under guardianship, and “all the functions of a guardian ... that a guardian has at law or in equity”.¹⁴

- 9.12 In either case, the Tribunal may make a guardianship order subject to any conditions it considers are appropriate.¹⁵
- 9.13 The *Guardianship Act* says that a “plenary guardianship order shall not be made” if “a limited guardianship order would suffice”.¹⁶ This is why it is “extremely rare” for the Tribunal to make a plenary order.¹⁷

Financial management orders

- 9.14 The Tribunal can make a financial management order appointing either a private person or the NSW Trustee to manage all or part of a person’s property or financial affairs (that is, their “estate”).¹⁸
- 9.15 The Tribunal may make a financial management order if it is satisfied that:
- the person is not capable of managing their own affairs
 - there is a need for another person to manage those affairs, and
 - making the order is in the person’s best interests.¹⁹
- 9.16 The Tribunal’s focus is on whether the person can deal with their own affairs “in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation”.²⁰
- 9.17 Unlike with guardianship orders, the Tribunal does not have to find that a person has a disability before it can make a financial management order. Even where the person does not have a disability, the Tribunal must consider the general principles in s 4 of the *Guardianship Act* and s 39 of the *NSW Trustee and Guardian Act 2009* (NSW) (“*Trustee and Guardian Act*”) when making an order.²¹

NSW Trustee as financial manager

- 9.18 The *Trustee and Guardian Act* grants the NSW Trustee broad powers and functions in its role as financial manager. It can exercise “all functions necessary and incidental to [the] management and care”²² of a person’s estate, and any other

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

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

16. *Guardianship Act 1987* (NSW) s 15(4).

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

18. *Guardianship Act 1987* (NSW) s 25M(1), s 25E, s 3(1) definition of “estate”. See also *NSW Trustee and Guardian Act 2009* (NSW) s 11(2), s 38 definition of “managed person”.

19. *Guardianship Act 1987* (NSW) s 25G.

20. *P v NSW Trustee and Guardian* [2015] NSWSC 579 [308]. See also *CJ v AKJ* [2015] NSWSC 498 [38].

21. *P v NSW Trustee and Guardian* [2015] NSWSC 579 [53]-[62]. See also *NSD* [2016] NSWCATGD 20 [38].

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

functions the Supreme Court or the Tribunal gives it.²³ Functions can include receiving rent, granting certain types of leases, buying and selling property, carrying on a business, bringing and defending legal actions, and making payments.²⁴

- 9.19 The NSW Trustee also “may do all such supplemental, incidental or consequential acts as may be necessary or expedient for the exercise of its functions”.²⁵ It can execute and sign documents on behalf of, and in the name of, the person concerned.²⁶
- 9.20 The NSW Trustee can use money from the estate to pay for such things as the person’s debts and expenses, maintenance of their dependents and materials needed to preserve and improve their property.²⁷

Private managers

- 9.21 The Tribunal may appoint a person to manage another person’s estate (a “private manager”). However, the private manager can only exercise their powers if:
- they have obtained a direction from the Supreme Court, or
 - the NSW Trustee has authorised them to exercise functions relating to the estate.²⁸
- 9.22 A private manager can do whatever is necessary to preserve the person’s estate while waiting for authorisation.²⁹
- 9.23 The Supreme Court and the NSW Trustee can grant private managers the power to use the money in the estate in a range of ways, and can grant a manager any of the powers that are available to the NSW Trustee when it acts as a manager.³⁰ The NSW Trustee may issue directions to a private manager about how to exercise their authority.³¹

Our recommendations

- 9.24 We recommend replacing guardianship and financial management orders with a single “representation order”. This is in keeping with our recommendations for a single regime of enduring representation agreements (replacing the separate regimes of enduring guardianship and enduring powers of attorney — see Chapter 8).
- 9.25 We recommend that the Tribunal can only make a representation order as a last resort when there is no other available option. Before making an order, the Tribunal

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

24. *NSW Trustee and Guardian Act 2009* (NSW) s 16.

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

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

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

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

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

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

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

should find that there is a need for an order, and less intrusive measures are either unavailable or not suitable.

- 9.26 The new Assisted Decision-Making Act (“the new Act”) should state that there will be no need for an order if the person has decision-making ability for the decisions to which the order would relate.
- 9.27 We have excluded the requirement which currently applies in relation to guardianship orders that, before it makes an order, the Tribunal must be satisfied that the person has a disability.
- 9.28 In framing our recommendations we have drawn on existing requirements and safeguards under the guardianship and financial management regimes. Our aim is to create an accessible and streamlined system with appropriate safeguards.

A single, limited order

9.1 Types of decisions a representation order may cover

The new Act should provide that a representation order may apply to decisions about personal matters, financial matters, healthcare and/or restrictive practices. The order should specify what decisions or types of decisions the representative may make as well as any conditions or limitations.

- 9.29 The new Act should allow the Tribunal to make a single order to appoint one or more representatives to make decisions for the represented person. This is consistent with our approach for enduring representation agreements.³²
- 9.30 Currently the Tribunal must make separate orders for guardians and financial managers and meet distinct preconditions for each. We want to simplify this process.
- 9.31 A single order should allow the Tribunal:
- the discretion and flexibility to make an order that suits the needs of the represented person
 - to limit or place conditions on the appointment as it sees fit
 - to make an order that is consistent with the principle of least restriction,³³ and
 - to recognise that many decisions will relate to both personal and financial matters.
- 9.32 Our recommendation is consistent with the recommendation of the Legislative Council Standing Committee on Social Issues (“Standing Committee”) in 2010 that

32. See Recommendation 8.1.

33. See Recommendation 5.2(l).

the *Guardianship Act* apply the same criteria to appointing financial managers as it does to appointing guardians.³⁴

- 9.33 Other jurisdictions have single orders that encompass personal and financial decision-making.³⁵ A number of submissions favour this approach.³⁶
- 9.34 Under our recommendations, the Tribunal would be able to appoint multiple decision-makers to act jointly or severally in relation to one or more decision-making functions.³⁷ This flexibility should meet concerns that single orders are unworkable because guardianship and financial management require different skills.³⁸
- 9.35 The new Act should require all orders to state the particular personal, healthcare, financial and/or restrictive practices decision-making functions that a representative has. This is a departure from the current provisions of the *Guardianship Act* that expressly permit the Tribunal to make plenary orders — orders that are undefined in scope.
- 9.36 Plenary orders do not offer representatives practical guidance on their powers and functions and are arguably inconsistent with the provision of “proportional and tailored” decision-making support. The Tribunal says it has not made a plenary guardianship order in about 18 years:

This approach is consistent with the requirement in the statute that a plenary order is, in effect, an order “of last resort” and reflects the serious impact that the making of a plenary order would have on fundamental rights relating to self-determination.³⁹

- 9.37 Legislation in other jurisdictions does not allow for plenary orders.⁴⁰ The majority of submissions favour removing the Tribunal’s express power to make plenary

34. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 11 [6.106].

35. See, for example, *Guardianship of Adults Act* (NT) s 14, s 16; *Mental Capacity Act 2005* (UK) s 15, s 16; *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 38(2)(b).

36. Mental Health Coordinating Council, *Submission GA87*, 15; P Deane, *Submission GA103*, 4; Mental Health Commission of NSW, *Submission GA148*, 4; Justice Connect, *Submission GA159*, 13.

37. Recommendation 9.10.

38. Seniors Rights Service, *Submission GA90C*, 6; NSW Trustee and Guardian, *Submission GA117*, 13; Law Society of NSW, *Submission GA118B*, 6; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [5.46].

39. NSW Civil and Administrative Tribunal, *Submission GA55*, 8.

40. *Guardianship and Management of Property Act 1991* (ACT) s 7(2), s 7(3); *Guardianship of Adults Act* (NT) s 16. See also Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 184-185.

orders⁴¹ and support a requirement that a representative's functions are specified in the order.⁴²

Applying for an order

9.2 Application for a representation order

The new Act should provide that:

- (1) The following people may apply to the Tribunal for a representation order:
 - (a) the person to whom the order will apply
 - (b) the Public Representative, Public Advocate, and NSW Trustee, and
 - (c) a person with a genuine interest in the personal and social wellbeing of the person the subject of the application.
- (2) An application must specify the grounds upon which there is a need for an order.
- (3) The Tribunal may treat an application for a support order, or review of a support order, support agreement or enduring representation agreement as an application for a representation order.

9.38 Recommendation 9.2 is largely consistent with provisions in the *Guardianship Act* about who can apply for a guardianship or financial management order,⁴³ and the provisions that require the applicant to say why they are seeking the order.⁴⁴ Submissions support these requirements.⁴⁵

9.39 Our recommendation proposes changes to the current law to provide that:

- Someone with a “genuine concern for the personal and social wellbeing” of a person may apply for an order (rather than the existing “genuine concern for the welfare” of the person).
- The Public Advocate can apply for an order.

9.40 We also recommend allowing the Tribunal to treat an application for review of an enduring appointment as an application for a representation order. This is

41. NSW Disability Network Forum, *Submission GA40*, 8; B Pace, *Submission GA42*, 6; Legal Aid NSW, *Submission GA58*, 9; Seniors Rights Service, *Submission GA62*, 5; People with Disability Australia Inc, *Submission GA65*, 8; Intellectual Disability Rights Service, *Submission GA71*, 7; NSW Public Guardian, *Submission GA73*, 7; Law Society of NSW, *Submission GA75*, 6; NSW Department of Family and Community Services, *Submission GA77*, 7; NSW Trustee and Guardian, *Submission GA79*, 7; Royal Australian College of General Practitioners, *Submission GA135*, 3; Justice Connect, *Submission GA159*, 13.

42. NSW Disability Network Forum, *Submission GA40*, 8; Mental Health Carers NSW Inc, *Submission GA44*, 15; Disability Council NSW, *Submission GA47*, 9; Legal Aid NSW, *Submission GA58*, 9; Seniors Rights Service, *Submission GA62*, 5; Intellectual Disability Rights Service, *Submission GA71*, 7; Justice Connect, *Submission GA159*, 13.

43. *Guardianship Act 1987* (NSW) s 9(1), s 25I(1).

44. *Guardianship Act 1987* (NSW) s 9(3), s 25I(2).

45. Law Society of NSW, *Submission GA118A*, 3; NSW Trustee and Guardian, *Submission GA117*, 3; Cognitive Decline Partnership Centre, *Submission GA112A*, 4; Legal Aid NSW, *Submission GA109A*, 4; NSW Department of Family and Community Services, *Submission GA125*, 5.

consistent with the effect of existing provisions⁴⁶ and should ensure flexibility for the Tribunal.

Making a representation order

9.3 Grounds for an order

The new Act should provide that:

- (1) The Tribunal may, after conducting a hearing into an application, appoint a person to be a representative under a representation order if:
 - (a) the proposed represented person is at least 17 years old
 - (b) the proposed represented person does not have decision-making ability for one or more decisions
 - (c) less intrusive and restrictive measures are neither available nor suitable, and
 - (d) there is a need for an order.
- (2) In considering whether there is a need for an order, the Tribunal should take into account, where relevant:
 - (a) the adequacy of existing or available formal or informal arrangements in meeting the person's decision-making needs, and
 - (b) the availability and suitability of less restrictive and intrusive measures to meet the person's needs, including but not limited to a support order or support agreement.

- 9.41 This recommendation sets out what the Tribunal must take into account before making a representation order. Criteria for appointment should be the same regardless of the representative's proposed functions. This is consistent with the laws in other states and territories, which generally do not apply different preconditions to orders for representatives with personal and financial functions.⁴⁷
- 9.42 Currently, the Tribunal must ensure that a financial management order is in the person's best interests.⁴⁸ Our recommendation removes this requirement. Instead, the Tribunal is required to observe the general principles of the new Act,⁴⁹ which include giving effect to a person's will and preferences wherever possible and promoting their personal and social wellbeing.
- 9.43 Before making an order, the Tribunal should be satisfied of the "need" for an order. This should be decided on the basis of the person's decision-making ability rather

46. *Powers of Attorney Act 2003* (NSW) s 33, s 35(1), s 36, s 37; *Guardianship Act 1987* (NSW) s 25F.

47. *Guardianship and Administration Act 2000* (Qld) s 5, s 12; *Guardianship and Administration Act 1993* (SA) s 5, s 29(1), s 35(1); *Guardianship and Administration Act 1995* (Tas) s 6, s 20, s 51; *Guardianship and Management of Property Act 1991* (ACT) s 4, s 7(1), s 8(1); *Guardianship of Adults Act* (NT) s 11.

48. *Guardianship Act 1987* (NSW) s 25G(c).

49. See Recommendation 5.2.

than “disability”.⁵⁰ This is consistent with the legislation in the Northern Territory (“NT”), the Australian Capital Territory and Queensland.⁵¹

- 9.44 Recommendation 9.3(2) is designed to ensure that the order complies with the principle of least restriction, and is only made as a last resort when formal and informal arrangements are not sufficient. This approach formalises the Tribunal’s current practice⁵² and is supported by submissions.⁵³

Age of a represented person

- 9.45 Tribunal orders should only be made in relation to a person who is at least 17 years old. We have also recommended that orders should not come into effect until the person turns 18.⁵⁴

- 9.46 Currently the Tribunal may make:

- guardianship orders for people 16 years and over, and
- financial management orders for people of any age.⁵⁵

- 9.47 However, the Tribunal rarely makes orders in relation to people under 18.⁵⁶

- 9.48 NSW is the only state with a guardianship regime that includes 16 and 17-year-olds.⁵⁷ There is no clear rationale for why NSW chose 16 as the age at which a person can come under guardianship. The intention may have been to address delays with the transition of children out of the child protection system into the guardianship system.⁵⁸ However, some other states and territories have overcome this by allowing a tribunal to make a guardianship order for a minor without the

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

51. *Guardianship of Adults Act* (NT) s 11(1)(c); *Guardianship and Management of Property Act 1991* (ACT) s 7(1)(b), s 8(1)(b); *Guardianship and Administration Act 2000* (Qld) s 12(1).

52. Public Agencies, *Consultation GAC09*; Public Guardian, *Consultation GAC08*.

53. NSW Council for Civil Liberties, *Submission GA147*, 3; NSW Trustee and Guardian, *Submission GA 140*, 3; Combined Pensioners and Superannuants Association of NSW Inc, *Submission GA150*, 1; People with Disability Australia Inc, *Submission GA154*, 15; Law Society of NSW, *Submission GA164*, 5; Legal Aid NSW, *Submission GA163*, 9-10; Mental Health Coordinating Council, *Submission GA1*, 5; Seniors Right Service, *Submission GA4*, 4; Aged and Community Services NSW and ACT, *Submission GA5*, 5; NSW Disability Network Forum, *Submission GA6*, 9; NSW Council for Intellectual Disability, *Submission GA7*, 5; Mental Health Carers NSW Inc, *Submission GA10*, 7; Schizophrenia Fellowship of NSW, *Submission GA15*, 9; Intellectual Disability Rights Service, *Submission GA16*, 4-5; Physical Disability Council of NSW, *Submission GA17*, 6; Synapse, *Submission GA21*, 3; S Travers, *Submission GA22*, 11; Capacity Australia, *Submission GA23*, 22-23; Mental Health Commission of NSW, *Submission GA25*, 7; Law Society of NSW Young Lawyers Civil Litigation Committee, *Submission GA27*, 12; NSW Trustee and Guardian, *Submission GA28*, 6.

54. Recommendation 9.8(1).

55. *Guardianship Act 1987* (NSW) s 15(1)(a), s 25E.

56. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2015-2016* (2016) 18.

57. See, eg, *Guardianship and Administration Act 1990* (WA) s 43(1)(a), s 43(2a), s 43(2c); *Guardianship and Administration Act 2000* (Qld) s 11A, s 12; *Guardianship and Administration Act 1986* (Vic) s 19(1); *Guardianship and Administration Act 1995* (Tas) s 19.

58. See Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [22.31]-[22.32].

order coming into effect until the person turns 18.⁵⁹ This is the intention of our recommendation.

- 9.49 Currently the Tribunal and the Public Guardian have a protocol whereby the Tribunal will appoint the Public Guardian with a limited advocacy function to assist a person under 18 who is transitioning from the child protection system. The Public Guardian uses this limited function to arrange appropriate support for the child for when they leave the child protection system. Our recommendation will preclude such an appointment. However, we envisage the Public Advocate will be able to assist young people transitioning from child protection in accordance with Recommendation 13.1(3)(c).

Additional considerations for orders about Aboriginal people and Torres Strait Islanders

9.4 Additional Tribunal considerations for orders in respect of Aboriginal people and Torres Strait Islanders

The new Act should provide that, to the extent that it is appropriate and practicable to do so, the Tribunal must, when determining whether a representation order should be made for an Aboriginal person or Torres Strait Islander, have regard to:

- (a) the likely impact of the order on the person's culture, values, beliefs (including religious beliefs) and linguistic environment
- (b) the likely impact of the order on the person's standing or reputation in their Indigenous community, and
- (c) any other relevant consideration pertaining to the person's culture.

- 9.50 This recommendation responds to the overrepresentation of Aboriginal people and Torres Strait Islanders in parts of the guardianship system⁶⁰ and complements the additional principles recommended in Chapter 5.⁶¹
- 9.51 The requirement to have regard to the likely impact of the order on the person's culture, values, beliefs and linguistic environment is consistent with a provision in Queensland guardianship legislation.⁶² The requirement to have regard to the likely impact on the person's standing or reputation in their community reflects a Tribunal decision that dealt with specific cultural considerations for Aboriginal people.⁶³

59. See, eg, *Guardianship and Administration Act 1990* (WA) s 43(2a), s 43(2c); *Guardianship and Management of Property Act 1991* (ACT) s 8C.

60. See [4.35]-[4.37].

61. Recommendation 5.3.

62. *Guardianship and Administration Act 2000* (Qld) sch 1 cl 9.

63. *UMT* [2016] NSWCATGD 7.

Eligibility for appointment as a representative

9.5 Eligibility for appointment as a representative

The new Act should provide that:

- (1) The Tribunal can appoint, as a representative, under a representation order:
 - (a) an eligible person, or
 - (b) in relation to personal, healthcare and/or restrictive practices decision-making functions - the Public Representative
 - (c) in relation to financial decision-making functions - the NSW Trustee.
- (2) A person is an “eligible person” if they are:
 - (a) at least 18 years old, or
 - (b) at least 16 years old and:
 - (i) they are the person’s primary carer, and
 - (ii) they are already supporting the person or making decisions on their behalf, and
 - (iii) the proposed functions are consistent with their decision-making abilities.
- (3) The Tribunal (other than in an emergency representation order) must not appoint the Public Representative or the NSW Trustee as a representative if some other person can be appointed.

Eligible age

9.52 Currently a person must be at least 18 years old to be a guardian.⁶⁴ There is no express minimum age for a financial manager. We recommend that a representative is at least 18 years old or, in limited circumstances, between 16 and 18.

9.53 About one in 10 Australian carers are under the age of 25.⁶⁵ Submissions suggest they are often unrecognised.⁶⁶ Research has shown that service providers and medical professionals often do not acknowledge young carers.⁶⁷ According to the Mental Health Coordinating Council, medical practitioners and clinical treating teams in particular often fail to consult with young carers whose parents are in hospital.⁶⁸ Allowing young carers to become representatives would oblige medical practitioners to consult with them and take them more seriously.

64. *Guardianship Act 1987* (NSW) s 16(1)(a), s 25M(1)(a).

65. Australian Bureau of Statistics, “A Profile of Carers in Australia”, *Disability Ageing and Carers Australia: Summary of Findings, 2015* no 4430.0 (2016).

66. Carers NSW, *Submission GA111*, 2. See also Law Society of NSW, *Submission GA118B*, 4.

67. Australia, Department of Social Services, *Young Carers Research Project: Final Report* (2002) [5.3.1].

68. Information provided by Mental Health Coordinating Council (12 December 2016).

- 9.54 Some submissions agree that it should be possible to appoint young people who are primary carers as representatives,⁶⁹ while others disagree.⁷⁰ In light of evidence about the significant number of carers in NSW, we see it as appropriate to allow people between 16 and 18 to be representatives, subject to certain safeguards.
- 9.55 An important safeguard is that the Tribunal must be satisfied that the proposed functions are consistent with the proposed representative's decision-making abilities. There may be some decisions that are inappropriate for young people to make; for example, decisions about the use of certain types of medication.⁷¹

Corporations may act as representatives

- 9.56 Currently, a corporation may act as a guardian or financial manager.⁷² This is because the word "person" is defined in NSW to include "an individual, a corporation and a body corporate or politic".⁷³ We see no reason to change this position and note that a corporation appointed as a representative is still subject to the duties of representatives and all relevant safeguards. The question of remuneration of corporations that act as representatives is dealt with below.⁷⁴

Public Representative and NSW Trustee appointed as a last resort

- 9.57 While the *Guardianship Act* states that the Public Guardian should be the guardian of last resort,⁷⁵ there is not a similar provision about the NSW Trustee.
- 9.58 We recommend that the new Act state that both the Public Representative and the NSW Trustee are representatives of last resort. This is supported by submissions⁷⁶ and is consistent with the law in other Australian states and territories.⁷⁷
- 9.59 The NSW government has expressed concern that such a recommendation could "amount to a proposal that commercial trustee corporations be preferred to the

69. Legal Aid NSW, *Submission GA109C*, 5; Carers NSW, *Submission GA111*, 2; Mental Health Commission of NSW, *Submission GA116C*, 7; Law Society of NSW, *Submission GA118B*, 4.

70. Intellectual Disability Rights Service, *Submission GA71*, 2; Senior Rights Service, *Submission GA62*, 1; NSW Trustee and Guardian, *Submission GA79*, 2.

71. NSW Public Guardian, *Submission GA108*, 16.

72. *Ability One Financial Management Pty Ltd v JB* [2014] NSWSC 245 [122].

73. *Interpretation Act 1987* (NSW) s 21(1) definition of "person". See also *Ability One Financial Management Pty Ltd v JB* [2014] NSWSC 245 [122] in relation to financial managers.

74. [9.77]-[9.81].

75. *Guardianship Act 1987* (NSW) s 15(3), s 17(3), s 25M(1).

76. NSW Disability Network Forum, *Submission GA40*, 5; Mental Health Carers NSW Inc, *Submission GA44*, 11; Disability Council NSW, *Submission GA47*, 7; Justice Health and Forensic Mental Health Network, *Submission GA50*, 5-6; Royal Australian and New Zealand College of Psychiatrists NSW Branch, *Submission GA53*, 4; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA57*, 2-3; Legal Aid NSW, *Submission GA58*, 8; Seniors Rights Service, *Submission GA62*, 1-2; People with Disability Australia Inc, *Submission GA65*, 4; Intellectual Disability Rights Service, *Submission GA71*, 3; NSW Public Guardian, *Submission GA73*, 5-6; Law Society of NSW, *Submission GA75*, 2; NSW Department of Family and Community Services, *Submission GA77*, 3-4; NSW Trustee and Guardian, *Submission GA79*, 3; D Coombridge, *Submission GA54*, 3.

77. *Guardianship and Management of Property Act 1991* (ACT) s 9(4)-(5); *Guardianship of Adults Act* (NT) s 13(2)-(3); *Guardianship and Administration Act 1990* (WA) s 68(5). In Western Australia this does not apply if the Public Advocate is appointed to act jointly with another person.

NSW Trustee”.⁷⁸ In our view, under the new framework, the Tribunal would only be able to appoint a trustee corporation when appropriate. The government also thought the recommendation could potentially expose a person to two sets of fees;⁷⁹ presumably the commercial trustee company’s fees and the fees that the NSW Trustee can charge for supervising a private manager.⁸⁰ However, under our recommendations, the Tribunal and NSW Trustee would have sufficient discretion to ensure that the fees charged are appropriate.⁸¹

Suitability for appointment as a representative

9.6 Suitability for appointment as a representative

The new Act should provide that:

- (1) The Tribunal may only appoint a person as a representative if it is satisfied that they are suitable and the proposed representative consents to the appointment.
- (2) In deciding whether a person (other than the Public Representative or NSW Trustee) is suitable, the Tribunal must take into account:
 - (a) the will and preferences of the person in need of decision-making assistance (“the person”)
 - (b) the nature of the relationship between the proposed representative and the person
 - (c) the abilities and availability of the proposed representative
 - (d) whether the proposed representative is likely to act honestly, diligently and in good faith
 - (e) whether the proposed representative has or may have a conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any conflicts
 - (f) whether the proposed representative will promote the person’s personal and social wellbeing
 - (g) the person’s cultural identity
 - (h) whether the proposed representative has been convicted of a serious indictable offence, and
 - (i) where they will have a financial function, whether the proposed representative has been bankrupt or been convicted of a dishonesty offence.

9.60 The new Act should contain the same suitability criteria for all representatives, regardless of the nature of their decision-making functions. Requiring the Tribunal to

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

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

80. See *NSW Trustee and Guardian Act 2009* (NSW) s 113(1).

81. See, eg, Recommendation 9.7, 9.19.

consider whether a representative is suitable before making an appointment acts as an important safeguard against conflicts of interest and abuse.

- 9.61 Currently, there are different suitability criteria for financial managers and guardians.⁸² In the case of financial managers, the legislation provides no guidance about what might make a person suitable (or unsuitable) for the role; although the Supreme Court has identified a range of factors.⁸³
- 9.62 The criteria we recommend are consistent with current suitability requirements in the *Guardianship Act* for guardians,⁸⁴ the new general principles,⁸⁵ and common law criteria for the appointment of financial managers.⁸⁶ They are broadly similar to the criteria used in other Australian states and territories⁸⁷ and are supported by submissions.⁸⁸
- 9.63 To address concerns that a statutory list of suitability criteria may restrict what the Tribunal can take into account,⁸⁹ our recommended criteria are non-exhaustive and allow other considerations to be taken into account where necessary.

People with a history of bankruptcy or criminal offences

- 9.64 We recommend that, when deciding if they are suitable, the Tribunal should consider:
- whether the proposed representative has been convicted of a serious indictable offence, and
 - where they have a financial function, whether the proposed representative has been bankrupt or convicted of a dishonesty offence.
- 9.65 These types of considerations apply in other states and territories.⁹⁰
- 9.66 The Law Society of NSW favours excluding people who have convictions for fraud or domestic violence.⁹¹ However, the ALRC, in its *Elder Abuse* report, recommended that the Tribunal “should have the power to assess and determine

82. *Guardianship Act 1987* (NSW) s 17(1), s 25M(1)(a).

83. *Re Sam* [2011] NSWSC 503 [33]-[34]. See also *Uniform Civil Procedure Rules 2005* (NSW) r 57.5(1)(c); *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 241-243.

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

85. Recommendation 5.2.

86. *Re L* [2000] NSWSC 721 [12]; *Re R* [2000] NSWSC 886 [49]; *Collis* [2009] NSWSC 852 [19]; citing *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 238-239.

87. *Guardianship and Management of Property Act 1991* (ACT) s 10(4); *Guardianship and Administration Act 1993* (SA) s 50(1); *Guardianship of Adults Act* (NT) s 15(2); *Guardianship and Administration Act 2000* (Qld) s 15(1); *Guardianship and Administration Act 1986* (Vic) s 23(1)-(3), s 47(1)-(3).

88. See, eg, NSW Young Lawyers, *Preliminary Submissions PGA32*, 7-8; NSW Trustee and Guardian, *Submission GA79*, 5; Multicultural NSW, *Submission GA82*, 4.

89. NSW, *Legislative Council Standing Committee on Social Issues: Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 9; in response to NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [6.106] rec 13.

90. See, eg, *Guardianship of Adults Act* (NT) s 15(2); *Guardianship and Management of Property Act 1991* (ACT) s 10(2); *Guardianship and Administration Act 2000* (Qld) s 15(4)(c)(i)-(ii).

91. Law Society of NSW, *Submission GA75*, 3.

the suitability of individuals, with convictions for fraud and dishonesty” on a case by case basis. The ALRC noted that while such restrictions are an important protection against abuse, a “blanket prohibition may be too restrictive”.⁹²

- 9.67 We agree that the automatic exclusion of people with a history of bankruptcy or offences may unnecessarily restrict the appointment of representatives who have a close and trusting relationship with the represented person, and are familiar with their will and preferences. Automatic exclusion may also undermine the principle that the Public Representative and NSW Trustee should only be appointed as a last resort. However, a requirement for the Tribunal to consider a proposed representative’s convictions or history of bankruptcy is important.

Paid carers

- 9.68 Our recommendation that the Tribunal consider whether the proposed representative has a conflict of interest will be particularly relevant where the proposed representative is providing paid services to the proposed represented person.
- 9.69 We do not consider it necessary to exclude such people expressly. We think it should be for the Tribunal to decide if a person providing services for fee or reward is unable to act in a manner consistent with the obligations of a representative.
- 9.70 While some Australian states and territories, such as Queensland, prohibit paid service providers from acting as guardians,⁹³ others require the tribunal to consider the appropriateness of the appointment in light of paid arrangements.⁹⁴ Some submissions also support such an approach.⁹⁵

Community volunteers as representatives

- 9.71 The eligibility and suitability requirements are sufficiently broad to allow the appointment of community volunteers as representatives should a community volunteer scheme, like those operating in Victoria and Western Australia, ever be established in NSW.
- 9.72 The Victorian Public Advocate, when appointed as a guardian, can, with the approval of the tribunal, delegate its powers and duties to a volunteer community guardian.⁹⁶ A community guardian must be at least 18 years old, complete background checks and meet other requirements.⁹⁷ The Office of the Public

92. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.68]-[5.70].

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

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

95. NSW Department of Family and Community Services, *Submission GA77*, 3; Disability Council NSW, *Submission GA47*, 6.

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

97. Victoria, Office of the Public Advocate, “Become a Volunteer: Volunteer Requirements” <www.publicadvocate.vic.gov.au/about-us/become-a-volunteer> (retrieved 13 April 2018).

- Advocate recruits the volunteers, trains them and provides ongoing mentoring and support.⁹⁸
- 9.73 In Western Australia, the tribunal appoints community guardians directly. The community guardians are accountable to the tribunal. The Western Australian Office of the Public Advocate recruits, trains and supports the community guardians.⁹⁹
- 9.74 In 2010, the Standing Committee recommended that the NSW government “prioritise assessment” of a program for the Public Guardian to recruit, train and match volunteers from the community to be guardians.¹⁰⁰ While some submissions support such a program for NSW,¹⁰¹ others, including the Public Guardian, oppose its introduction,¹⁰² citing a number of disadvantages. These include the likely shortage of volunteers¹⁰³ and the resource implications of providing adequate safeguards against abuse.¹⁰⁴
- 9.75 However, other submissions identify a range of potential benefits of community representatives, including reducing demand on the Public Representative,¹⁰⁵ and the ability of a community program to match people in need of representation with a suitable volunteer, who can develop an understanding of their needs, personality and background,¹⁰⁶ creating a stronger basis for decision-making.¹⁰⁷
- 9.76 With these potential benefits in mind, our recommendations leave open the possibility of community volunteers acting as representatives in appropriate cases if such a scheme eventuates.

-
98. Victoria, Office of the Public Advocate, “Become a Volunteer: How does OPA support volunteers?” <www.publicadvocate.vic.gov.au/about-us/become-a-volunteer> (retrieved 13 April 2018).
99. S Whisson and L Jones, “Western Australia’s Community Guardianship Program” (Paper presented at the Australian Guardianship and Administration Council Conference, Brisbane, March 2009) 3–9.
100. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 29 [10.34]-[10.40].
101. NSW Disability Network Forum, *Submission GA40*, 5; B Pace, *Submission GA42*, 2; Mental Health Carers NSW Inc, *Submission GA44*, 12; Disability Council NSW, *Submission GA47*, 7-8; Royal Australian and New Zealand College of Psychiatrists NSW Branch, *Submission GA53*, 4; Intellectual Disability Rights Service, *Submission GA71*, 3; NSW Department of Family and Community Services, *Submission GA77*, 4-5.
102. NSW Public Guardian, *Submission GA73*, 6; See also Law Society of NSW, *Submission GA75*, 2.
103. B Pace, *Submission GA42*, 2; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA57*, 4.
104. Intellectual Disability Rights Service, *Submission GA71*, 3; NSW Public Guardian, *Submission GA73*, 6. See also Law Society of NSW, *Submission GA75*, 2; NSW Civil and Administrative Tribunal, *Submission GA55*, 6.
105. NSW Disability Network Forum, *Submission GA40*, 5; People with Disability Australia Inc, *Submission GA65*, 5.
106. B Pace, *Submission GA42*, 2; Legal Aid NSW, *Submission GA58*, 8; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA57*, 4.
107. Mental Health Carers NSW Inc, *Submission GA44*, 12; B Pace, *Submission GA42*, 2; Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA57*, 4; Intellectual Disability Rights Service, *Submission GA71*, 3; NSW Trustee and Guardian, *Submission GA79*, 4.

Remuneration of professional representatives

9.7 Remuneration of professional representatives with financial functions

The new Act should provide that:

- (1) The Tribunal may determine that a representative with financial functions, who carries on a business that includes the administration of estates, is entitled to remuneration out of the represented person's estate for their work in administering that estate.
- (2) As part of any oversight and direction of representatives with financial functions, the NSW Trustee should decide the amount of any remuneration.

- 9.77 A "professional representative" is a representative with financial functions (who is not the NSW Trustee or a licensed trustee company) and who carries on a business that includes the administration of estates.
- 9.78 Recommendation 9.7 allows the Tribunal to decide that a professional representative is entitled to remuneration from the represented person's estate and allows the NSW Trustee to decide what amount is reasonable.
- 9.79 Currently a professional representative must apply to the Supreme Court for an order to obtain remuneration from the estate, unless the proposed representative is a licensed trustee company with a statutory right to remuneration.¹⁰⁸ The Court will only appoint such a person or corporation if it is "absolutely necessary" and certain safeguards are in place, including that the remuneration is just and reasonable, can be reviewed by the Court and serves the represented person's best interests.¹⁰⁹
- 9.80 The Law Society of NSW opposes permitting the Tribunal to approve the remuneration of professional representatives because of concerns about regulatory complexity and conflict of interest.¹¹⁰ The Seniors Rights Service supports this approach, noting that it might decrease the use of the Public Representative and NSW Trustee and allow for the appointment of trusted advisors such as solicitors.¹¹¹ A number of submissions support the use of professional representatives, provided appropriate safeguards are in place.¹¹²
- 9.81 Our recommendation seeks to strike the appropriate balance between ensuring access to professional representatives and maintaining sufficient safeguards to protect the represented person.

108. *GDR v EKR* [2012] NSWSC 1543, [32].

109. *Ability One Financial Management Pty Ltd v JB* [2014] NSWSC 245 [12], [217], [247]-[249], [290].

110. Law Society of NSW, *Submission GA75*, 4.

111. Seniors Rights Service, *Submission GA158*, 17.

112. NSW Department of Family and Community Services, *Submission GA77*, 6; Disability Council NSW, *Submission GA47*, 8; Royal Australian and New Zealand College of Psychiatrists NSW Branch, *Submission GA53*, 5.

Operation of representation orders

When a representation order has effect

9.8 When a representation order has effect

The new Act should provide that:

- (1) A representation order has effect only if the represented person is aged 18 years or over.
- (2) Unless a representation order is revoked or suspended or has lapsed, it has effect in relation to a decision to which the order applies only when the represented person does not have decision-making ability for that decision.
- (3) An order (except for an emergency order) has effect for no more than:
 - (a) 1 year for an initial order, or
 - (b) 3 years for an order that is renewed following review.
- (4) However, if the Tribunal is satisfied that the represented person will never have the relevant decision-making ability and there is a need for an order of longer duration the Tribunal may specify that the order (except for an emergency order) has effect for no more than:
 - (a) 3 years for an initial order, and
 - (b) 5 years for an order that is renewed following review.
- (5) The Tribunal may specify that an order will not be reviewed at the end of the period for which it has effect, but only if the Tribunal is satisfied that, in all the circumstances, not reviewing the order promotes the personal and social wellbeing of the represented person.

9.82 As already discussed,¹¹³ we recommend that representation orders made for people who are 17 not come into effect until they turn 18.

9.83 We also recommend placing time limits on the duration of representation orders, with a process of periodic review for all representation orders. The current law sets time limits on and provides a process for the periodic review for guardianship orders but not for financial management orders.¹¹⁴ The lack of a legislative time limit on financial management orders has been described as a “major shortcoming in the legislation”.¹¹⁵ Submissions say that regular reviews can help prevent (or address) abuse and exploitation.¹¹⁶ Legal Aid NSW notes that time limited orders are “particularly important for young people exiting care, whose capacity to manage

113. See [9.45]-[9.49].

114. *Guardianship Act 1987* (NSW) s 25(2)(b), s 25N.

115. 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.

116. Seniors Rights Service, *Preliminary Submission PGA07*, 24; Council on the Ageing NSW, *Preliminary Submission PGA10*, 6; Mental Health Coordinating Council, *Submission GA87*, 2; NSW Disability Network Forum, *Submission GA126*, 3.

their money will, in many cases, improve with age and increased maturity and independence”.¹¹⁷

- 9.84 Our recommendation is consistent with the United Nations *Convention on the Rights of Persons with Disabilities* (“UN Convention”), which emphasises that measures must be “proportional and tailored to the person’s circumstances”, “apply for the shortest time possible” and be “subject to regular review by a competent, independent and impartial authority or judicial body”.¹¹⁸ It is also consistent with a recommendation of the Legislative Council Standing Committee on Social Issues.¹¹⁹
- 9.85 Other states and territories require periodic reviews of substitute decision-making orders.¹²⁰ Submissions largely favour periodic reviews,¹²¹ although views differ about what time periods should apply.¹²² While too-frequent reviews could be resource-intensive for the Tribunal,¹²³ and time consuming and emotionally draining for participants, inadequate opportunities for review may mean that orders remain in force longer than they should. Our recommendation, which includes timeframes that are broadly consistent with those that apply to guardianship orders, seeks to strike an appropriate balance between these considerations.
- 9.86 The Tribunal should continue to be able to specify that an order will not be reviewed at the end of the period for which it has effect. It should only specify this if satisfied that, in all the circumstances, not reviewing the order promotes the personal and social wellbeing of the person. This is broadly consistent with current *Guardianship Act* provisions in relation to guardianship orders.¹²⁴

117. Legal Aid NSW, *Submission GA109A*, 4.

118. *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.

119. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 15.

120. *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(1); *Guardianship and Administration Act 1995* (Tas) s 24, s 52; *Guardianship and Administration Act 1990* (WA) s 84; *Guardianship and Administration Act 1986* (Vic) s 61; *Guardianship of Adults Act 2016* (NT) s 19, s 36(1). See also Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 382; *Guardianship and Administration Bill 2018* (Vic) cl 7(1)(b)(ii).

121. Seniors Rights Service, *Submission GA90A*, 2, 3; Council of the Ageing NSW, *Preliminary Submission PGA10*, 6; NSW Ombudsman, *Preliminary Submission PGA41*, 6; Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 7-8; NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 6.

122. Mental Health Coordinating Council, *Submission GA87*, 1-2; B Pace, *Submission GA92*, 11, 14; Seniors Rights Service, *Preliminary Submission PGA07*, 23; Mental Health Carers NSW Inc, *Submission GA121A*, 4; Disability Council NSW, *Preliminary Submission PGA26*, 16; NSW Young Lawyers, *Preliminary Submission PGA32*, 8.

123. NSW Civil and Administrative Tribunal, *Submission GA101A*, 3; NSW Trustee and Guardian, *Submission GA140*, 9. See also Law Society of NSW, *Submission GA164*, 2-3.

124. *Guardianship Act 1987* (NSW) s 16(2A).

*Emergency orders***9.9 Emergency orders**

The new Act should provide:

- (1) The Tribunal may, where it considers it appropriate by reason of unacceptable risk to the person and urgency,
 - (a) make an order it considers appropriate in the circumstances in respect of a person that remains in effect for a specified period of no more than 30 days, if it addresses the unacceptable risk to the person, and
 - (b) renew the order for a further specified period of not more than 30 days if it addresses the unacceptable risk to the person.
- (2) The Tribunal may make the order at the request of the person to whom the order relates, or at the request of a person with a genuine interest in the personal and social wellbeing of the person to whom the order relates.
- (3) In making an emergency order, the Tribunal may appoint the Public Representative (in relation to personal, healthcare and/or restrictive practices decisions) and/or the NSW Trustee (in relation to financial decisions) as representative if the person does not have a representative or person responsible, and it considers that there may be grounds for making an order.
- (4) The Tribunal is not prevented from making an emergency order just because evidence about a person's decision-making ability is limited.
- (5) In making an emergency order, the Tribunal must specify the extent (if any) to which the proposed representative has custody of the person.
- (6) The Tribunal cannot make an emergency order if:
 - (a) there is a valid advance care directive that expressly prohibits the decision for which the order is sought, or
 - (b) another order would be more appropriate.

9.87 We recommend allowing the Tribunal to make short-term orders for 30 days or less in emergency situations. These orders will not be subject to the same safeguards as non-emergency orders. Specifically, the Tribunal will not be prevented from making an order just because evidence about the person's decision-making ability is limited. Given the reduced safeguards, emergency orders should only be available in situations where the person is exposed to an unacceptable risk and the Tribunal is satisfied that the need for the order is urgent. The Tribunal cannot make an emergency order if another order would be more appropriate.

9.88 Currently, the *Guardianship Act* allows the Tribunal to make a temporary order that is initially in force for no more than 30 days, and to renew it once for an extra 30 days.¹²⁵ Some submissions suggest that the 30 day time period is insufficient.¹²⁶ However, we consider that a short time period is important to emphasise that these orders are only a temporary measure to be used in exceptional circumstances.

125. *Guardianship Act 1987* (NSW) s 18(2)-(3).

126. Law Society of NSW, *Submission GA164*, 31; NSW Trustee and Guardian, *Submission GA140*, 9.

Multiple representatives

9.10 Multiple representatives

The new Act should:

- (a) allow the Tribunal to appoint two or more representatives to act jointly or severally, in relation to one or more functions
- (b) provide for situations where one or more representatives cannot act (by reason of death, resignation, or loss of decision-making ability), and
- (c) ensure that the Public Representative and NSW Trustee are not appointed as joint representatives for the same decision-making functions with each other or with anyone else.

- 9.89 Consistent with provisions in the *Guardianship Act*, we recommend allowing the Tribunal to appoint multiple representatives to act jointly or severally in relation to one or more decision-making functions.¹²⁷
- 9.90 Currently, the Tribunal cannot appoint the Public Guardian to act jointly with a private guardian for the same decision-making function.¹²⁸ However, the Tribunal can appoint the Public Guardian and a private guardian to exercise separate decision-making functions.¹²⁹ This might occur if a private individual cannot carry out specific functions.
- 9.91 We recommend similar provisions apply to the Public Representative and the NSW Trustee, to prevent conflict in decision-making functions. The NSW Trustee supports this.¹³⁰
- 9.92 We also recommend that the new Act provide a process for where one or more representatives cannot act, and there is no reserve representative or remaining joint representative. These provisions should be consistent with current provisions in the *Guardianship Act*.¹³¹

Reserve representatives

9.11 Reserve representatives

The new Act should allow the Tribunal to appoint a reserve representative to act if an original representative dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the order.

- 9.93 Consistent with provisions in the *Guardianship Act*, we recommend allowing the Tribunal to appoint an alternative representative who can act if the original representative is unable to act.¹³² The alternative representative also acts as a

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

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

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

130. NSW Trustee and Guardian, *Submission GA140*, 9.

131. *Guardianship Act 1987* (NSW) s 22A.

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

person's representative if the original representative dies and there is no surviving joint representative to take over the original representative's functions.¹³³

Functions of representatives

9.12 Functions of representatives

The new Act should provide:

- (1) A representative's decision-making functions (and any limits or conditions on them) are determined by the representation order.
- (2) A representative may sign and do all such things as are necessary to give effect to any decision-making function.
- (3) A representative can access, collect or obtain personal information (including financial information and health records) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions.

- 9.94 We recommend that the Tribunal should specify, in an order, the scope of a representative's decision-making functions and any limits or conditions on them.
- 9.95 In Recommendation 8.6(4) we set out certain decision-making functions that cannot be given to an enduring representative. However, in the case of Tribunal orders, we do not think it necessary to limit the functions that the Tribunal may grant.¹³⁴
- 9.96 Currently, the *Guardianship Act* and the *Trustee and Guardian Act* allow a representative to do all things necessary to give effect to a decision-making function.¹³⁵ Our recommendation is consistent with this approach. The representative's decisions are effective as if they were made by the person and the person had the capacity to make them.¹³⁶
- 9.97 Finally, we recommend that a representative be able to access, obtain and collect personal information about the represented person that is necessary for their decision-making functions.

Responsibilities of representatives

9.13 Responsibilities of representatives

The new Act should provide that:

- (1) Representatives must:
 - (a) observe the Act's general principles

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

134. See Legal Aid NSW, *Submission GA58*, 9.

135. *Guardianship Act 1987* (NSW) s 21, s 21B, s 21C; *NSW Trustee and Guardian Act 2009* (NSW) s 56(a), s 66(1)(a).

136. *NSW Trustee and Guardian Act 2009* (NSW) s 67(2), s 58(2); *Guardianship Act 1987* (NSW) s 21(2A), s 21C.

- (b) act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the represented person
 - (c) act within any conditions and limitations of the order
 - (d) ensure that they identify and respond to situations where their 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
 - (e) communicate with the represented person when making decisions on their behalf and explain the decisions as far as possible
 - (f) treat the represented person and important people in their life with dignity and respect
 - (g) if they have a financial decision-making function:
 - (i) keep accurate records and accounts
 - (ii) keep their money and property separate from the represented person's money and property, and
 - (iii) not gain a benefit from being a representative unless expressly authorised
 - (h) respect the represented person's privacy and confidentiality by:
 - (i) only collecting personal information to the extent necessary for carrying out the representative's role, and
 - (ii) only disclosing such information when permitted by **Recommendation 14.3**.
- (2) Representatives are expected, where possible, to:
- (a) develop a person's decision-making skills
 - (b) promote and maximise a person's autonomy, and
 - (c) provide decision-making support.
- (3) Representatives, other than the NSW Trustee or the Public Representative, must sign an acknowledgement that they have read and understood these responsibilities.

9.98 We recommend that the new Act contain a statement of representative responsibilities. These are the same responsibilities that we recommend, for similar reasons, should apply to enduring representatives.¹³⁷

9.99 Other states, including Queensland and Victoria, specify in their legislation the responsibilities owed by representatives.¹³⁸ In the context of Tribunal orders, such a statement will act as a tool the Tribunal can use when deciding whether a proposed representative is suitable for the role, on application or review.

137. Recommendation 8.7 [8.54]-[8.59].

138. *Guardianship and Administration Act 2000* (Qld) s 35, s 36. See also *Guardianship of Adults Act* (NT) s 22(1); *Powers of Attorney Act 2014* (Vic) s 63.

Effect of order on other appointments or agreements

9.14 Effect of order on other appointments or agreements

The new Act should provide that a representation order (including an order of the Supreme Court to like effect) suspends any enduring representation agreement, support agreement, or support order in its entirety, unless the Court or Tribunal order expressly allows a limited continuing operation.

- 9.100 Consistent with existing provisions that relate to guardianship and financial management orders,¹³⁹ this recommendation seeks to ensure that, when a representation order is made, it suspends all pre-existing representation agreements, support agreements and support orders.
- 9.101 It also allows the Tribunal to give all pre-existing orders and/or agreements a limited continuing operation in appropriate situations.
- 9.102 This recommendation clarifies the ongoing operation of an existing order and/or appointment by requiring the Court or Tribunal to expressly state if it will have any continuing operation during the life of the representation order.¹⁴⁰
- 9.103 Some submissions, including the Tribunal's, support the Tribunal being able to make limited orders that only partially suspend the operation of certain functions under the enduring appointment, rather than suspending the entire enduring appointment.¹⁴¹ The Tribunal notes that this would enable it to make orders that are "less intrusive upon the original intentions of the appointer".¹⁴²
- 9.104 Despite concerns that such limited orders can involve "unnecessary complexity",¹⁴³ this approach is consistent with the general principles of the new Act, including the principle of giving effect to the represented person's will and preference.¹⁴⁴

Orders to be forwarded to Public Representative and/or NSW Trustee

9.15 Orders to be forwarded to Public Representative and/or NSW Trustee

The new Act should provide that if the Tribunal makes a representation order appointing a person other than:

- (a) the Public Representative as a representative in relation to a personal, healthcare or restrictive practices decision-making function, and/or
- (b) the NSW Trustee as a representative in relation to a financial decision-making function,

139. *Guardianship Act 1987* (NSW) s 61; *Powers of Attorney Act 2003* (NSW) s 50.

140. See Seniors Rights Service, *Submission GA90C*, 6-7.

141. Seniors Rights Service; *Submission GA90C*, 6; NSW Civil and Administrative Tribunal, *Submission GA110*, 6-7; Law Society of NSW, *Submission GA118B*, 7.

142. NSW Civil and Administrative Tribunal, *Submission GA110*, 7.

143. NSW Trustee and Guardian, *Submission GA117*, 13.

144. See Recommendation 5.2(a), 5.4.

it should forward a copy to the Public Representative and/or the NSW Trustee as the case may require.

- 9.105 The *Guardianship Act* requires the Tribunal to forward a copy of an order appointing a guardian, other than the Public Guardian, to the Public Guardian.¹⁴⁵ Our recommendation is that this practice continues in relation to all representation orders, and that a copy is forwarded to the Public Representative and/or NSW Trustee, depending on what type of decision-making functions the order relates to.

Review of orders

- 9.106 In this section, we make recommendations about when the Tribunal may review a representation order and how the Tribunal should conduct its review.

Tribunal review upon application or own motion

9.16 Tribunal review of representation orders

The new Act should provide that:

- (1) The Tribunal may review a representation order on its own motion.
- (2) The Tribunal must review a representation order:
 - (a) at the end of the period for which the order has effect (unless the order provides there is to be no review at the end of the period), or
 - (b) if requested to do so by:
 - (i) the represented person
 - (ii) a person with a proper interest in the proceedings
 - (iii) a person with genuine interest in the personal and social wellbeing of the represented person
 - (iv) the representative, or
 - (v) the Public Representative, the NSW Trustee or the Public Advocate,unless the request does not disclose grounds that warrant a review order.
- (3) The Tribunal should, before carrying out the review, notify each party of the date, time and place of the review (although failure to do so will not invalidate any decision).

- 9.107 This recommendation seeks to strengthen the current review provisions of the *Guardianship Act* and ensure that Tribunal review is available for all representation orders. This is consistent with the new Act's general principles and the UN *Convention*, which requires that measures relating to the exercise of legal capacity

145. *Guardianship Act 1987* (NSW) s 19.

should be “subject to regular review by a competent, independent and impartial authority or judicial body”.¹⁴⁶

9.108 We recommend retaining existing provisions that:

- require the Tribunal to undertake a review of an order when requested by specified categories of people¹⁴⁷
- allow the Tribunal to conduct a review of an order “on its own motion”,¹⁴⁸ and
- allow the Tribunal to refuse to review an order if the request or application does not disclose grounds that warrant a review.¹⁴⁹

9.109 In addition to the existing list of people who can request a review, we have included the category of “person with a proper interest in the proceedings”. This is included in the *Powers of Attorney Act 2003* (NSW) (“*Powers of Attorney Act*”) for reviews of attorney appointments¹⁵⁰ and is arguably a wider category than “a person with genuine interest in the personal and social wellbeing of the represented person”.

9.110 Currently the Tribunal can refuse a request to review an order if it has previously reviewed the order. The Tribunal considers this a useful power to deter “frivolous or vexatious applications”.¹⁵¹ Despite this, we have not recommended retaining this power because it may impose an unnecessary barrier in cases where a person’s circumstances have changed. The Tribunal should be able to deal with frivolous or vexatious applications by refusing to review an order where the request does not disclose grounds that warrant a review.

Tribunal action on review

9.17 Tribunal action on review

The new Act should provide that:

- (1) The Tribunal should, when reviewing an order, consider, where relevant:
 - (a) whether there is still a need for the order
 - (b) whether eligibility and suitability criteria for a representative are still met, and
 - (c) whether the representative is meeting their responsibilities and carrying out their required functions.
- (2) The Tribunal may, on reviewing a representation order:

146. *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.

147. *Guardianship Act 1987* (NSW) s 25(2)(a), s 25B, s 25N(4)(b), s 25R.

148. *Guardianship Act 1987* (NSW) s 25(1), s 25N(4)(a).

149. *Guardianship Act 1987* (NSW) s 25A(a), s 25O(a).

150. *Powers of Attorney Act 2003* (NSW) s 35(1)(d).

151. *BFT* [2014] NSWCATGD 51 [40].

- (a) at the end of the period for which the order has effect, renew it, renew and vary it, or decide that it may lapse
- (b) confirm, vary, suspend (in whole or in part) or revoke the order, or
- (c) make a support order in accordance with the new Act.

- 9.111 Recommendation 9.17(1) sets out the factors the Tribunal should consider, where relevant, when reviewing an order.
- 9.112 The *Guardianship Act* does not specify what the Tribunal must consider when it reviews an order. Instead, the Tribunal has developed certain principles to guide its decisions, such as the need for an order. Our recommendation is consistent with these principles, and incorporates factors suggested in a range of submissions.¹⁵² The Tribunal agrees that the new Act should specify what matters it should consider upon review to ensure “certainty and consistency in decision-making”.¹⁵³
- 9.113 Recommendation 9.17(2) sets out the actions that the Tribunal may take after a review. We recommend broad powers irrespective of the type of representation order. The Intellectual Disability Rights Service says that the *Guardianship Act* does not expressly allow “for the revocation of a [financial management] order on the basis that there is no longer a need for a person’s affairs to be under management”.¹⁵⁴ Our recommendation ensures that representation orders that deal with financial decision-making can be revoked if no longer needed.
- 9.114 In accordance with the principle of least restriction, the Tribunal should also have the power to make a support order, where appropriate.

Administrative review of decisions of the Public Representative and NSW Trustee

9.18 Administrative review of decisions of the Public Representative and NSW Trustee

The new Act should provide that:

- (1) A person may apply to the Civil and Administrative Tribunal under the *Administrative Decisions Review Act 1997* (NSW) for an administrative review of a decision of the Public Representative or the NSW Trustee that:
 - (a) is made in connection with the exercise of the Public Representative’s or NSW Trustee’s functions as a representative under the new Act, and
 - (b) is of a class of decision prescribed by the regulations for the purposes of these provisions.
- (2) Such an application may be made by:

152. Seniors Rights Service, *Submission GA90A*, 4; Legal Aid NSW, *Submission GA109A*, 5; Cognitive Decline Partnership Centre, *Submission GA112A*, 4; Mental Health Carers NSW Inc, *Submission GA121A*, 5.

153. NSW Civil and Administrative Tribunal, *Submission GA101A*, 7.

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

- (a) the person to whom the decision relates,
- (b) the spouse of the person
- (c) the person who has the care of the person, or
- (d) any other person whose interests are, in the opinion of the Civil and Administrative Tribunal, adversely affected by the decision.

9.115 This recommendation mirrors existing provisions in the *Guardianship Act* about the administrative review of decisions of the Public Guardian.¹⁵⁵ The *Trustee and Guardian Act* contains similar provisions for decisions of the NSW Trustee as financial manager and as supervisor of private managers.¹⁵⁶ A number of submissions regard these arrangements as adequate.¹⁵⁷

Supervision and reporting requirements

9.19 Supervising representatives with a financial function

- (1) The new Act should provide that:
 - (a) The Tribunal may require the NSW Trustee to supervise a representative with a financial function, but only if the Tribunal considers it necessary.
 - (b) In considering whether supervision is necessary, the Tribunal must take into account:
 - (i) the size and complexity of the represented person's property
 - (ii) whether there are other measures to protect the represented person
 - (iii) any potential conflicts of interest between the represented person and the representative, and
 - (iv) any other relevant matters.
 - (c) The Tribunal must always require NSW Trustee supervision when appointing a professional representative with a financial function.
 - (d) If the order requires NSW Trustee authorisation for the representative to make financial decisions, the representative can do what is necessary to protect the property pending authorisation.
- (2) The *NSW Trustee and Guardian Act 2009* (NSW) should provide that the NSW Trustee, when supervising a representative with a financial function, may decide the nature and timing of any financial reporting.

155. *Guardianship Act 1987* (NSW) s 80A.

156. *NSW Trustee and Guardian Act 2009* (NSW) s 62, s 70.

157. Seniors Rights Service, *Submission GA90A*, 8; NSW Public Guardian, *Submission GA108*, 5; Law Society of NSW, *Submission GA118A*, 7.

Supervision at discretion of Tribunal

- 9.116 We recommend that the Tribunal have the power to decide whether the NSW Trustee should supervise a representative with a financial function.
- 9.117 Currently, the NSW Trustee supervises all private financial managers and charges fees for supervision.¹⁵⁸ Supervision by the NSW Trustee may be unnecessarily onerous, such as where the representative only has to manage a small income or aged pension. In these circumstances, supervision fees by the NSW Trustee can be a significant drain on the estate.
- 9.118 The Cognitive Decline Partnership Centre notes that “there are disproportionate costs associated” with supervision requirements and that “private managers are hampered by the process of applying to NSW Trustee and Guardian each time they wish to make a financial decision involving the estate of the person”.¹⁵⁹
- 9.119 Submissions support the Tribunal having discretion to decide that NSW Trustee supervision is not appropriate.¹⁶⁰ Our recommendation for periodic reviews of financial decision-making orders should provide an additional safeguard for represented people whose representative is not subject to supervision.
- 9.120 However, we recommend that NSW Trustee supervision should always be required where a professional representative has been appointed, to protect the represented person from financial abuse.

Authorisation from the Supreme Court or NSW Trustee

- 9.121 Currently, all financial managers, once appointed by the Tribunal, must not “interfere” with the represented person’s estate until they have obtained either:
- a direction from the Supreme Court, or
 - authorisation from the NSW Trustee.¹⁶¹
- 9.122 Under the *Trustee and Guardian Act*, the Supreme Court or the NSW Trustee may:
- make such orders in relation to the management of the person’s estate as it thinks fit, and
 - make orders authorising, directing or enforcing the exercise of a representative’s functions under the Act.¹⁶²
- 9.123 We recommend that the Tribunal be able to make orders that specify the scope of the representative’s financial decision-making functions, without necessarily requiring additional direction or authorisation. The Tribunal should also be able to

158. *NSW Trustee and Guardian Act 2009* (NSW) s 113(1); *NSW Trustee and Guardian Regulation 2017* (NSW) cl 27. See also NSW Trustee and Guardian, “Private Management Fees” <www.tag.nsw.gov.au/private-management-fees.html> (retrieved 19 April 2018).

159. Cognitive Decline Partnership Centre, *Submission GA112A*, 6.

160. P Deane, *Submission GA103*, 5-6; NSW Council for Intellectual Disability, *Submission GA113*, 4; NSW Department of Family and Community Services, *Submission GA125*, 10; Law Society of NSW, *Submission GA164*, 34, 62. See also Public Forum, *Consultation GAC16*.

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

162. *NSW Trustee and Guardian Act 2009* (NSW) s 64(1)-(2).

require that the representative obtains additional authorisation from the NSW Trustee, where necessary.

Reporting to the NSW Trustee

- 9.124 The NSW Trustee's current practice is to require private financial managers to lodge annual accounts. We recommend that the new Act gives the NSW Trustee an express discretion to decide how often accounts should be lodged. The NSW Trustee supports this:

[W]here a financial manager is performing reliably it might be reasonable to extend the reporting period to every two or three years, or where a manager is not performing well or there is a risk of exploitation an earlier reporting schedule may be warranted. The discretion [...] would reduce ongoing compliance burdens on performing financial managers, and enable [the NSW Trustee] to focus its resources on matters where there is greater risk of mismanagement.¹⁶³

- 9.125 While some submissions say that accounts should be lodged annually to safeguard against financial abuse,¹⁶⁴ others support the NSW Trustee having discretion to decide the reporting requirements on a case by case basis.¹⁶⁵ We agree that giving the NSW Trustee discretion in this area will ensure limited resources are used more efficiently.

Enforcing representatives' decisions

9.20 Enforcing representatives' decisions

The new Act should provide that:

- (1) A Tribunal order may specify the actions that:

- (a) a representative
- (b) a specified person or a person of a specified class, or
- (c) a person authorised by the representative

may take (including the use of force) to ensure that the represented person complies with any decision of the representative in the exercise of the representative's functions.

- (2) However, the Tribunal may not make such an order unless the Tribunal is satisfied that:

- (a) the represented person will be exposed to an unacceptable risk of harm, including by way of neglect, abuse or exploitation, if the order is not made
- (b) allowing such action is the least restrictive option for ensuring the represented person is not exposed to the harm in (2)(a)

163. NSW Trustee and Guardian, *Submission GA117*, 7.

164. Seniors Rights Service, *Submission GA90A*, 7; Legal Aid NSW, *Submission GA109A*, 7; Law Society of NSW, *Submission GA118A*, 6.

165. NSW Trustee and Guardian, *Submission GA117*, 7; Mental Health Carers NSW Inc, *Submission GA121A*, 7. See also: NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 25.

- (c) the actions authorised by the order are appropriate and proportionate to the circumstances, and
 - (d) the order is for the shortest period necessary to give effect to the order.
- (3) The Tribunal may at any time:
- (a) impose conditions or give directions about exercising the actions specified in the order, or
 - (b) revoke the order.
- (4) A person permitted in the order to use force may use such force as is reasonably necessary in the circumstances.
- (5) A person acting in accordance with such an order, in good faith, is not liable to any action, liability, claim or demand arising from the action.

9.126 Consistent with provisions in the *Guardianship Act* for guardianship orders,¹⁶⁶ we recommend allowing the Tribunal to make an order that says what actions a representative can take to enforce a decision.

9.127 These powers are different to search and removal powers (discussed in Chapter 17) and restrictive practices (discussed in Chapter 12). They are sometimes used, for example, when a guardian has decided that the person under guardianship should live somewhere new, but the person refuses to go there.¹⁶⁷ Such orders are not made often. The Tribunal has described the use of force as “draconian” and has said it is “loathe” to authorise it.¹⁶⁸ We agree that enforcement orders should be used sparingly.

9.128 We recommend that the Tribunal continues to be able to empower a broad range of people to enforce a decision. For example, the Tribunal has previously authorised police and ambulance officers to enforce a decision.¹⁶⁹

9.129 We acknowledge that such an order may infringe the represented person’s autonomy. Recommendation 9.20(2) therefore introduces matters not in the current law that the Tribunal must be satisfied of before making an enforcement order.

9.130 In our Draft Proposals, we proposed that enforcement orders be reviewed within 21 days. Some submissions say that this time frame may cause difficulty in practice.¹⁷⁰ Recommendation 9.20(2)(d) therefore provides, in accordance with the principle of least restriction, that the length of orders be at the Tribunal’s discretion, but should be limited to the shortest period necessary to give effect to the order.

9.131 The current law does not expressly refer to the amount of force that can be used to enforce an order. The Seniors Rights Service says that force should only be used “as a last resort and only to the extent appropriate and proportionate in the circumstances”.¹⁷¹ Recommendation 9.20(4) limits the use of force allowed to what

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

167. See, eg, *OHB* [2009] NSWGT 14 [17].

168. *NIQ* [2014] NSWCATGD 28 [50]-[51].

169. *PT* [2009] VCAT 1187 [1]; *OHB* [2009] NSWGT 14 [17].

170. See, eg, Mental Health Coordinating Council, *Submission GA138*, 4.

171. Seniors Rights Service, *Submission GA90C*, 8.

is reasonably necessary in the circumstances. This is consistent with provisions about the use of force by police in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).¹⁷²

- 9.132 Consistent with our general approach in Recommendation 14.4, Recommendation 9.20(5) is that a person acting in good faith, or under the reasonable belief that they are empowered under an order to take such action, is protected from liability.

Ending an order

Resignation of a representative

9.21 Resignation of a representative

The new Act should provide that a representative, other than the Public Representative or the NSW Trustee, may resign with the approval of the Tribunal.

- 9.133 We recommend that a representative only be able to resign with the approval of the Tribunal.
- 9.134 Under the current law, to end their appointment before the end of the order, a guardian or financial manager must apply to the Tribunal to revoke or vary the order.¹⁷³
- 9.135 This recommendation is consistent with our approach to representatives appointed under an enduring representation agreement.¹⁷⁴
- 9.136 Legal Aid NSW submits that a representative should be able to resign merely by notifying the Tribunal, and should not be required to “continue to act as representative while waiting for the approval of the Tribunal”.¹⁷⁵ However, in our view, requiring Tribunal approval is an important safeguard to protect people that lack decision-making ability from being left without adequate representation if a decision needs to be made.
- 9.137 As the NSW Trustee and Public Guardian are representatives of last resort, they should not be able to resign their appointment. Where the represented person no longer requires representation, the NSW Trustee or the Public Representative may apply to the Tribunal to revoke the appointment.

172. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 230.

173. *Guardianship Act 1987* (NSW) s 25, s 25B, s 25C, s 25R, s 25N(4)(b), s 25P.

174. See Recommendation 8.14.

175. Legal Aid NSW, *Submission GA163*, 11.

Ending or suspending a representation order

9.22 End or suspension of a representation order

The new Act should provide that:

- (1) A representation order lapses if a representative dies, unless there is a joint or reserve representative to carry out the functions.
- (2) The Tribunal shall, on application or its own motion, review a representation order and appoint a replacement representative, where necessary (for example, if the order has lapsed). Until the Tribunal makes an order following review:
 - (a) the Public Representative shall act as a representative for personal, healthcare and/or restrictive practices decision-making functions, and
 - (b) the NSW Trustee shall act as a representative for financial decision-making functions.
- (3) A representation order is suspended, so far as it appoints a representative, when the representative does not have the decision-making ability to act under the order.

9.138 We recommend that the provisions in the *Guardianship Act* about ending or suspending a guardianship order¹⁷⁶ apply to all representation orders, including those that involve financial decisions. Currently, there are no similar provisions for financial managers.

9.139 The *Guardianship Act* already enables the Public Guardian to be automatically appointed where a representative dies and there is no surviving or alternative guardian available, until an alternative representative can be appointed.¹⁷⁷ Submissions support the NSW Trustee having a similar role in relation to financial decision-making.¹⁷⁸ The NSW Trustee also supports this, saying it would ensure that upon the death of a representative, the represented person can have “continued access to funds, services are maintained and accounts paid, and [is] able to give instructions in any legal or other significant matters that might not be able to await the appointment of a new manager”.¹⁷⁹

Return of property

9.23 Possession or control of a represented person’s property

The new Act should provide that:

- (1) Nothing in the Act operates to change the ownership of any part of a represented person’s property.

176. *Guardianship Act 1987* (NSW) s 20(1), s 22A.

177. *Guardianship Act 1987* (NSW) s 22A(c).

178. Seniors Rights Service, *Submission GA90A*, 5; NSW Department of Family and Community Services, *Submission GA125*, 7-8; Legal Aid NSW, *Submission GA109A*, 6; Law Society of NSW, *Submission GA118A*, 5.

179. NSW Trustee and Guardian, *Submission GA117*, 5.

- (2) A representative, upon ceasing to act as such, must ensure that possession or control of any part of a represented person's property in relation to which they have functions, is transferred, as the case may require, to:
- (a) the formerly represented person, or
 - (b) any replacement representative who has functions in relation to that part of the represented person's property.

- 9.140 When a representation order ends, the possession and control of the represented person's property should be transferred to the appropriate person. This is consistent with a provision in the *Guardianship Act* that requires financial managers to hand over all of a person's estate to the owner, or the new financial manager, if the appointment ends.¹⁸⁰
- 9.141 We also recommend that the new Act states, as the *Guardianship Act* does, that the appointment of a representative to manage a represented person's property does not change the ownership of any part of that property.

No new offences

- 9.142 We do not recommend introducing criminal or civil penalties for when a representative misuses their power, or fails to act in line with their responsibilities.

Criminal offences

- 9.143 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.
- 9.144 In its 2016 report on elder abuse, a NSW Legislative Council General Purpose Standing Committee said that the law contains insufficient safeguards to prevent financial abuse.¹⁸¹ It recommended changing the *Powers of Attorney Act* to introduce "new indictable offences for dishonestly obtaining or using an enduring power of attorney, which are punishable by imprisonment".¹⁸² Victoria's powers of attorney legislation has similar provisions.¹⁸³
- 9.145 The *Guardianship Act* and the *Trustee and Guardian Act* do not include such provisions. We consider that offences in the *Crimes Act 1900* (NSW) can be used to address situations of abuse, exploitation or neglect committed by a representative. Relevant offences include:
- fraud¹⁸⁴

180. *Guardianship Act 1987* (NSW) s 25Q.

181. NSW, Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) [6.24]-[6.27], [6.96].

182. NSW, Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016) rec 7 [6.45], [6.101].

183. *Powers of Attorney Act 2014* (Vic) s 135.

184. *Crimes Act 1900* (NSW) s 192E.

- corrupt benefits received or solicited by a person appointed to manage property,¹⁸⁵ and
 - a person's failure to provide someone else with the necessities of life.¹⁸⁶
- 9.146 The fact that an offence is committed by a person in a position of trust is a relevant aggravating factor when an offender is sentenced.¹⁸⁷
- 9.147 The ALRC warned against duplicating existing offences and creating further complexity by introducing new offences to combat elder abuse. In its view, there is no guarantee that new offences would lead to an increase in the number of prosecutions.¹⁸⁸ Some submissions say that new criminal offences are not necessary.¹⁸⁹ The Law Society of NSW says that in light of the difficulty in obtaining evidence in many such cases:
- protection against abuse, exploitation and neglect would be better achieved though the allocation of resources for law enforcement and the prosecution of offenders utilising the offences which already exist.¹⁹⁰
- 9.148 We agree that including criminal offences in the new Act would unnecessarily duplicate existing offences.

Civil penalties

- 9.149 In its report on Victoria's guardianship laws, the VLRC recommended new civil penalties to tackle the abuse, neglect and exploitation of people with impaired decision-making ability.¹⁹¹
- 9.150 However, submissions have persuaded us that civil penalties may significantly deter people from accepting an appointment as a representative, and that there is not enough evidence that they would result in better quality decision-making or reduce undesirable behaviour.¹⁹²

185. *Crimes Act 1900* (NSW) s 249E.

186. *Crimes Act 1900* (NSW) s 44.

187. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).

188. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [4.20], [4.35]-[4.40].

189. Mental Health Coordinating Council, *Submission GA87*, 4; Law Society of NSW, *Submission GA118A*, 8; Legal Aid NSW, *Submission GA109A*, 8; NSW Department of Family and Community Services, *Submission GA125*, 11.

190. Law Society of NSW, *Submission GA118A*, 8 (footnotes omitted).

191. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 305-314.

192. Legal Aid NSW, *Submission GA109A*, 9; NSW Young Lawyers Civil Litigation Committee, *Submission GA122*, 6; NSW Public Guardian, *Submission GA108*, 5.

10. Healthcare

In brief

In this Chapter, we recommend changes to the consent framework for healthcare decisions. These include the introduction of a will and preferences approach to healthcare decisions, statutory recognition of advance care directives, and guidance on resolving disputes between “persons responsible”.

The current law	154
Who can give consent on a patient’s behalf?.....	154
When can treatment be administered without consent?	155
Our recommendations.....	156
Statutory objects	156
Application: patients who do not have decision-making ability.....	156
Definition of healthcare	157
Advance care directives	159
Urgent healthcare	161
Special healthcare	161
Definition.....	161
Consent	163
Consent to continuing or further special healthcare.....	165
Major healthcare	165
Definition.....	165
Consent to major healthcare.....	166
Minor healthcare	166
Definition.....	166
Consent to minor healthcare.....	167
Consent to withdrawing or withholding life-sustaining measures	167
Patient objections to healthcare	169
Overriding a patient’s objection to major or minor healthcare	169
Effect of consent and objections	170
The person responsible	171
Identifying the person responsible	171
The person responsible hierarchy.....	173
Identifying a carer and a close friend or relative	174
Consent of the person responsible	175
Tribunal consent	176
Application to the Tribunal for consent.....	176
Tribunal consent to healthcare.....	177
Liability for healthcare and clinical records	178
Offences	178

- 10.1 The recommendations in this Chapter relate to healthcare decision-making when a patient requires decision-making assistance. In making these recommendations, we aim to clarify how the law should operate, and align the framework with the principles of the United Nations *Convention on the Rights of Persons with Disabilities* (“UN Convention”) and the general principles of our proposed Assisted Decision-Making Act (“the new Act”).

The current law

- 10.2 Part 5 of the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) creates a range of substitute decision-making arrangements that apply when a patient cannot consent to their own medical or dental treatment.
- 10.3 In many cases, the “person responsible” can give consent for a patient. If the patient is under the age of 18, the person responsible is someone with parental responsibility for them. In most other cases, the person responsible is whoever is at the top of the hierarchy set out in the legislation.¹ That hierarchy is, in descending order:
- the patient’s guardian (if one has been appointed to make such a decision)
 - their spouse
 - their carer
 - a close friend or relative.
- 10.4 Part 5 only provides substitute consent arrangements for “medical or dental treatment”.² Non-intrusive examinations made for diagnostic purposes, first aid and non-prescription drugs are explicitly excluded from the operation of the provisions.³ This is because they are of “such a minor nature or are so linked to day to day living and only carried out when necessary that it was inappropriate for consent to them to have to be sought through the substitute decision-making regime”.⁴

Who can give consent on a patient’s behalf?

- 10.5 Depending on whether the treatment is “minor”, “major” or “special” treatment, a “person responsible” or the Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”) can consent to the treatment.
- 10.6 “Special treatment” is considered the most invasive or risky kind of treatment and therefore has the most stringent consent requirements. Only the Tribunal can consent to special treatment on a patient’s behalf. Special treatment includes treatment that:
- is intended or reasonably likely to render the patient permanently infertile (also known as sterilisation)
 - has not yet gained the support of a substantial number of specialists in the relevant practice area
 - terminates a pregnancy (also known as abortion)
 - is in the nature of a vasectomy or tubal occlusion, or

1. *Guardianship Act 1987* (NSW) s 33A(4).

2. *Guardianship Act 1987* (NSW) s 33(1)(a)-(b) definition of “medical or dental treatment”.

3. *Guardianship Act 1987* (NSW) s 33(1)(d)-(f) definition of “medical or dental treatment”.

4. N O'Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2nd ed, 2017) [12.4.4.1].

- involves using an aversive stimulus⁵

but does not include such treatment if it is given in the course of a clinical trial.

- 10.7 In contrast, either the person responsible or the Tribunal can consent to minor and major treatment. “Major treatment” includes, for example, certain contraceptives, treatments to regulate or eliminate menstruation, general anaesthetics, some sedatives, and high-risk treatments (unless given in the course of a clinical trial).⁶
- 10.8 “Minor treatment” is any treatment falling within the definition of “medical and dental treatment” that is not special treatment, major treatment or treatment as part of a clinical trial.⁷

When can treatment be administered without consent?

- 10.9 The consent requirements that apply in a particular case also depend on factors such as:
- the urgency of the treatment, and
 - whether the patient objects to having the treatment.
- 10.10 Special treatment can only be carried out without consent if the doctor thinks it is urgently needed to save the patient’s life or prevent serious damage to their health.⁸
- 10.11 Major or minor treatment can be carried out without consent if the medical practitioner or dentist thinks urgent treatment is needed:
- to save the patient’s life
 - to prevent serious damage to the patient’s health, or
 - to prevent the patient from suffering or continuing to suffer significant pain or distress.⁹
- 10.12 Minor treatment can also be carried out without consent if:
- there is no person responsible, or they cannot be contacted, or they are unwilling to make a decision, and
 - the medical practitioner or dentist certifies in writing that:
 - the treatment is necessary
 - the form of treatment will be the most successful at promoting the patient’s health and wellbeing, and

5. *Guardianship Act 1987* (NSW) s 33(1) definition of “special treatment”; *Guardianship Regulation 2016* (NSW) cl 9.

6. *Guardianship Act 1987* (NSW) s 33(1) definition of “major treatment”; *Guardianship Regulation 2016* (NSW) cl 10.

7. *Guardianship Act 1987* (NSW) s 33(1) definition of “minor treatment”.

8. *Guardianship Act 1987* (NSW) s 37(1).

9. *Guardianship Act 1987* (NSW) s 37(1).

- the patient does not object to the treatment.¹⁰

Our recommendations

Statutory objects

10.1 Statutory objects

The new Act should not have separate statutory objects for healthcare decision-making.

- 10.13 Currently, the objects of part 5 are to ensure that people are not deprived of necessary treatment merely because they cannot consent to it and that such treatment promotes and maintains their health and well-being.¹¹
- 10.14 We have recommended new statutory objects together with new general principles for the new Act.¹² They are broad enough to cover the part 5 objects and render them unnecessary.

Application: patients who do not have decision-making ability

10.2 Application of healthcare provisions

The new Act should provide that its healthcare provisions apply to a patient:

- (a) who is of or above the age of 16 years, and
- (b) who does not have decision-making ability for a healthcare decision.

10.3 Decision-making ability

The definition of decision-making ability in **Recommendation 6.1** should apply to the new Act's healthcare provisions.

- 10.15 Part 5 applies to patients aged 16 years or older, who are "incapable of giving consent" to medical treatment.¹³ A patient is "incapable of giving consent" if they cannot understand the general nature and effect of the proposed treatment or cannot indicate whether or not they consent to the treatment.¹⁴
- 10.16 The application of part 5 to patients aged 16 or older is appropriate. However, we recommend that the healthcare provisions apply to patients who "do not have

10. *Guardianship Act 1987* (NSW) s 37(2)-(3).

11. *Guardianship Act 1987* (NSW) s 32.

12. Recommendation 5.1, 5.2.

13. *Guardianship Act 1987* (NSW) s 34.

14. *Guardianship Act 1987* (NSW) s 33(2).

decision-making ability” for a healthcare decision, as defined in Recommendation 6.1, rather than patients who are “incapable of giving consent” as currently defined.

- 10.17 A person’s decision-making ability for healthcare decisions should be determined consistently in all areas covered by the new Act. Many submissions support this approach.¹⁵
- 10.18 We note that if a person has a supporter with medical functions and has decision-making ability (as defined in Recommendation 6.1) in relation to a healthcare decision only when assisted by the supporter, the person has decision-making ability for the purposes of these provisions.

Definition of healthcare

10.4 Definition of “healthcare”

The new Act should provide that:

(1) “**Healthcare**” includes:

- (a) any care, service, procedure or treatment provided by, or under the supervision of, a registered health practitioner for the purpose of diagnosing, maintaining or treating a physical or mental condition of a person
- (b) in the case of healthcare in the course of a medical research procedure — the giving of placebos, and
- (c) any other act declared by the regulations to be healthcare.

(2) “**Healthcare**” does not include:

- (a) any non-intrusive examination for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears)
- (b) first-aid
- (c) administering a pharmaceutical drug for which a prescription is not required and which is normally self-administered in accordance with the manufacturer’s recommendations as to purpose and dosage level
- (d) mental health treatment given to a patient or affected person under the *Mental Health Act 2007* (NSW) or *Mental Health (Forensic Provisions) Act 1990* (NSW), or
- (e) anything else that the regulations declare is not healthcare for the purposes of these provisions.

(3) “**Registered health practitioner**” means a person who practises in:

15. Avant Mutual Group Ltd, *Submission GA97*, 1-2; Cognitive Decline Partnership Centre, *Submission GA112B*, 1-2; Mental Health Commission of NSW, *Submission GA116B*, 4; Being, *Submission GA119B*, 4; Mental Health Carers NSW Inc, *Submission GA121B*, 4; NSW Young Lawyers Civil Litigation Committee, *Submission GA122*, 9; Law Society of NSW, *Submission GA123*, 2; NSW Disability Network Forum, *Submission GA127*, 5. See also, Royal Australasian College of Physicians, *Submission GA91*, 1; NSW Department of Family and Community Services, *Submission GA125*, 2; NSW Ministry of Health, *Submission GA130*, 2.

- (a) a health profession within the meaning of the *Health Practitioner Regulation National Law* (NSW), and/or
- (b) any other profession or practice as declared by the regulations.

- 10.19 Part 5 of the *Guardianship Act* only applies to consent for treatment administered or supervised by a registered medical practitioner or a dentist. We recommend a broader category of healthcare provided by or under the supervision of a “registered health practitioner”. This will ensure that the person responsible can consent to a wider range of healthcare for a patient in accordance with the new Act’s processes and safeguards. This approach follows reforms in other Australian jurisdictions¹⁶ and is supported by a majority of submissions.¹⁷
- 10.20 This will bring a range of healthcare under the consent provisions for the first time. Importantly, it will ensure that healthcare administered by nurses and paramedics is covered. It will also include, for example, healthcare administered by midwives, Aboriginal and Torres Strait Islander health practitioners, Chinese medicine practitioners, chiropractors, occupational therapists, optometrists, pharmacists, osteopaths, podiatrists, physical therapists and psychologists.
- 10.21 We envisage that many of these treatments will qualify as “minor healthcare” that can be carried out without the person responsible’s consent if the health practitioner is satisfied that the healthcare is necessary and will promote the patient’s health and personal and social wellbeing, and that the patient does not object.¹⁸
- 10.22 These requirements should not represent an undue burden for health practitioners, when weighed against the goal of respecting a patient’s autonomy and their will and preferences. Overall, including these treatments within the consent framework represents a more holistic approach, and will help to ensure that appropriate consent arrangements are in place for patients who do not have decision-making ability.
- 10.23 The definition of “healthcare” explicitly excludes the same list of treatments as the current definition of “medical or dental treatment” (for example, first aid).¹⁹ It excludes “mental health treatment given to a patient or affected person under the *Mental Health Act 2007* (NSW) or *Mental Health (Forensic Provisions) Act 1990* (NSW)” in order to give effect to Recommendation 18.3.

16. See, eg, *Medical Treatment Planning and Decisions Act 2016* (Vic) s 3 definition of “registered health practitioner”.

17. NSW Minister for Health, *Preliminary Submission PGA55*, 1; Tasmanian Department of Health and Human Services, *Submission GA84*, 3; Seniors Rights Service, *Submission GA90B*, 3; Royal Australasian College of Physicians, *Submission GA91*, 2; Avant Mutual Group Ltd, *Submission GA97*, 3; Royal College of Pathologists of Australasia, *Submission GA107*, 1; Legal Aid NSW, *Submission GA109B*, 3; Cognitive Decline Partnership Centre, *Submission GA112B*, 2; Sexual Assault Services Within Nepean Blue Mountains and Western Sydney Local Health Districts, *Submission GA114*, 1; Medical Insurance Group Australia, *Submission GA115*, 5; Mental Health Carers NSW Inc, *Submission GA121B*, 6; Law Society of NSW, *Submission GA123*, 4; NSW Department of Family and Community Services, *Submission GA125*, 16-17; NSW Ministry of Health, *Submission GA130*, 4. See also NSW Public Guardian, *Submission GA108*, 10-11.

18. Recommendation 10.13.

19. *Guardianship Act 1987* (NSW) s 33(1).

Advance care directives

10.5 Advance care directives

The new Act should provide:

- (1) A patient may consent to healthcare or a medical research procedure in a valid advance care directive.
- (2) Healthcare must not be given and a medical research procedure must not be undertaken if it would be against a patient's will and preference as expressed in an advance care directive that is clear and extends to the situation at hand.
- (3) An advance care directive can be made in any form, including orally.
- (4) An advance care directive can include instructions on specific matters as well as expressions of values and preferences.
- (5) The provisions do not limit the common law about advance care directives.
- (6) A requirement to consider a person's will and preferences includes considering any valid advance care directive (see also **Recommendation 5.4**).
- (7) A registered health practitioner must make a reasonable effort in the circumstances to find out if a patient who does not have decision-making ability has an advance care directive before treating them or seeking another person's consent to treat them.
- (8) Notwithstanding an advance care directive, a registered health practitioner is not under any obligation to deliver a life-sustaining measure if to do so would be inconsistent with standard medical practice.

10.24 This recommendation requires that the new healthcare provisions explicitly recognise advance care directives. An advance care directive contains a person's wishes and preferences for a time when they can no longer consent to healthcare, including end-of-life care. A person can make their directive either orally or in writing and a valid directive will take priority over the decisions of a guardian or person responsible.

10.25 Valid advance care directives are binding at common law.²⁰ In 2009, the Supreme Court set out some general principles about advance care directives:

- An adult can make an advance care directive specifying that they do not wish to receive medical treatment, or medical treatment of a particular kind.
- If the adult makes an advance care directive at a time when they have capacity, and it "is clear and unambiguous, and extends to the situation at hand", the advance care directive must be respected.
- A medical practitioner or hospital should apply to the court for help if there is genuine and reasonable doubt about whether an advance care directive is valid or whether it applies to the situation at hand.

20. *Hunter and New England Area Health Service v A* [2009] NSWSC 761, 74 NSWLR 88.

- If a medical practitioner or hospital promptly applies to the court for help, they can continue with emergency treatment until the court hands down its decision.
 - An adult does not need to be told of the consequences of refusing the medical treatment in order for their advance care directive to be valid, “[n]or does it matter that the person’s decision is based on religious, social or moral grounds rather than upon (for example) some balancing of risk and benefit”.
 - A capable adult’s decision does not need to be supported by “any discernible reason” so long as the advance care directive is made voluntarily and in the absence of any vitiating factors such as misrepresentation or undue influence.²¹
- 10.26 The *Guardianship Act* does not directly mention advance care directives. This has led to uncertainty in the medical profession and the wider community about the validity of common law advance care directives, resulting in a low uptake.²² A NSW Health working group identified “inadequate end of life advance care planning processes” as a factor that contributes to family conflict in end-of-life decision-making.²³
- 10.27 In our view, recognising advance care directives in legislation will make it easier for health professionals to refer to the law, minimise confusion around their validity and, therefore, encourage people to use them. Encouraging people to record their wishes in an advance care directive, and requiring health practitioners to respect them, is also consistent with the new Act’s will and preferences focus.
- 10.28 A majority of submissions favour recognising advance care directives in legislation.²⁴ However, many caution against a prescriptive approach.²⁵ We recommend a “light touch” approach that preserves the common law requirements while incorporating advance care directives into the substitute decision-making process. Although it may be helpful for a person to record an advance care directive in writing, or to seek the advice of a general practitioner before making an advance care directive,²⁶ we consider it undesirable to impose formal requirements that

-
21. *Hunter and New England Area Health Service v A* [2009] NSWSC 761, 74 NSWLR 88 [40].
22. R Z Carter and others, “Advance Care Planning in Australia: What does the Law Say?” (2016) 40 *Australian Health Review* 405. See also S McCarthy and others, “Legal and Ethical Issues Surrounding Advance Care Directives in Australia: Implications for the Advance Care Planning Document in the Australian My Health Record” (2017) 25 *Journal of Law and Medicine* 136; Law Society of NSW, *Submission GA123*, 9.
23. NSW Health, *Conflict Resolution in End of Life Settings (CRELS): Final CRELS Project Working Group Report Including Consultation Summary* (2010) [4.6].
24. Australian Centre for Health Law Research, *Preliminary Submission PGA47*, 3; Tasmanian Department of Health and Human Services, *Submission GA84*, 7; Mental Health Coordinating Council, *Submission GA87*, 10; Seniors Rights Service, *Submission GA90B*, 8-9; Royal Australasian College of Physicians, *Submission GA91*, 5; Avant Mutual Group Ltd, *Submission GA97*, 4; Legal Aid NSW, *Submission GA109B*, 6; Cognitive Decline Partnership Centre, *Submission GA112B*, 4-5; Medical Insurance Group Australia, *Submission GA115*, 1, 7; Being, *Submission GA119B*, 7-8; Mental Health Carers NSW Inc, *Submission GA121B*, 2, 9; Law Society of NSW, *Submission GA123*, 9-10.
25. Royal Australasian College of Physicians, *Submission GA91*, 6; Legal Aid NSW, *Submission GA109B*, 6; Cognitive Decline Partnership Centre, *Submission GA112B*, 5; Medical Insurance Group Australia, *Submission GA115*, 1, 12; Mental Health Carers NSW Inc, *Submission GA121B*, 10.
26. See, eg, H Y Chan, “Refusing Treatment Prior to Becoming Incapacitated: Supported Decision-Making as an Approach in Advance Directives” (2018) 25 *European Journal of Health Law* 1, 13.

might deter a person from making an advance care directive, or prevent health practitioners from following clearly expressed wishes.

- 10.29 Health practitioners should be required to make a reasonable effort to find out if a patient has a valid directive before treating them, or seeking substitute consent. The *Medical Treatment Planning and Decisions Act 2016* (Vic) imposes a similar requirement.²⁷

Urgent healthcare

10.6 Urgent healthcare

The new Act should provide:

- (1) Healthcare may be provided to a patient without consent if the registered health practitioner carrying out or supervising the healthcare considers the healthcare is necessary, as a matter of urgency:
 - (a) to save the patient's life, or
 - (b) to prevent serious damage to the patient's health, or
 - (c) except in the case of special healthcare — to prevent the patient from suffering or continuing to suffer significant pain or distress.
- (2) In urgent circumstances, a registered health practitioner is not required to search for an advance care directive that is not readily available.

- 10.30 Recommendation 10.6 maintains the urgent treatment regime in part 5 of *Guardianship Act*.²⁸ This ensures that a patient can receive healthcare without consent if the healthcare is necessary, as a matter of urgency, to save their life, prevent serious damage to their health, or, in some cases, to prevent significant pain or distress.

- 10.31 We do not think practitioners should be required in urgent circumstances to search for an advance care directive that is not readily available. Other Australian jurisdictions also take this approach.²⁹

Special healthcare

Definition

10.7 Definition of “special healthcare”

The new Act should provide that “**special healthcare**” means:

27. *Medical Treatment Planning and Decisions Act 2016* (Vic) s 50. See also *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 13(1)(d).

28. *Guardianship Act 1987* (NSW) s 37.

29. See, eg, *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 13(2a); *Medical Treatment Planning and Decisions Act 2016* (Vic) s 53(3).

- (a) any healthcare that is intended, or is reasonably likely, to render the patient permanently infertile
- (b) any healthcare that is not supported by a substantial number of registered health practitioners specialising in the relevant practice area, or
- (c) any healthcare that the regulations declare to be special healthcare.

- 10.32 We recommend that “special healthcare” should have the same meaning as “special treatment” under the *Guardianship Act*.³⁰ Currently, treatments declared to be special treatment in the regulations include terminations of pregnancies, vasectomies, tubal occlusions and treatment involving the use of aversive stimuli.³¹
- 10.33 Some submissions have no concerns with the current definition of special treatment.³² Others raise concerns about the current treatment categories being complex and confusing.³³ The Royal College of Pathologists of Australasia argues that the current definition of special treatment should be replaced by a broader alternative; for example, “the most risky and invasive kinds of treatment”.³⁴ Submissions make similar comments about the definition of “major” treatment.³⁵
- 10.34 Ultimately, we are not satisfied that any alternatives would be clearer than the existing definition of special treatment.
- 10.35 **Termination of pregnancy as special healthcare.** Under the *Guardianship Regulation 2016* (NSW) (“*Guardianship Regulation*”), treatment carried out to terminate a pregnancy is special treatment.³⁶ This means that only the Tribunal can give consent on a patient’s behalf. The Tribunal can only give consent if satisfied that the treatment is necessary to save the patient’s life, or to prevent serious damage to their health.³⁷
- 10.36 In NSW, medicinal termination of pregnancy is an alternative method to surgery and involves the administration of a drug regimen. It is generally carried out in the early stages of pregnancy.³⁸ Some submissions question whether medicinal terminations should be “special treatment”. For example, the NSW Ministry of Health argues that categorising terminations as a special treatment “significantly impedes timeliness” and suggests that terminations could be treated differently depending on whether

30. *Guardianship Act 1987* (NSW) s 33(1) definition of “special treatment”.

31. *Guardianship Regulation 2016* (NSW) cl 9.

32. Seniors Rights Service, *Submission GA90B*, 3; Mental Health Carers NSW, *Submission GA121B*, 6.

33. Avant Mutual Group Ltd, *Submission GA97*, 3; Medical Insurance Group Australia, *Submission GA115*, 6.

34. Royal College of Pathologists of Australasia, *Submission GA107*, 2. See, also, Sexual Assault Services within Nepean Blue Mountains and Western Sydney Local Health Districts, *Submission GA114*, 2.

35. Royal College of Pathologists of Australasia, *Submission GA107*, 3; Sexual Assault Services within Nepean Blue Mountains and Western Sydney Local Health Districts, *Submission GA114*, 2.

36. *Guardianship Regulation 2016* (NSW) cl 9(a).

37. *Guardianship Act 1987* (NSW) s 45(2).

38. Royal Australian and New Zealand College of Obstetricians and Gynaecologists, *The Use of Mifepristone for Medical Termination of Pregnancy* (2016) 3.

the proposed treatment is a medicinal or surgical termination.³⁹ The Law Society of NSW comments:

Some of our members consider it to be disproportionate to require an NCAT order or Court order to enable medication to be prescribed to terminate a pregnancy. For example, the termination of a pregnancy is not classified as special medical treatment in the definition of the *Children and Young Persons (Care and Protection) Act 1998*.⁴⁰

- 10.37 However, it appears that most Australian jurisdictions require a Tribunal to approve terminations where the patient does not have decision-making ability.⁴¹ On balance, we consider it is appropriate for the Tribunal to remain responsible for consenting to these procedures to ensure a patient's will and preferences are given effect where possible. This is particularly important in light of the strong emotional, moral and ethical responses to terminations that patients and their family members and carers often have. We note that the Tribunal can make orders efficiently where time is of the essence.
- 10.38 Recommendation 10.8(1)(b), below, clarifies that the Tribunal should consider whether special treatment is necessary to prevent serious damage to a patient's *emotional, psychological or physical* health. This will ensure that the Tribunal can take into account a broad range of factors in termination cases.

Tribunal consent

10.8 Tribunal consent to special healthcare

The new Act should provide:

- (1) The Tribunal may consent to special healthcare for a patient if it is satisfied that it is necessary:
 - (a) to save the patient's life, or
 - (b) to prevent serious damage to the patient's emotional, psychological or physical health.
- (2) In the case of healthcare intended or reasonably likely to render the patient permanently infertile, the Tribunal must be satisfied that the patient will not regain decision-making ability in the foreseeable future.
- (3) In the case of healthcare that is not supported by a substantial number of health practitioners specialising in the relevant practice area, the Tribunal may give consent only if:

39. NSW Ministry of Health, *Submission GA130*, 5-6.

40. Law Society of NSW, *Submission GA123*, 4-5. The Law Society ultimately concludes that the current defining of special treatment (including terminations) is appropriate.

41. See, eg, *Guardianship and Administration Act 1986* (Vic) s 3 definition of "special medical procedure", s 42E; *Guardianship and Administration Act 2000* (Qld) sch 2 cl 7 definition of "special health care", s 65, s 68; *Guardianship and Administration Act 1993* (SA) s 3 definition of "prescribed treatment", s 61(3); *Guardianship and Management of Property Act 1991* (ACT) Dictionary, "prescribed medical procedure", s 70; *Guardianship of Adults Act* (NT) s 8(1) definition of "restricted health care", s 23(2); *Guardianship and Administration Act 1995* (Tas) s 3(1) definition of "special treatment", s 39.

- (a) the treatment is the only or most appropriate way of treating the patient, and
- (b) it is satisfied that any relevant National Health and Medical Research Council guidelines have been or will be complied with.

*For matters that the Tribunal must consider before giving consent, see **Recommendation 10.24.***

- 10.39 We recommend that special healthcare should continue to require Tribunal consent, and must be necessary to save a patient's life or prevent serious damage to the patient's health. These are the same preconditions that currently apply to special treatment.⁴² However, we recommend clarifying that serious damage to the patient's health includes serious damage to their *emotional, physical or psychological* health.⁴³
- 10.40 In relation to sterilisation, the Tribunal should be prevented from giving consent where the patient may regain decision-making ability in the foreseeable future. This is consistent with a recommendation of the Commonwealth Senate Community Affairs References Committee.⁴⁴ Some Australian jurisdictions already require this.⁴⁵
- 10.41 In our Draft Proposals, we listed additional factors that the Tribunal should be prevented from taking into account when making a decision whether to consent to sterilisation: the risk of pregnancy as a result of sexual abuse; the patient's current or hypothetical capacity to care for children; and a desire to prevent an inheritable disability. This was an attempt to prevent decision-making being based on out-dated and paternalistic attitudes to disability and eugenic considerations. We included these factors in our proposals in response to submissions that argue the Tribunal should be expressly prevented from considering them.⁴⁶
- 10.42 Upon further consideration, we have decided not to include such a list in Recommendation 10.8, since it may be appropriate for the Tribunal to consider these matters if they are raised by a woman who is the subject of a consent application. For example, if a woman expresses a desire to undergo sterilisation because she does not wish her children to inherit a disability, the Tribunal should not be prevented from properly taking this into account as an expression of her will and preference.
- 10.43 We have not followed our Draft Proposals, which proposed that "serious damage to the patient's health" include health problems associated with menstruation, as we received feedback that reference to such problems is not required.⁴⁷

42. *Guardianship Act 1987* (NSW) s 45(2).

43. J Carter, *Submission GA166*, 1.

44. Australia, Senate, Community Affairs References Committee, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013) rec 7.

45. *Guardianship and Administration Act 1993* (SA) s 61(2)(b)(i); *Guardianship and Administration Act 2000* (Qld) s 70(1)(c).

46. Tasmanian Department of Health and Human Services, *Submission GA84*, 7; Legal Aid NSW, *Submission GA109B*, 6; Law Society of NSW, *Submission GA123*, 9; NSW Disability Network Forum, *Submission GA127*, 6.

47. See, eg, NSW Ombudsman, *Submission GA136*, 4.

*Consent to continuing or further special healthcare***10.9 Consent to continuing or further special healthcare**

The new Act should provide:

- (1) The Tribunal may, when consenting to special healthcare, authorise the patient's representative to consent to:
 - (a) continuing the special healthcare, or
 - (b) further special healthcare of a similar nature.
- (2) The Tribunal may only give such an authority if the representative requests it or consents to it.
- (3) The Tribunal may at any time:
 - (a) impose conditions or give directions as to the exercise of such an authority, or
 - (b) revoke such an authority.
- (4) If the representative has such an authority, any person may ask the representative for their consent to give the relevant special healthcare.
- (5) In considering a request for consent to further or continuing healthcare, a representative must give effect to the will and preferences of the patient (to be determined as set out in **Recommendation 5.4**).

- 10.44 The new Act should continue to allow the Tribunal, after it has consented to special healthcare in the first instance, to authorise a patient's representative to consent to continuing or further special healthcare. This power should still be restricted to appointed representatives (rather than persons responsible more generally) to reflect the serious nature of the decision. The person responsible can seek appointment as a representative if they think they need to exercise this power.
- 10.45 Recommendation 10.9 generally mirrors the existing provision but requires a representative to give effect to the patient's will and preferences in accordance with Recommendation 5.4, rather than having regard to their views.⁴⁸

Major healthcare*Definition***10.10 Definition of "major healthcare"**

- (1) The new Act should provide that "**major healthcare**" means healthcare that the regulations declare to be major healthcare.
- (2) The new regulations should mirror the present regulations except that HIV testing should not be included.

48. *Guardianship Act 1987* (NSW) s 45A(5).

- 10.46 We recommend that “major healthcare” should, like “major treatment”, be defined by regulations accompanying the new Act. Submissions have different ideas about the treatments that should be considered “major”, and how they should be described.⁴⁹ Based on feedback, we recommend removing HIV testing from the list of major treatments. Reclassifying HIV testing as minor healthcare is consistent with efforts to promote testing and decrease the stigma around HIV.⁵⁰
- 10.47 In our Draft Proposals, we also proposed reclassifying contraceptive treatments as minor healthcare. However, after receiving feedback that support workers sometimes use contraception inappropriately,⁵¹ for example, to suppress menstruation in residential settings, we have decided that the more stringent consent requirements are appropriate.

Consent to major healthcare

10.11 Consent to major healthcare

The new Act should provide that the person responsible or the Tribunal may consent to major healthcare for a patient.

*For matters that the person responsible must consider before giving consent, see **Recommendation 10.22**.*

*For matters that the Tribunal must consider before giving consent, see **Recommendation 10.24**.*

- 10.48 We recommend that the person responsible or the Tribunal should continue to be able to consent to major healthcare for a patient.
- 10.49 We received limited specific feedback on the consent regime for major treatment. One submission suggests that consent to major healthcare should be given by the Tribunal only.⁵² On balance, we consider this would be unduly burdensome for all parties, and could impede equal access to healthcare.

Minor healthcare

Definition

10.12 Definition of “minor healthcare”

The new Act should provide that “**minor healthcare**” means healthcare that is not special healthcare or major healthcare.

49. See, eg, Royal College of Pathologists of Australasia, *Submission GA107*, 2-3; Mental Health Carers NSW Inc, *Submission GA121B*, 7; Law Society of NSW, *Submission GA123*, 5.

50. NSW Ministry of Health, *Submission GA130*, 6-7.

51. People with Disability Australia Inc, *Submission GA154*, 16-17; NSW Council for Intellectual Disability, *Submission GA144*, 2.

52. Tasmanian Department of Health and Human Services, *Submission GA84*, 4.

- 10.50 The effect of Recommendation 10.12 is to rename “minor treatment” as “minor healthcare” but for the definition to remain the same.

Consent to minor healthcare

10.13 Consent to minor healthcare

The new Act should provide:

- (1) The person responsible may consent to minor healthcare for a patient.
- (2) If there is no person responsible, minor healthcare may be carried out on a patient without consent provided that the registered health practitioner carrying out, or supervising the minor healthcare, certifies in writing in the patient’s clinical record that:
 - (a) the healthcare is necessary and is in a form that will most successfully promote the patient’s health and personal and social wellbeing, and
 - (b) the patient does not object to the healthcare.
- (3) The Tribunal may consent to minor health care for a patient in any case.

*For matters that the person responsible must consider before giving consent, see **Recommendation 10.22**.*

*For matters that the Tribunal must consider before giving consent, see **Recommendation 10.24**.*

- 10.51 We recommend that the person responsible or the Tribunal should be able to consent to minor healthcare for a patient. A registered health practitioner should also be able to administer minor healthcare without consent if the patient does not object and the practitioner is satisfied that it is necessary and will promote the patient’s personal and social wellbeing.
- 10.52 This recommendation largely preserves the existing consent arrangements for minor treatment.⁵³ A number of submissions say this framework remains appropriate.⁵⁴ The ability to administer minor healthcare without consent respects a patient’s will and preferences because the patient can object and the practitioner must record why the healthcare is necessary and appropriate.

Consent to withdrawing or withholding life-sustaining measures

10.14 Consent to withdrawing or withholding life-sustaining measures

The new Act should provide:

53. *Guardianship Act 1987* (NSW) s 36-37.

54. Seniors Rights Service, *Submission GA90B*, 5; Royal College of Pathologists of Australasia, *Submission GA107*, 3; Medical Insurance Group Australia, *Submission GA115*, 8; Mental Health Carers NSW Inc, *Submission GA121B*, 7; Law Society of NSW, *Submission GA123*, 6; NSW Department of Family and Community Services, *Submission GA125*, 18; NSW Ministry of Health, *Submission GA130*, 7.

- (1) The person responsible or Tribunal may consent to withholding or withdrawing a life-sustaining measure, but only if:
 - (a) starting or continuing the measure would be inconsistent with good medical practice, and
 - (b) the decision gives effect to the patient's will and preferences, as set out in **Recommendation 5.4**.
- (2) Death as a result of withdrawing or withholding life-sustaining measures is not necessarily incompatible with promoting a patient's personal and social wellbeing.

- 10.53 We recommend that the person responsible should be able to consent to withholding or withdrawing a life-sustaining measure for a patient. Some submissions suggest that the current provisions are unclear about who can consent to such measures and in what circumstances.⁵⁵ Doctors do not need consent to withdraw life-sustaining measures if they form the view that the treatment is therapeutically ineffective, extraordinary, excessively burdensome, intrusive or futile.⁵⁶ However, they may prefer to seek consent. The (then) Administrative Decisions Tribunal found that a guardian who is authorised to make healthcare decisions can give consent to withdrawing or withholding life-sustaining treatment if it is in the patient's best interests.⁵⁷
- 10.54 In 2010, the NSW Legislative Council Standing Committee on Social Issues noted the need to clarify this issue but did not receive enough evidence to make a specific recommendation. Many submissions say that the person responsible, or at the very least a guardian with a healthcare function, should be able to consent to withholding or stopping life-sustaining treatment.⁵⁸ Most people who are dying will not have an appointed guardian and we understand that these decisions are often made informally, in consultation with family.
- 10.55 Therefore, we recommend that the person responsible should be able to consent to withholding or withdrawing life-sustaining measures where starting or continuing the measure would be inconsistent with good medical practice, and doing so gives effect to the patient's will and preferences, where possible, in accordance with Recommendation 5.4. This recommendation reflects the approach in other Australian states and territories.⁵⁹

55. See, eg, NSW Public Guardian, *Submission GA108*, 10; Medical Insurance Group Australia, *Submission GA115*, 3-4; NSW Health, *Preliminary Submission PGA49*, 3-7.

56. *Fl v Public Guardian* [2008] NSWADT 263 [46].

57. *Fl v Public Guardian* [2008] NSWADT 263 [53].

58. Tasmanian Department of Health and Human Services, *Submission GA84*, 1-2; Seniors Rights Service, *Submission GA90B*, 2; Royal Australasian College of Physicians, *Submission GA91*, 1-2; Avant Mutual Group Ltd, *Submission GA97*, 2; Medical Insurance Group Australia, *Submission GA115*, 3-4; Law Society of NSW, *Submission GA123*, 2-3; NSW Ministry of Health, *Submission GA130*, 2; NSW Public Guardian, *Submission GA108*, 10. See also, Avant Mutual Group Ltd, *Preliminary Submission PGA20*, 2; Australian Centre for Health Law Research, *Preliminary Submission PGA47*, 3-4; NSW Health, *Preliminary Submission PGA49*, 6-7; NSW, South Eastern Sydney Local Health District, Clinical Ethics Committee, *Submission GA152*, 2.

59. *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 4(1) definition of "life sustaining measures", s 17(2)(b); *Guardianship and Administration Act 2000* (Qld) sch 2 cl 5(2), cl 5A definition of "life sustaining measure", s 66. See also *Powers of Attorney Act 2006* (ACT) s 46(2).

Patient objections to healthcare

10.15 Patient objections to healthcare

The new Act should provide that a patient is taken to object to healthcare:

- (a) if the patient indicates (by whatever means) that they do not want the healthcare, or
- (b) if the patient:
 - (i) has previously indicated, in similar circumstances, that they did not then want the healthcare (including in an advance care directive that is clear and unambiguous and extends to the situation at hand), and
 - (ii) has not subsequently indicated otherwise.

- 10.56 We recommend that new healthcare provisions include a broad definition of an “objection” to healthcare. This is important because an objection, however expressed, may represent the patient’s current will and preferences. Under our recommended framework, decision-makers will be required to give effect to a patient’s will and preferences where possible.⁶⁰
- 10.57 This recommendation largely mirrors the existing definition of an objection⁶¹ and clarifies that a person can refuse treatment in a “clear and unambiguous” advance care directive that “extends to the situation at hand”.⁶²

Overriding a patient’s objection to major or minor healthcare

10.16 Overriding a patient’s objection to major or minor healthcare

The new Act should provide:

- (1) The Tribunal may authorise a representative (at their request or with their consent) to override the patient’s objection to major or minor healthcare if satisfied that:
 - (a) the patient has not refused the healthcare in an advance care directive that is clear and extends to the situation at hand
 - (b) there would be an unacceptable risk to the patient if the healthcare was not given, and
 - (c) receiving the healthcare would promote the patient’s health and personal and social wellbeing.
- (2) The Tribunal may at any time:
 - (a) impose conditions on or give directions about exercising the authority, or
 - (b) revoke the authority.

60. Recommendation 5.2(a), 5.4.

61. *Guardianship Act 1987* (NSW) s 33(3).

62. *Hunter and New England Area Health Service v A* [2009] NSWSC 761, 74 NSWLR 88 [40].

- (3) The patient's representative may exercise the authority only if satisfied that the healthcare promotes the patient's health and personal and social wellbeing.
- (4) These provisions do not apply to healthcare delivered in the course of a medical research procedure.

- 10.58 We recommend that the Tribunal should have the power to authorise a representative to override an objection to major or minor healthcare. However, the Tribunal should only grant such an authority if not receiving the healthcare would create an unacceptable risk to the patient, and receiving the healthcare would promote their health and personal and social wellbeing.
- 10.59 A similar override power already exists in the *Guardianship Act*,⁶³ however it is based on preconditions that are inconsistent with a will and preferences model of decision-making. This recommendation, therefore, has moved away from a "best interests" approach to decision-making to a model that aims to promote a person's personal and social wellbeing.
- 10.60 We recommend an exception to this recommendation where healthcare is delivered as part of a medical research procedure. In such cases, a patient's objection should never be overridden. This reflects the approach in other jurisdictions and the particular human rights implications of conducting human research against the wishes of the research subject.⁶⁴

Effect of consent and objections

10.17 Effect of consent and objections

The new Act should provide:

- (1) A healthcare consent has effect as if:
 - (a) the patient had decision-making ability, as defined in **Recommendation 6.1**, to consent to the healthcare, and
 - (b) the healthcare had been given with the patient's consent.
- (2) A consent given by the person responsible has no effect:
 - (a) if the person giving or supervising the healthcare knows, or ought reasonably to know, that the patient objects to the healthcare, or
 - (b) if the healthcare is to be carried out for any purpose other than that of promoting the patient's health and personal and social wellbeing.
- (3) A consent given by the patient's representative has effect even if the patient objects when the representative is authorised by the Tribunal under **Recommendation 10.16**.

63. *Guardianship Act 1987* (NSW) s 46A.

64. See [11.22]-[11.23].

- 10.61 We recommend that new healthcare provisions provide that a health practitioner can rely on consent given by the person responsible, except where it is clear that the patient objects.
- 10.62 This recommendation is consistent with an existing provision that deals with the legal effect of a consent given by the person responsible.⁶⁵ Consent will generally operate as though it was given by the patient. However, substitute consent should not be effective if a health practitioner knows or ought to know that the patient objects.⁶⁶ This is consistent with our new approach, because an objection might suggest that the person responsible's consent does not align with the patient's will and preferences.
- 10.63 This recommendation does not include the existing power to disregard a patient's objection simply because "the patient has minimal or no understanding of what the treatment entails" and the treatment will cause the patient no distress, or only "reasonably tolerable and only transitory" distress.⁶⁷ Such preconditions are ambiguous and subjective,⁶⁸ and are inconsistent with our recommendation that a person's will and preferences can only be overridden if they create an unacceptable risk to the person.⁶⁹
- 10.64 We note that if a person has a supporter with healthcare functions and has decision-making ability⁷⁰ in relation to a healthcare decision only when assisted by the supporter, the person has "decision-making ability" for the purposes of Recommendation 10.17(1)(a).

The person responsible

Identifying the person responsible

10.18 Identifying the person responsible

- (1) The new Act should define the "**person responsible**" as follows:
- (a) The person responsible for a young person aged 16 or 17 is the person with parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*).
 - (b) The person responsible for an adult is the first person in the person responsible hierarchy who:
 - (i) has decision-making ability for the decision
 - (ii) is reasonably available to make a decision, and
 - (iii) has not, if asked, declined to make a decision.

65. *Guardianship Act 1987* (NSW) s 46.

66. *Guardianship Act 1987* (NSW) s 46(2)(a).

67. *Guardianship Act 1987* (NSW) s 46(4).

68. See NSW Young Lawyers Civil Litigation Committee, *Submission GA122*, 10.

69. Recommendation 5.4.

70. As defined in Recommendation 6.1.

See **Recommendation 10.19** for the person responsible hierarchy.

- (2) The new Act should provide for a record to be made if a person in the hierarchy declines to make a decision, or if the health practitioner decides that a person who would otherwise be the person responsible is not reasonably available or does not have decision-making ability for the decision. The regulations should make provisions about the keeping of such records.
- (3) The new Act should provide that disputes about who is the person responsible may be referred to the Public Advocate for mediation.

- 10.65 This recommendation clarifies how to identify the person responsible for a patient who does not have decision-making ability. Many submissions say the person responsible hierarchy is appropriate and clear.⁷¹ However, some say that the legislation should provide more guidance where there are multiple people with equal standing who would like to act (for example, where there is more than one close friend or relative).⁷² Some submissions also say there should be a mechanism to resolve disputes around who is the appropriate decision-maker.⁷³
- 10.66 In response, we recommend that the new Act should specify that the person responsible is the first person in the hierarchy who is reasonably available, has decision-making ability, and is willing to make a decision. This is consistent with the approaches in other states.⁷⁴ The new Act should also allow for disputes about who is the person responsible to be referred to the Public Advocate.
- 10.67 Under this recommendation, a health practitioner would first determine whether a patient has a representative with consent powers who has decision-making ability and is available and willing to act. If not, the health practitioner would continue searching down the hierarchy until they find a person who satisfies these criteria. Where there is no person responsible who meets the criteria, the Tribunal would need to give consent or appoint a representative for the patient.
- 10.68 We do not recommend that the person responsible should be required, as at present, to decline in writing in all cases where they are unwilling to make a consent decision.⁷⁵ There will be situations where an urgent decision is required, but the

71. Royal Australasian College of Physicians, *Submission GA91*, 3; Avant Mutual Group Ltd, *Submission GA97*, 3-4; Sexual Assault Services within Nepean Blue Mountains and Western Sydney Local Health Districts, *Submission GA114*, 2; Mental Health Carers NSW Inc, *Submission GA121B*, 8; Law Society of NSW, *Submission GA123*, 7; NSW Department of Family and Community Services, *Submission GA125*, 2, 19; NSW Ministry of Health, *Submission GA130*, 8.

72. Avant Mutual Group Ltd, *Submission GA97*, 3-4; Cognitive Decline Partnership Centre, *Submission 112B*, 3; NSW Council for Intellectual Disability, *Submission GA113*, 11; Medical Insurance Group Australia, *Submission GA115*, 10; NSW Disability Network Forum, *Submission GA127*, 5; NSW Ministry of Health, *Submission GA130*, 8; Medical Roundtable, *Consultation GAC25*. See also Council on the Ageing NSW, *Preliminary Submission PGA10*, 7.

73. NSW Council of Social Service, *Submission GA95*, 2; Medical Insurance Group Australia, *Submission GA115*, 10; NSW Ministry of Health, *Submission GA130*, 8; NSW Disability Network Forum, *Submission GA127*, 5.

74. *Medical Treatment Planning and Decisions Act 2016* (Vic) s 55(3); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14(1) definition of "person responsible"; *Guardianship and Administration Act 1990* (WA) s 110ZD, s 110ZJ.

75. *Guardianship Act 1987* (NSW) s 33A(5)(a).

person who wishes to decline is not in a position to do so in writing because, for example, they have been contacted by telephone. Such situations should be accommodated by the health practitioner making an appropriate record in accordance with provisions provided for in the regulations.

- 10.69 Similarly, the regulations should provide for records to be kept where a health practitioner decides that a person who would otherwise be the person responsible is not reasonably available or does not have decision-making ability.⁷⁶

The person responsible hierarchy

10.19 The person responsible hierarchy

The new Act should provide:

- (1) The person responsible hierarchy is:
 - (a) a person who is empowered to make the relevant decision under an enduring representation agreement or representation order
 - (b) the spouse of the person, if the relationship is close and continuing
 - (c) a person who has the care of the person, or
 - (d) a close friend or relative of the person.
- (2) The “spouse” of an Aboriginal person or a Torres Strait Islander includes a spouse married according to customary law.

- 10.70 This recommendation preserves the existing hierarchy for the person responsible but clarifies that a “spouse” includes a person married under Aboriginal customary law.⁷⁷

- 10.71 Some submissions suggest other changes to the person responsible hierarchy. For example, one suggests that the categories in the hierarchy should be further broken down to alleviate confusion and conflict where there is more than one person within a category available.⁷⁸ It has also been suggested that guardians (or representatives) be removed from the hierarchy so that it only applies to patients without an appointed decision-maker.⁷⁹ This is a response to concerns about guardians without healthcare functions being asked to make consent decisions, and confusion around the broader powers of a guardian as compared to another person responsible.⁸⁰

- 10.72 We consider that Recommendation 10.18, which clarifies how the hierarchy operates, will help to alleviate conflict and confusion. Healthcare services should emphasise that a representative can only make consent decisions ahead of other people in the person responsible hierarchy if they have the relevant medical consent functions.

76. See *Guardianship Act 1987* (NSW) s 33A(5)(b).

77. See *Guardianship Act 1987* (NSW) s 33A(4)(b).

78. NSW Ministry of Health, *Submission GA130*, 8.

79. Medical Roundtable, *Consultation GAC25*.

80. Medical Roundtable, *Consultation GAC25*.

- 10.73 We note that if a person has a supporter with medical functions and has decision-making ability⁸¹ in relation to a healthcare decision only when assisted by the supporter, the person has decision-making ability for the purposes of these provisions and the person responsible hierarchy will not come into play.

Identifying a carer and a close friend or relative

10.20 When a person “has the care of another person”

- (1) The new Act should provide that a person may be regarded as “**having the care of another person**” where, for example, they, on a regular basis:
 - (a) provide domestic services and support for another person
 - (b) arrange such services and support for another person, or
 - (c) provided or arranged such services and support immediately before the other person moved to a place where they receive care (such as a hospital, nursing home, group home, boarding-house or hostel),
provided they are or were not paid for the services and support by the other person or from any other source (except for a carer’s pension).
- (2) The definition of “has care of another person” should appear in the same section or part of the new Act as the person responsible hierarchy.

10.21 Definition of “close friend or relative”

The new Act should provide:

- (1) A “**close friend or relative**” of another person is a friend or relative (including a member of the extended family or kin of an Aboriginal or Torres Strait Islander person according to their culture) who maintains:
 - (a) a close personal relationship with the other person through frequent personal contact, and
 - (b) a personal interest in the other person’s welfareprovided they are not paid by the other person or from any other source (except for a carer’s pension) for, or have a financial interest in, any care services that they perform for the person.
- (2) The definition of “close friend or relative” should appear in the same section of the new Act as the person responsible hierarchy.

- 10.74 These recommendations define “a person who has the care of the person” and “a close friend or relative” for the purposes of the person responsible hierarchy. They largely reflect existing definitions.⁸² However, it seems that some health practitioners do not know these definitions exist in the present law and it could be difficult to identify the person responsible without referring to them. Therefore, we

81. As defined in Recommendation 6.1.

82. *Guardianship Act 1987* (NSW) s 3D-3E.

recommend that the new Act should be drafted so that these definitions appear within the provision that contains the person responsible hierarchy.

- 10.75 We also recommend that the definition of “a close friend or relative” should be changed to confirm that a person may be a relative according to an indigenous kinship system.
- 10.76 We have not recommended a provision to enable the Tribunal to issue guidelines specifying the circumstances in which a person is to be regarded as a “close friend or relative” as is currently possible under the *Guardianship Act*.⁸³ The Tribunal has never issued any such guidelines and considers such a provision unnecessary.

Consent of the person responsible

10.22 Consent of the person responsible

- (1) The new Act should provide:
- (a) Any person may ask the person responsible to consent to a course of healthcare for a patient.
 - (b) The request must explain:
 - (i) that the patient does not have decision-making ability for the decisions that need to be made
 - (ii) the patient’s condition that requires healthcare
 - (iii) the courses of healthcare that are available for that condition
 - (iv) the general nature and effect of each of those courses
 - (v) the nature and degree of any significant risks associated with those courses, and
 - (vi) the reasons why any particular course should be carried out.
 - (c) In considering such a request, the person responsible must:
 - (i) give effect to the patient’s will and preferences (to be determined as set out in **Recommendation 5.4**), and
 - (ii) have regard to the matters referred to in the request.
- (2) The regulations should provide when a consent or request for consent must be in writing.

- 10.77 We recommend that the person responsible be required to make consent decisions that give effect to a patient’s will and preferences in accordance with Recommendation 5.4, rather than simply having regard to the patient’s views when they make decisions. This aligns the person responsible’s powers with the statutory objects and general principles of the new Act.
- 10.78 A person seeking consent from the person responsible should have to provide the information that is currently required.⁸⁴ This includes, for example, the range of

83. *Guardianship Act 1987* (NSW) s 3E(2).

84. *Guardianship Act 1987* (NSW) s 40(2).

healthcare options that are available, and the nature and degree of any significant risks associated with the proposed course of healthcare. The person responsible should consider all this information, in addition to the patient's will and preferences, to make a consent decision. A number of people say the existing considerations are appropriate.⁸⁵

- 10.79 Recommendation 10.22(2) allows for regulations to provide when a consent or a request for a consent should be in writing. The *Guardianship Regulation*⁸⁶ currently requires a request for consent to minor treatment to be in writing unless it is not practicable or the person responsible does not require a written request. A request for consent to major treatment must be in writing unless it is not practicable to do so because the patient needs to be treated quickly. Consent must also be given in writing, subject to similar exceptions. We consider that these existing arrangements are appropriate. A number of submissions agree.⁸⁷

Tribunal consent

Application to the Tribunal for consent

10.23 Application to Tribunal for consent

The new Act should provide:

- (1) Any person can apply to the Tribunal for consent for healthcare for a patient.
- (2) The application shall state:
 - (a) how the patient does not have decision-making ability for the decision or decisions that need to be made
 - (b) the patient's condition that requires healthcare
 - (c) the courses of healthcare that are available for that condition
 - (d) the general nature and effect of each of those courses
 - (e) the nature and degree of any significant risks associated with those courses, and
 - (f) the reasons why any particular course should be carried out.
- (3) The Tribunal need not consider an application if it is not satisfied that the applicant has a sufficient interest in the patient's health and personal and social wellbeing.

85. Seniors Rights Service, *Submission GA90B*, 7; Royal Australasian College of Physicians, *Submission GA91*, 3; Medical Insurance Group Australia, *Submission GA115*, 11; Mental Health Carers NSW Inc, *Submission GA121B*, 8; Law Society of NSW, *Submission GA123*, 7.

86. Guardianship Regulation 2016 (NSW) cl 12, cl 13.

87. Seniors Rights Service, *Submission GA90B*, 7; Royal Australasian College of Physicians, *Submission GA91*, 3; NSW Ministry of Health, *GA130*, 9. See also Sexual Assault Services within Nepean Blue Mountains and Western Sydney Local Health Districts, *Submission GA114*, 3.

- (4) Whenever an application is made for consent to healthcare and the healthcare cannot be given without that consent, the Tribunal may:
 - (a) order the person who is to give the healthcare not to start it, or
 - (b) if the healthcare has already started, order the person who is carrying out the healthcare to stop it,
 until the Tribunal has determined the application.
- (5) The service arrangements set out in s 43 of the *Guardianship Act 1987* (NSW) should continue to apply.

- 10.80 We recommend that any person with a sufficient interest in a patient's health and personal and social wellbeing should continue to be able to ask the Tribunal to consent to healthcare. This is important for patients who do not have a person who can act as the person responsible.
- 10.81 A person who applies to the Tribunal should be required to address a range of important questions, including why they have concluded the patient does not have decision-making ability, the nature and degree of risk associated with the proposed healthcare and the reasons why the proposed healthcare should be carried out.
- 10.82 This recommendation reflects the comments we received in submissions,⁸⁸ and preserves the existing consent process.⁸⁹

Tribunal consent to healthcare

10.24 Tribunal consent to healthcare

The new Act should provide:

- (1) In considering an application for consent to healthcare, the Tribunal must have regard to the matters that must be stated in the application (as set out in **Recommendation 10.23(2)**).
- (2) After conducting a hearing, the Tribunal may consent to the healthcare if it is satisfied that it is the most appropriate form of healthcare and gives effect to the patient's will and preferences (as set out in **Recommendation 5.4**).

- 10.83 We recommend that the Tribunal should be able consent on a patient's behalf if it is satisfied that the proposed healthcare is the most appropriate form of healthcare, and consenting would give effect to the patient's will and preferences.
- 10.84 This recommendation largely preserves the existing consent framework,⁹⁰ except that it removes the requirement that the Tribunal have regard to the views of the

88. House with No Steps, *Submission GA85*, 23-24; Seniors Rights Service, *Submission GA90B*, 7; Royal Australasian College of Physicians, *Submission GA91*, 3; NSW Public Guardian, *Submission GA108*, 11; Medical Insurance Group Australia, *Submission GA115*, 11; Mental Health Carers NSW Inc, *Submission GA121B*, 8; Law Society of NSW, *Submission GA123*, 7.

89. *Guardianship Act 1987* (NSW) s 42.

90. *Guardianship Act 1987* (NSW) s 44.

person proposing the treatment or the person responsible. In our view, all of the relevant considerations are already contained in the information that must be stated in the application to the Tribunal. Our recommendation also requires the Tribunal to give effect to the patient's will and preferences, rather than merely having regard to their views. This puts the patient at the centre of the consent decision and holds the Tribunal to the same decision-making standard as the person responsible.

Liability for healthcare and clinical records

10.25 Liability for healthcare

The new Act should provide that nothing in the Act relieves a person from liability in respect of giving healthcare to a patient, if they would have been liable:

- (a) had the patient been able to consent to the healthcare, and
- (b) had the healthcare been given with the patient's consent.

10.26 Clinical records

The new Act should provide that the regulations may make provision about keeping records of a patient's healthcare carried out under the Act.

- 10.85 These recommendations preserve existing provisions relating to liability for giving treatment and clinical record keeping.⁹¹ There were no submissions that identified a problem with these recommendations.

Offences

10.27 Offences

The new Act should provide:

- (1) A person must not give healthcare to a patient unless:
 - (a) consent for the healthcare has been given in accordance with the new Act, or
 - (b) the healthcare provisions authorise the healthcare without consent, or
 - (c) the healthcare is given in accordance with an order of the Supreme Court in the exercise of its inherent jurisdiction.
- (2) A registered health practitioner has a defence if they have, in good faith and without negligence, administered or not administered healthcare to a patient and believed on reasonable grounds that the requirements of the Act have been complied with.

91. *Guardianship Act 1987* (NSW) s 47-48.

(3) A person must not take another person without decision-making ability outside Australia to obtain an unauthorised sterilisation procedure.

- 10.86 We recommend preserving the offences relating to people who treat a patient without proper authorisation.⁹² We also recommend a new “good faith” defence where a practitioner administers healthcare in good faith and without negligence, believing that all the consent requirements of the Act have been satisfied.⁹³ Guardianship legislation in other Australian jurisdictions includes good faith protections for medical practitioners who carry out treatment on people who cannot consent.⁹⁴ One potential advantage of these protections is that doctors will feel more comfortable making decisions and fewer will feel the need to apply to the Tribunal for reassurance.
- 10.87 We further recommend a new offence of taking a person without decision-making ability outside Australia to obtain an unauthorised sterilisation procedure. We have heard anecdotally that sterilisations are occurring without Tribunal authorisation.⁹⁵ In 2013, the Commonwealth Senate Community Affairs References Committee heard similar evidence and recommended that states and territories should create an offence for those who take, attempt to take, or knowingly assist a person to take, a child or an adult with a disability overseas to obtain a sterilisation procedure.⁹⁶

92. *Guardianship Act 1987* (NSW) s 35.

93. Medical Insurance Group Australia, *Submission GA115*, 4, 13.

94. *Guardianship and Administration Act 1986* (Vic) s 42G(2); *Medical Treatment Planning and Decisions Act 2016* (Vic) s 52; *Guardianship and Administration Act 1990* (WA) s 110ZK; *Advance Personal Planning Act* (NT) s 49.

95. People with Disability Australia Inc, *Consultation GAC20*; J Carter, *Preliminary Submission PGA03*.

96. Australia, Senate, Community Affairs References Committee, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013) [7.66]-[7.67] rec 28.

11. Medical research

In brief

We recommend changes to the approval and consent process for medical research procedures. The changes allow the person responsible to give consent for someone who does not have decision-making ability to participate in medical research approved by a human research ethics committee.

Definition of “medical research procedure”	182
Approval and consent	184
Requirement to find advance care directives	187
Effect of a participant’s objection	188
Emergency treatment.....	189
Records to be filed with the Public Advocate	190
Offences.....	191

11.1 In this Chapter, we recommend changes to the law on the approval and consent process for medical research involving people who do not have decision-making ability. Our key recommendations are as follows:

- replace the existing category of “clinical trials” with the broader category of “medical research”¹
- remove the existing Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”) approval and consent process, so that the person responsible (or the Tribunal, if there is no person responsible) can consent to a person participating in medical research approved by a human research ethics committee²
- allow a person to be included in research without prior consent where the research involves administering an accepted and necessary emergency treatment³
- expressly prohibit research practitioners from conducting medical research on a participant who objects,⁴ and
- create new offences for research practitioners who administer a medical research procedure without proper ethics approval and consent.⁵

11.2 Our recommendations are designed to safeguard the rights of people who do not have the decision-making ability to consent to medical research, including their right to access healthcare and participate in research on an equal basis with others.

-
1. Recommendation 11.1.
 2. Recommendation 11.2.
 3. Recommendation 11.5.
 4. Recommendation 11.6.
 5. Recommendation 11.7.

- 11.3 The United Nations *Convention on the Rights of Persons with Disabilities* (“UN Convention”) requires that people with disability have access to the same range, quality and standard of healthcare as other people and requires that states prevent “discriminatory denial of health care or health services ... on the basis of disability”.⁶
- 11.4 When barriers exist that restrict the opportunities for people who need decision-making assistance to participate in medical research, this can, in turn, limit their access to the healthcare they need. This is because some new healthcare is only available in Australia through clinical trials.⁷ Such barriers can also limit research into potential new and beneficial treatments, for example, in relation to dementia:
- [R]esearch is not keeping pace with the burden of dementia. As a consequence, there are many gaps in the evidence base to inform care for people living with dementia. For example, Australian Clinical Practice Guidelines for Dementia were published in 2016. Of the 109 recommendations in the guidelines, only 29 are considered “evidence based”, that is, based on a systematic review and synthesis of available scientific evidence.⁸
- 11.5 In seeking to reduce unnecessary barriers to participation as well as make other improvements to the framework, our recommendations draw extensively on the Victorian model.⁹ Several submissions support this approach.¹⁰ However, in the interests of greater compliance with the UN *Convention*, our recommendations differ from the Victorian model in a key way. In Victoria, a medical research practitioner can administer a medical research procedure without consent if the participant does not have someone to consent on their behalf.¹¹ Under our model, in the absence of the person responsible, the Tribunal would need to appoint a representative to provide consent or the Tribunal itself would need to provide consent. Relying on a medical research practitioner to decide when it is appropriate to proceed without consent involves an undesirable conflict of interest.

Definition of “medical research procedure”

11.1 Definition of “medical research procedure”

The new Act should provide:

- (1) A “medical research procedure” is:
- (a) a procedure carried out for the purposes of medical research, including (as part of a clinical trial or otherwise):
 - (i) administering pharmaceuticals, or

6. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 25(f).
7. See, eg, Department of Health and Ageing Therapeutic Goods Administration, *Access to Unapproved Therapeutic Goods: Clinical Trials in Australia* (2004).
8. N Ries, E Mansfield, A Waller and J Bryant, *Submission GA93*, 2 (footnotes omitted). See also N O'Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2nd ed, 2017) [16.5].
9. *Medical Treatment Planning and Decisions Act 2016* (Vic) pt 5.
10. See, eg, Clinical Trials Roundtable, *Consultation GAC28*; NSW Ministry of Health, *Submission GA130*, 15.
11. *Medical Treatment Planning and Decisions Act 2016* (Vic) pt 5 div 3.

- (ii) using equipment or a device, or
- (b) anything prescribed by the regulations as a medical research procedure.
- (2) “Medical research procedure” does not include any of the following:
 - (a) any non-intrusive examination including:
 - (i) a visual examination of the mouth, throat, nasal cavity, eyes or ears, or
 - (ii) the measurement of a person’s height, weight or vision
 - (b) observing a person’s activities
 - (c) administering a survey
 - (d) collecting or using information, including:
 - (i) personal information within the meaning of the *Privacy and Personal Information Protection Act 1998* (NSW)
 - (ii) health information within the meaning of the *Health Records and Information Privacy Act 2002* (NSW), or
 - (e) any other procedure prescribed by the regulations as not being a medical research procedure.
- (3) “**Medical research practitioner**” includes a person who practises in a health profession within the meaning of the *Health Practitioner Regulation National Law* (NSW).

- 11.6 The new Assisted Decision-Making Act (“the new Act”) should regulate “medical research procedures” involving people who do not have the necessary decision-making ability to consent. The new Act should adopt Victoria’s “medical research procedure” terminology and definitions.¹²
- 11.7 This recommendation responds to problems associated with the “clinical trials” consent and approval regime in part 4A of the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”). Part 4A requires the Tribunal to approve “clinical trials” that involve participants who do not have capacity. A “clinical trial” is defined as “a trial of drugs or techniques that necessarily involves the carrying out of medical or dental treatment on the participants in the trial”.¹³
- 11.8 Many consider this definition vague and unhelpful.¹⁴ The definition has needed further interpretation because it is so broad. Notably, the Appeal Panel of the NSW Civil and Administrative Tribunal has held that a “clinical trial” must be limited to “a trial of drugs or techniques that necessarily involves new medical treatment that has

12. *Medical Treatment Planning and Decisions Act 2016* (Vic) s 3.

13. *Guardianship Act 1987* (NSW) s 33(1).

14. Clinical Trials Roundtable, *Consultation GAC28*; NSW Institute of Trauma and Injury Management, *Submission GA105*, 4; NSW Ministry of Health, *Submission GA130*, 11; N Ries, E Mansfield, A Waller and J Bryant, *Submission GA93*, 4; South Eastern Sydney Local Health District Human Research Ethics Committee, *Preliminary Submission PGA40*, 5-6; NSW Health, *Preliminary Submission PGA49*, 7-8.

not yet gained the support of a substantial number of medical practitioners specialising in the area of practice concerned”.¹⁵

- 11.9 Uncertainty about what constitutes a “clinical trial” has led to researchers asking the Tribunal to rule on whether their project is a clinical trial.¹⁶ Although some submissions suggest the definition of “clinical trial” could be clarified,¹⁷ others indicate that it does not reflect the way that research is developed in practice.¹⁸
- 11.10 Some submissions suggest there should be new categories of medical research based on the level of risk to the participant.¹⁹ The ACT follows such an approach with different consent requirements for “low risk research” and “medical research”.²⁰ We considered developing different categories of research based on risk, or the stage of development of the drugs or techniques being tested. Ultimately, we were not satisfied that any such models would be clear and workable.
- 11.11 The NSW Ministry of Health suggests medical research should be distinguished by whether it involves interventions that a person would not receive in standard clinical practice.²¹ Recommendation 11.5 makes this distinction in the context of emergency treatment.

Approval and consent

11.2 Approval and consent to a medical research procedure

The new Act should provide that:

- (1) A person can consent to a medical research procedure in an advance care directive.
- (2) A medical research practitioner must not administer a medical research procedure to a participant who does not have decision-making ability for that procedure unless the relevant human research ethics committee has approved the research; and
 - (a) the participant has consented to the medical research procedure or medical research procedures of a similar nature in a valid advance care directive
 - (b) if there is no relevant advance care directive, the person responsible has consented to the procedure, or

15. *Shehabi v Attorney General (NSW)* [2016] NSWCATAP 137 [155].

16. See, eg, *Shehabi v Attorney General (NSW)* [2016] NSWCATAP 137.

17. See, eg, NSW Institute of Trauma and Injury Management, *Submission GA105*, 4; Law Society of NSW, *Submission GA123*, 11.

18. Clinical Trials Roundtable, *Consultation GAC28*.

19. Australasian College for Emergency Medicine, *Submission GA106*, 3; N Ries, E Mansfield, A Waller and J Bryant, *Submission GA93*, 4; Tasmanian Department of Health and Human Services, *Submission GA84*, 9.

20. *Powers of Attorney Act 2006* (ACT) s 41A(1) definitions of “low-risk research” and “medical research”, s 41C, s 41D.

21. NSW Ministry of Health, *Submission GA130*, 12.

(c) if there is no person responsible, the Tribunal has consented to the procedure.

(3) The approval of the relevant human research ethics committee will not be effective for the purposes of (2) unless the committee has satisfied itself that the consent material gives sufficient information in a clear enough form to enable the person responsible to make an informed decision about participation.

(4) The person responsible or the Tribunal may consent to the medical research procedure only if they are satisfied the decision gives effect to the participant's will and preferences (to be determined as set out in **Recommendation 5.4**) taking into account:

(a) the likely effects and consequences of the medical research procedure, including the likely effectiveness of the procedure, and

(b) whether there are any alternatives, including not administering the medical research procedure.

(5) The fact that a research procedure may involve administering placebos should not necessarily prevent the person responsible or the Tribunal from being satisfied that taking part would promote the participant's personal and social wellbeing.

(6) A medical research practitioner must not administer a medical research procedure if they know that the participant has refused the particular procedure in an advance care directive.

(7) An interested person can apply to the Tribunal to review the decision of the person responsible and whether it gives effect to a participant's will and preferences or promotes their personal and social wellbeing. This may include interpreting a participant's will and preferences as expressed in an advance care directive.

11.12 The new Act should allow a person who does not have decision-making ability to participate in medical research projects approved by a human research ethics committee, provided:

- they have an advance care directive that gives effective consent
- their person responsible consents, or
- the Tribunal consents.

11.13 The current approval regime was introduced in 1998 after a report by the Legislative Council Standing Committee on Social Issues ("Standing Committee").²² To address concerns about whether Institutional Ethics Committees ("IECs") adequately regulated clinical trials, the Standing Committee recommended that the Guardianship Board should have increased oversight. At that time, some of these concerns included:

- the lack of experience and expertise in smaller IECs

22. NSW, Legislative Council Standing Committee on Social Issues, *Clinical Trials and Guardianship: Maximising the Safeguards*, Report 13 (1997).

- the impact of resource constraints on the rigour of IEC monitoring
- a perceived lack of public accountability, and
- the overrepresentation of researchers on IECs.²³

11.14 The *Guardianship Act* accordingly sets out two distinct Tribunal approval processes for clinical trials involving participants who do not have decision-making ability:

- the approval of the clinical trial itself, and
- the substitute consent arrangements for a participant.

In practice, if the Tribunal approves the trial, then in nearly all matters, it also gives approval for persons responsible to provide consent for the entry of individual participants into the trial.

11.15 We understand that the Tribunal's approval of persons responsible providing consent generally involves ensuring that a project's consent materials give persons responsible adequate information in an accessible style and format to enable them to give consent for participants to enter the clinical trial. In contrast, the regimes in Victoria and the ACT operate with little involvement of their respective guardianship tribunals. In both jurisdictions, medical research practitioners can seek consent from an authorised substitute decision-maker, subject to certain conditions, after a human research ethics committee has approved the project.²⁴ The ACT opted for an approach where the Tribunal plays a minimal role, citing the adverse impact on the Tribunal's workload, the aim of facilitating people's involvement in "ethically-approved and potentially beneficial" research, and avoiding "the potentially perverse outcome of replacing the appointed decision-maker with an unknown person or panel of people".²⁵

11.16 A number of submissions consider that the Tribunal should not have direct oversight of medical research projects that have been approved by a human research ethics committee.²⁶ One submission reflects on a recent survey of people aged 60 and over attending outpatient clinics at a NSW hospital. The survey participants were asked who they would want to be involved in decisions about their inclusion in research if they were not able to make their own decision. Nearly 90% of respondents indicated they would like their decision-maker for healthcare matters to make decisions about whether they participate in research. Respondents expressed more negative views about a legal body being involved in these decisions.²⁷

11.17 Generally, submissions indicate that:

23. See NSW, Legislative Council Standing Committee on Social Issues, *Clinical Trials and Guardianship: Maximising the Safeguards*, Report 13 (1997) 33-42.

24. *Medical Treatment Planning and Decisions Act 2016* (Vic) pt 5 div 2; *Powers of Attorney Act 2006* (ACT) pt 4.3A; *Guardianship and Management of Property Act 1991* (ACT) pt 2B.

25. Explanatory Statement, *Powers of Attorney Amendment Bill 2015* (ACT), 2-3.

26. Mental Health Carers NSW Inc, *Submission GA121B*, 2, 11; NSW Ministry of Health, *Submission GA130*, 15; N Ries, E Mansfield, A Waller and J Bryant, *Submission GA93*, 4-5.

27. N Ries and E Mansfield, *Submission GA149*, 4.

- there is no need for a tribunal to approve medical research procedures, given the already rigorous approval process before an ethics committee,²⁸ and
 - having two separate approval processes creates substantial delays, slowing down research projects and deterring practitioners from conducting research in NSW.²⁹ This has indirect disadvantages for people who do not have decision-making ability, who might otherwise benefit from the advances in medical research that can result from such trials.
- 11.18 When considering a participant’s will and preferences, we recommend that the person responsible or the Tribunal take into account the likely effects and consequences of the medical research procedure, and whether there are any alternatives to the procedure.³⁰ We have decided not to include the existing requirement that the “drugs or techniques being tested ... are intended to cure or alleviate a particular condition from which the patients suffer”.³¹ This requirement could unnecessarily limit people participating in research for altruistic reasons.³² An interested person should be able to apply to the Tribunal if they are concerned that participating in research does not align with a participant’s will and preferences or promote their personal and social wellbeing.³³
- 11.19 We also recommend that:
- A person should be able to consent to a medical research procedure in an advance care directive. A precise or scientific description of the research they wish to participate should not be required to give effective consent.
 - A person should be able to refuse consent to a medical research procedure in an advance care directive.
 - When giving consent for a participant, the person responsible or the Tribunal must be satisfied that participating in the research would give effect to the person’s will and preferences in accordance with Recommendation 5.4. However, they should not be able to override a participant’s objection to a medical research procedure.

Requirement to find advance care directives

11.3 Requirement to find advance care directives

The new Act should provide that:

-
- 28. N Ries, E Mansfield, A Waller and J Bryant, *Submission GA93*, 3; Avant Mutual Group Limited, *Submission GA97*, 5; Australasian College for Emergency Medicine, *Submission GA106*, 1; NSW Ministry of Health, *Submission GA130*, 15; Clinical Trials Roundtable, *Consultation GAC28*.
 - 29. N Ries, E Mansfield, A Waller and J Bryant, *Submission GA93*, 2-3; NSW Institute of Trauma and Injury Management, *Submission GA105*, 3-4; South Eastern Sydney Local Health District Human Research Ethics Committee, *Submission PGA40*, 7; Clinical Trials Roundtable, *Consultation GAC28*.
 - 30. Recommendation 11.2(4).
 - 31. *Guardianship Act 1987* (NSW) s 45AA(2)(a).
 - 32. M Ries and E Mansfield, *Submission GA149*, 4-5.
 - 33. Recommendation 11.2(7).

- (1) Before a medical research practitioner administers a medical research procedure to a participant who does not have decision-making ability, they must make reasonable efforts in the circumstances to ascertain if the participant has an advance care directive.
- (2) Failure to take this step is unprofessional conduct.

- 11.20 We recommend that the new Act require a medical research practitioner to make reasonable efforts to ascertain whether a potential participant in medical research has a relevant advance care directive.³⁴
- 11.21 Given the need to give effect to a person's will and preferences wherever possible,³⁵ it is important that research practitioners make an effort to locate and consider a participant's advance care directive, if they have one. This principle extends to approaching the participant's appointed representative or close family and friends, because these people are likely to have insight into the participant's will, preferences and values.

Effect of a participant's objection

11.4 Effect of a participant's objection

The new Act should provide that nothing may be done to a participant in the course of a medical research procedure if the participant objects orally or by conduct. This includes an objection given in an advance care directive that is clear and extends to the situation at hand.

- 11.22 The new Act should explicitly provide that nothing may be done to a participant in the course of medical research if they object. A participant should be able to communicate their objection orally, or by conduct.³⁶ We heard that medical research practitioners generally do not continue a procedure if a participant objects, even if that participant does not have decision-making ability.³⁷ However, the current provisions do not mandate this. It is currently open to medical research practitioners to carry out research on a person who objects, provided substitute consent requirements are met.
- 11.23 It is important to emphasise that a participant may object to a procedure, even if the person responsible has consented to the research. This is accommodated by legislation in other jurisdictions. For example, the *Mental Capacity Act 2005* (UK) provides that "the interests of the person must be assumed to outweigh those of science and society" and if an incapacitated person indicates they want to withdraw from a research project, they must be withdrawn immediately, unless this would create a significant risk to their health.³⁸ Safeguards of this kind also reflect the

34. The recommendation is consistent with s 73 of the *Medical Treatment Planning and Decisions Act 2016* (Vic).

35. Recommendation 5.2, 5.4.

36. See *Guardianship and Administration Act 2000* (Qld) sch 4 definition of "object".

37. Clinical Trials Roundtable, *Consultation GAC28*.

38. *Mental Capacity Act 2005* (UK) s 33(3)-(6). See also *Guardianship and Administration Act 2000* (Qld) s 72(3); *Adults with Incapacity (Scotland) Act 2000* s 51(3)(b).

principle in the UN *Convention* that “[e]very person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.”³⁹

Emergency treatment

11.5 Medical research involving emergency treatment

The new Act should provide that:

- (1) A human research ethics committee may approve a research project that involves the administration of emergency medical treatment (involving participants who do not have decision-making ability) without prior consent in accordance with Chapter 4.4 of the *National Statement on Ethical Conduct in Human Research*.
- (2) Once approved, a medical research practitioner may carry out a medical research procedure without seeking consent from the participant or the person responsible if the procedure involves administering accepted emergency treatment.
- (3) “**Accepted emergency treatment**” means urgent treatment that aligns with standard clinical practice.
- (4) A medical research practitioner must not administer a medical research procedure if they are aware that the participant has refused the particular procedure or a procedure of a similar nature in an advance care directive. However, a practitioner is not required to search for an advance care directive not readily available in urgent circumstances.
- (5) A medical research practitioner must notify the participant or the person responsible that they have been included in a medical research project as soon as reasonably possible. The participant or the person responsible must have the opportunity to stop the procedure and withdraw from the research without compromising the person’s ability to receive any available alternative medical treatment or care.

11.24 Medical research practitioners should be able to enrol a person in a research project without prior consent where the person would receive emergency treatment that aligns with standard clinical practice and could ordinarily be administered without their consent.

11.25 This recommendation responds to concerns from practitioners involved in emergency medicine and trauma research.⁴⁰ Specifically, we heard that the consent process for clinical trials involving emergency treatment leaves a very limited window of opportunity to seek consent from the person responsible before administering the treatment. This is particularly problematic because the current definition of “clinical trial” can capture research that simply compares the efficacy of different emergency treatments that are in wide use and that a person can already receive without consent outside the context of a clinical trial (to save their life or

39. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 17.

40. Clinical Trials Roundtable, *Consultation GAC28*.

prevent serious damage to their health).⁴¹ For this reason, a number of submissions support changes that would allow consent to be waived or deferred in certain circumstances.⁴²

- 11.26 We heard support for facilitating more research that helps medical practitioners to make the best treatment decisions for their patients.⁴³ The Institute of Trauma and Injury Management submits that:

The lack of high-level scientific evidence affects both clinical decisions on individual patients and the ability to establish firm evidence-based guidelines that can be applied with confidence to improve trauma management and outcomes. Uncertainty and deficiencies in clinical evidence impacts overall patient care – mortality for major trauma has remained stagnant in NSW for the past fifteen years.⁴⁴

- 11.27 In accordance with our will and preferences approach, a medical research practitioner should not be able to administer a medical research procedure if they are aware that the participant has refused the procedure (or a similar procedure) in a valid advance care directive. However, they should not be required to search for an advance care directive that is not readily available in urgent circumstances.

- 11.28 Often, but not always, a patient who receives urgent treatment will recover and regain decision-making ability. Therefore, we recommend that practitioners should be required to inform the participant or the person responsible that they have been included in a medical research project as soon as reasonably possible. At this point, the participant or person responsible should have the opportunity to withdraw from the research, if possible, without compromising their standard of care. This model would meet the requirements of the *National Statement on Ethical Conduct in Human Research*.⁴⁵

Records to be filed with the Public Advocate

11.6 Records to be filed with the Public Advocate

(1) The new Act should require:

- (a) medical research practitioners to file a record with the Public Advocate when a person who does not have decision-making ability is enrolled as a participant in a medical research procedure, including in relation to emergency treatment, and

41. *Shehabi v Attorney General* (NSW) [2016] NSWCATAP 137 [68], [84].

42. Tasmanian Department of Health and Human Services, *Submission GA84*, 11; NSW Institute of Trauma and Injury Management, *Submission GA105*, 5-6; Australasian College for Emergency Medicine, *Submission GA106*, 5; NSW Ministry of Health, *Submission GA130*, 15; Clinical Trials Roundtable, *Consultation GAC28*. See also NSW Health, *Preliminary Submission PGA49*, 8.

43. Clinical Trials Roundtable, *Consultation GAC28*.

44. NSW Institute of Trauma and Injury Management, *Submission GA105*, 3-4.

45. Australia, National Health and Medical Research Council, *National Statement on Ethical Conduct in Human Research* (2007) (updated May 2015) [4.4.13]-[4.4.14].

(b) the Public Advocate to use these records to monitor and report on medical research in NSW that involves participants who do not have decision-making ability.

(2) The new Act should provide that the failure of a medical research practitioner to file the necessary records with the Public Advocate amounts to unprofessional conduct.

- 11.29 New provisions should require medical research practitioners to file a record with the Public Advocate when they enrol a person who does not have decision-making ability in a research project.
- 11.30 In Chapter 13, we recommend a new body called the Public Advocate. This body would have advocacy and investigative functions in relation to people who are in need of decision-making assistance.
- 11.31 In Victoria, medical research practitioners must notify a Public Advocate when there is no person responsible available to give substitute consent.⁴⁶ However, we think this would be a useful safeguard in all cases where a research participant does not have decision-making ability. We recommend the Public Advocate monitor the operation of the medical research regime, report on the research projects undertaken in NSW involving participants who do not have decision-making ability, and make recommendations to government. This is appropriate given the reduced role for the Tribunal. It should maximise transparency and accountability, and help to safeguard participants' rights.

Offences

11.7 Offences

The new Act should provide:

- (1) It is an offence for a medical research practitioner to administer a medical research procedure to a person who does not have decision-making ability, unless:
- (a) a human research ethics committee has approved the procedure, and
 - (b) consent has been obtained in accordance with the new Act.
- (2) A medical research practitioner has a defence if they have, in good faith and without negligence, administered or not administered healthcare to a person and believes on reasonable grounds that the Act's requirements have been complied with.

- 11.32 This recommendation sets out new offences consistent with provisions in Victoria.⁴⁷ Specifically, we recommend that it should be an offence for a medical research practitioner to administer a medical research procedure on a person who does not have decision-making ability if their project has not been approved by a human research ethics committee, and/or the practitioner has not obtained appropriate

46. *Medical Treatment Planning and Decisions Act 2016* (Vic) s 81(3).

47. *Medical Treatment Planning and Decisions Act 2016* (Vic) s 84-85.

consent from an advance care directive, the person responsible or the Tribunal. This includes a situation where consent becomes invalid because the participant objects.

12. Restrictive practices

In brief

This Chapter considers the approach that NSW should take to regulating restrictive practices, particularly in light of the uncertain regulatory environment surrounding the NDIS.

Background.....	193
Current law.....	193
The National Disability Insurance Scheme	196
Definition of restrictive practices	196
Regulation of service providers.....	196
Quality and Safeguards Commissioner.....	197
What we heard.....	198
Should NSW regulate restrictive practices through legislation?	198
What areas should be regulated?	199
Definition of “restrictive practices”	200
When should restrictive practices be permitted?.....	200
Safeguards	200
Legislating for behaviour support plans	201
Our conclusions	201
The disability sector and the NDIS.....	202
Restrictive practices in the education, mental health and aged care sectors.....	203
Informal settings.....	204
A further reference	204

- 12.1 The terms of reference require us to consider whether guardianship law in NSW should explicitly address the use of restrictive practices on people in need of decision-making assistance.
- 12.2 In light of the introduction of legislative requirements through the Commonwealth’s National Disability Insurance Scheme (“NDIS”), we recommend that NSW does not introduce legislative requirements for the use of restrictive practices in the disability sector at this time. While we support consistent regulation of restrictive practices across NSW, the use of restrictive practices in the mental health and education sectors is beyond the scope of this review because of the specific and complex considerations that apply in these contexts.

Background

Current law

- 12.3 The law in NSW does not define restrictive practices. Generally, a restrictive practice is any practice or intervention that restricts a person’s rights or freedom of movement. Restrictive practices are used to manage challenging behaviour or avoid injury, with the primary purpose of protecting the person or others from harm.

Examples of restrictive practices include physically restraining someone, limiting their freedom of movement or access to objects, or using medication to control their behaviour.¹

- 12.4 Restrictive practices have often been used as a “first line of response” to difficult behaviour. It is now recognised that restrictive practices can seriously infringe a person’s human rights. There is also evidence that using restrictive practices routinely to control behaviour can be harmful to the person and exacerbate the behaviours they intend to control.² Without consent, many restrictive practices constitute an assault or wrongful imprisonment.
- 12.5 Currently, the document appointing an enduring guardian may empower an enduring guardian to consent to the use of restrictive practices.³ An order of the Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”) appointing a guardian may also empower that guardian to consent to the use of restrictive practices.⁴
- 12.6 Before granting a restrictive practices function, the Tribunal must usually be satisfied that the practice is for the purpose of managing the person’s challenging behaviour, and:
- there is some doubt about whether the practice is lawful without informed consent, or
 - a guardian is otherwise needed to protect the person.⁵
- 12.7 Other factors the Tribunal will consider before it grants a restrictive practices function to a guardian include:
- the views of the person under guardianship
 - whether the restrictive practice would address the challenging behaviour
 - whether there are less restrictive alternatives, and
 - whether review and monitoring mechanisms are in place.⁶
- 12.8 A guardian can only consent to the use of restrictive practices if it is in the person’s best interests. The Tribunal usually imposes a condition that the guardian can only consent to a restrictive practice if positive approaches are also being used to address the challenging behaviour.⁷

1. NSW Civil and Administrative Tribunal Guardianship Division, *Restrictive Practices and Guardianship*, Fact Sheet (2016) 1.

2. Australian Government, Department of Social Services, *NDIS Quality and Safeguarding Framework* (2016) 67.

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

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

5. NSW Civil and Administrative Tribunal Guardianship Division, *Restrictive Practices and Guardianship*, Fact Sheet (2016) 1-2.

6. NSW Civil and Administrative Tribunal Guardianship Division, *Restrictive Practices and Guardianship*, Fact Sheet (2016) 2-3.

7. NSW Civil and Administrative Tribunal Guardianship Division, *Restrictive Practices and Guardianship*, Fact Sheet (2016) 3.

- 12.9 NSW government policies control the use of restrictive practices in government-run and government-funded facilities. All facilities run or funded by the NSW Department of Family and Community Services (“FACS”) apply FACS’s behavioural support policy. The policy requires that a practice must be authorised by an appropriate person or body (for example, a specialist panel that includes clinical experts) and informed legal consent from, for example, a guardian with a restrictive practices function. The policy also includes a list of prohibited practices.⁸ Similar policy documents govern the use of restrictive practices in public mental health and aged care facilities.⁹
- 12.10 In recent years, there has been increasing discussion about whether NSW should legislate to regulate the use of restrictive practices. In 2010, the NSW Legislative Council Standing Committee on Social Issues recommended that the NSW government consider such legislation in the context of guardianship.¹⁰ Many submissions we received favour such legislation.¹¹
- 12.11 In the course of our review, we heard about a variety of perceived problems with the current regulation of restrictive practices in NSW, including:
- the lack of a consistent definition of “restrictive practices”¹²
 - inconsistent approaches to regulation¹³
 - minimal regulation in informal settings¹⁴
 - inadequate requirements for consents and authorisations,¹⁵ and
 - lack of independent oversight.¹⁶

-
8. NSW Department of Family and Community Services, *Behaviour Support Policy* (version 3.1, 2014) 25.
9. NSW Health, *Aggression, Seclusion and Restraint in Mental Health Facilities in NSW*, Policy Directive 2012_035 (2018); NSW Ministry of Health, *Assessment and Management of People with Behavioural and Psychological Symptoms of Dementia (BPSD): A Handbook for NSW Health Clinicians* (2013).
10. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity* (2010) [10.14]-[10.17] rec 27.
11. See, eg, Alzheimer’s Australia NSW, *Preliminary Submission PGA14*, 6-7; Disability Council NSW, *Preliminary Submission PGA26*, 17; B Ripperger and L Joseph, *Preliminary Submission PGA31*, 11-12; NSW Ombudsman, *Preliminary Submission PGA41*, 7-8; N Brown, *Preliminary Submission PGA42*, 6; Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 9; Confidential, *Preliminary Submission PGA48*; NSW Trustee and Guardian, *Preliminary Submission PGA50*, 11.
12. See, eg, B White, L Willmott and P Neller, *Submission GA88*, 2-3; Mental Health Carers NSW Inc, *Submission GA121B*, 2-3; NSW Department of Family and Community Services, *Submission GA125*, 21.
13. NSW Council of Social Service, *Submission GA95*, 3; National Disability Services, *Submission GA100*, 6; Mental Health Carers NSW Inc, *Submission GA121B*, 2-3, 14-15.
14. Tasmanian Department of Health and Human Services, *Submission GA84*, 12; NSW Council for Intellectual Disability, *Submission GA113*, 12-13; Australian Association of Gerontology, *Submission GA146*, 2, 6; NSW Department of Family and Community Services, *Submission GA125*, 21.
15. NSW Department of Family and Community Services, *Submission GA125*, 22.
16. See, eg, Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 9; NSW Council of Social Service, *Submission GA95*, 3; NSW Department of Family and Community Services, *Submission GA125*, 22.

- 12.12 In 2014, the NSW government released a consultation draft of the Disability Inclusion Bill 2014 (NSW) which included provisions about restrictive practices.¹⁷ However, the relevant provisions were removed because the government decided to wait for Commonwealth regulation of the area under the NDIS.¹⁸

The National Disability Insurance Scheme

- 12.13 The roll-out of the NDIS in NSW fundamentally changes the way disability support is funded and delivered. Previously, the NSW government provided most disability services in NSW. However, under the NDIS, the NSW system will be replaced with a Commonwealth administered system that includes the supply of supports by the non-government sector. The NSW government is currently transferring disability services to the non-government sector. All services will be transferred by July 2018.
- 12.14 The NDIS Quality and Safeguarding Framework underpins the NDIS. A goal of the Framework is to reduce or eliminate the use of restrictive practices. The Framework envisages moving towards a system in which using restrictive practices to respond to concerning behaviour is the exception and any restrictive practices are accompanied by positive behaviour support.¹⁹ The *National Disability Insurance Scheme Act 2013* (“NDIS Act”) and the associated Regulations and Rules provide the legislative regime for the NDIS.

Definition of restrictive practices

- 12.15 The NDIS Act defines “restrictive practices” broadly as “any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability”.²⁰ We understand at the time of writing that the intention is to regulate the use of seclusion, as well as chemical, mechanical, physical and environmental restraints.

Regulation of service providers

- 12.16 Under the NDIS, each participant will have a plan approved by the National Disability Insurance Agency (“Agency”). The Commonwealth intends that under the NDIS a restrictive practice can only be used when it is part of a behaviour support plan developed by a registered support practitioner:

Participants with identified complex behaviour support needs will be assessed by an approved positive behaviour support practitioner, funded through their plans, who will then use the information from the assessment, together with information from other sources (including the participant, family and key providers), to develop a positive behaviour plan for the participant.²¹

17. Disability Inclusion Bill 2014 (NSW) (Public Consultation Draft) cl 37-41.

18. NSW, *Parliamentary Debates*, Legislative Council, 23 October 2014, 1787-1788.

19. Australia, Department of Social Services, *NDIS Quality and Safeguarding Framework* (2016) 68.

20. *National Disability Insurance Scheme Act 2013* (Cth) s 9 to be inserted by *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Cth) sch 1 cl 13.

21. Explanatory Memorandum, *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017* (Cth) 86.

- 12.17 The NDIS Act provides the Agency with a range of compliance and enforcement tools, including monitoring powers, investigation powers, civil penalties, infringement notices, compliance notices, banning orders, enforceable undertakings and injunctions.²²
- 12.18 Registered providers must comply with the NDIS Practice Standards and Code of Conduct, and may be subject to civil penalties if they breach them. Using a restrictive practice without proper authorisation is a reportable incident,²³ and registered providers will have notification and management obligations in relation to reportable incidents.²⁴
- 12.19 The proper authorisation required is the “authorisation (however described) of a State or Territory”.²⁵ We understand that FACS will be responsible for authorising restrictive practices for all NDIS registered disability service providers in NSW, in similar terms to those provided in its current policies. Those policies are being amended to align with the NDIS framework, and will enable FACS to refer matters to the Quality and Safeguards Commissioner where appropriate.

Quality and Safeguards Commissioner

- 12.20 The NDIS Act, from July 2018, establishes a Quality and Safeguards Commissioner (“Commissioner”) with a behaviour support function that will be managed by a Senior Practitioner. The Commissioner will have a role in providing “national oversight and policy settings in relation to promoting strategies to reduce challenging behaviours, and monitoring the use of restrictive practices within the NDIS”.²⁶
- 12.21 Responsibilities of the Commissioner under the behaviour support function include:
- building providers’ capabilities around delivering behaviour supports
 - developing policy and guidance materials, and providing education, training and advice, about behaviour supports and reducing and eliminating the use of restrictive practices
 - overseeing the use of behaviour support and restrictive practices, including by monitoring registered provider compliance with the conditions of registration relating to behaviour support plans, and collecting, analysing and disseminating relevant data and other information

22. *National Disability Insurance Scheme Act 2013* (Cth) pt 3A, div 8 to be inserted by *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Cth) sch 1 cl 48.

23. *National Disability Insurance Scheme Act 2013* (Cth) s 73Z(4)(f) to be inserted by *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Cth) sch 1 cl 48.

24. *National Disability Insurance Scheme Act 2013* (Cth) s 73Z to be inserted by *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Cth) sch 1 cl 48.

25. *National Disability Insurance Scheme Act 2013* (Cth) s 73Z(4)(f) to be inserted by *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Cth) sch 1 cl 48.

26. Australia, *Parliamentary Debates*, Senate, 31 May 2017, 5743.

- undertaking and publishing research to inform the development and evaluation of the use of behaviour supports and to develop strategies to encourage the reduction and elimination of restrictive practices by NDIS providers, and
- assisting the states and territories to develop regulations in line with the UN *Convention on the Rights of Persons with Disabilities* and the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector.²⁷

What we heard

Should NSW regulate restrictive practices through legislation?

- 12.22 There is significant, though not universal, support for NSW legislative regulation of restrictive practices. Submissions generally recognise that the NDIS regime will have a role in regulating restrictive practices in the disability sector, but note that there are gaps that state law should fill. For example, submissions state that NDIS regulation is limited to NDIS providers; therefore, a comprehensive regime is needed for the disability sector at large as well as for other sectors and settings where restrictive practices are used.²⁸ Some submissions assert that the NDIS relies on states and territories specifying the conditions that must be met for approving the use of a restrictive practice, and that in the absence of further regulation, it is not clear what the approval process in NSW is intended to be.²⁹
- 12.23 One submission suggests that the NDIS framework is inadequate even for the sector it seeks to regulate; for example, because it does not appropriately deal with the issues that can arise when working with people who live with mental illness or psychosocial disability.³⁰ A number of submissions suggest that it would be premature to consider NSW regulation until such time as the NDIS regulatory regime has been enacted or, at the very least, made available in its entirety.³¹
- 12.24 Another submission says that NSW should regulate restrictive practices through an administrative model rather than legislation.³²
- 12.25 Among those supporting legislation, submissions are divided about whether provisions should sit in guardianship legislation or somewhere else. Some favour

27. *National Disability Insurance Scheme Act 2013* (Cth) s 181H to be inserted by *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Cth) sch 1 cl 60; Australia, Department of Social Services, “National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability” (7 November 2014) <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-framework-for-reducing-and-eliminating-the-use-of-restrictive-practices-in-the-disability-service-sector>> (retrieved 4 May 2018).

28. NSW Ombudsman, *Submission GA136*, 4; NSW Council of Social Service, *Submission GA137*, 2; Australian Association of Gerontology, *Submission GA146*, 6.

29. NSW Ombudsman, *Submission GA136*, 4; NSW Council of Social Service, *Submission GA137*, 2; NSW Council for Intellectual Disability, *Submission GA144*, 2; National Disability Services, *Submission GA155*, 7.

30. Mental Health Coordinating Council, *Submission GA138*, 1-2.

31. See, eg, National Disability Services, *Submission GA100*, 3; Law Society of NSW, *Submission GA123*, 14-15.

32. B White, L Willmott and P Neller, *Submission GA88*, 1, 6-7, 9.

regulating restrictive practices in guardianship legislation.³³ The Office of the Public Guardian states this is appropriate because restrictive practices are “bound to issues of consent”.³⁴ The NSW Council for Intellectual Disability supports this approach “in view of the existing expertise in relation to restrictive practices in both the Tribunal and the Public Guardian”.³⁵ Others suggest that it should be incorporated not just in guardianship legislation but in other NSW legislation, too; for example, relevant mental health legislation.³⁶

12.26 Another group of submissions opposes regulation of restrictive practices sitting in guardianship laws,³⁷ with a number saying it should be in standalone legislation that applies to all relevant areas.³⁸ People With Disability Australia calls for a restrictive practices to be excluded from any assisted decision-making regime altogether for two reasons:

- Supporters and representatives do not have sufficient skills and knowledge to make decisions about the use of restrictive practices.
- Restrictive practices conflict with a supporter’s and representative’s responsibility to uphold the human rights, will and preferences of the person they are representing.³⁹

12.27 The National Disability Service submits that guardians should not have the authority to consent to the use of a restrictive practice because it is a clinical decision, and private guardians “could be prone to pressure from service providers to agree to practices for fear of the service relinquishing the care of their family member”.⁴⁰

What areas should be regulated?

12.28 Among those submissions that support legislation to regulate restrictive practices, there is no clear preference for what areas should be regulated. For example, FACS submits that NSW should only legislate for “matters that clearly fall outside the jurisdiction of the NDIS, and for which there are no other mechanisms already available”.⁴¹ The Mental Health Coordinating Council suggests that all services working with vulnerable people should be regulated.⁴²

33. NSW Council of Social Service, *Submission GA95*, 3; NSW Public Guardian, *Submission GA108*, 14; *Confidential Submission GA131*.

34. NSW Public Guardian, *Submission GA108*, 14.

35. NSW Council for Intellectual Disability, *Submission GA113*, 13.

36. NSW Ministry of Health, *Submission GA130*, 19-20; Mental Health Coordinating Council, *Submission GA87*, 13.

37. B White, L Willmott and P Neller, *Submission GA88*, 6; National Disability Services, *Submission GA100*, 6; Mental Health Commission of NSW, *Submission GA116B*, 9.

38. See, eg, Being, *Submission GA119B*, 13.

39. People with Disability Australia Inc, *Submission GA154*, 18.

40. National Disability Services, *Submission GA100*, 16.

41. NSW Department of Family and Community Services, *Submission GA125*, 3, 22.

42. Mental Health Coordinating Council, *Submission GA87*, 13.

Definition of “restrictive practices”

- 12.29 Those submissions that express a view on how restrictive practices should be defined tend to support the definition in the National Framework for Reducing and Eliminating the Use of Restrictive Practices.⁴³ The definition forms the basis for the Quality and Safeguarding Framework definition, which underlies the NDIS.

When should restrictive practices be permitted?

- 12.30 Submissions generally agree that we should work to eliminate restrictive practices⁴⁴ but that there are limited circumstances where they might be required, for example, on a short-term basis in emergency situations to prevent harm to the person or other people.⁴⁵ In such situations, there is broad agreement that restrictive practices should be used only as a last resort, in a way that is the least restrictive response available, and where the risk posed by the proposed intervention is in proportion to the risk of harm posed by the behaviour.⁴⁶ Some submissions say that there should always be a behaviour support plan and clinical assessment in place and that there should be a mechanism for review.⁴⁷ Where possible, the views, wishes and preferences of the person subject to restrictive practices should be taken into account.⁴⁸
- 12.31 Submissions say there should be an explicit prohibition on using restrictive practices for certain purposes including for the convenience of staff, as punishment for “bad” or “challenging” behaviours, or instead of appropriate support services, environment or accommodation.⁴⁹ We also heard that some restrictive practices should never be sanctioned, including practices likely to be misused or abused, and those that have little evidence to suggest any long-term efficacy or impact.⁵⁰

Safeguards

- 12.32 Suggestions for increased safeguards include:

-
43. Mental Health Coordinating Council, *Submission GA87*, 13; Royal Australasian College of Physicians, *Submission GA91*, 6; NSW Council of Social Service, *Submission GA95*, 3; NSW Council for Intellectual Disability, *Submission GA113*, 13; Being, *Submission GA119B*, 14; NSW Disability Network Forum, *Submission GA127*, 7-8.
44. See, eg, NSW Disability Network Forum, *Submission GA127*, 2, 8; Multicultural Disability Advocacy Association of NSW Inc, *Submission GA151*, 5.
45. See, eg, Tasmanian Department of Health and Human Services, *Submission GA84*, 12; Mental Health Coordinating Council, *Submission GA87*, 13-14; Royal Australasian College of Physicians, *Submission GA91*, 6; Mental Health Carers NSW Inc, *Submission GA121B*, 15; Law Society of NSW, *Submission GA123*, 15; NSW Department of Family and Community Services, *Submission GA125*, 23,.
46. See, eg, NSW Council of Social Service, *Submission GA95*, 3; Seniors Rights Service, *Submission GA90B*, 15;; Law Society of NSW, *Submission GA123*, 15.
47. See, eg, National Disability Services, *Submission GA100*, 8-9, 11.
48. B White, L Willmott and P Neller, *Submission GA88*, 8; National Disability Services, *Submission GA100*, 16; NSW Council for Intellectual Disability, *Submission GA113*, 14-15.
49. B White, L Willmott and P Neller, *Submission GA88*, 8.
50. National Disability Services, *Submission GA100*, 15.

- an independent monitoring authority⁵¹
- a right to have an independent tribunal or court review a restrictive practices decision⁵²
- a time limit on Tribunal orders relating to restrictive practices, for example, 12 months⁵³
- a state register of restrictive practice authorisations,⁵⁴ and
- a system of mandatory reporting, audits and reviews of undesirable trends in relation to particular providers or individuals.⁵⁵

Legislating for behaviour support plans

- 12.33 Submissions acknowledge that, when making a guardianship order, the Tribunal usually includes a condition that the guardian may only consent to a restrictive practice if positive approaches are also being used to address the person's behaviour or needs. Nevertheless, some submissions suggest that legislation should explicitly require a behaviour support plan.⁵⁶ One submission sees national standards and guidelines as an appropriate place for such requirements.⁵⁷

Our conclusions

12.1 Regulation of restrictive practices

- (1) The NSW government should closely monitor the implementation of the NDIS restrictive practices regulatory scheme with a view to considering whether to apply comparable regulation in the sectors that NSW regulates, including education and mental health.
- (2) The new Act should provide that the Public Advocate has the function of educating families, carers and community groups about restrictive practices and the need for their reduction and eventual elimination.
- (3) The NSW government should consider giving the NSW Law Reform Commission a standalone reference on the use and regulation of restrictive practices in NSW once the NDIS is rolled out and all details of the scheme are known.

51. Tasmanian Department of Health and Human Services, *Submission GA84*, 12; B White, L Willmott and P Neller, *Submission GA88*, 9; National Disability Services, *Submission GA100*, 11; Law Society of NSW, *Submission GA123*, 16.

52. B White, L Willmott and P Neller, *Submission GA88*, 9.

53. NSW Council for Intellectual Disability, *Submission GA113*, 15.

54. NSW Disability Network Forum, *Submission GA127*, 10; Mental Health Carers NSW Inc, *Submission GA121B*, 16.

55. NSW Disability Network Forum, *Submission GA127*, 10.

56. Tasmanian Department of Health and Human Services, *Submission GA84*, 13; NSW Council of Social Service, *Submission GA95*, 3; Law Society of NSW, *Submission GA123*, 16-17.

57. Mental Health Coordinating Council, *Submission GA87*, 14.

- 12.34 It is clear that there is significant support for legislation to regulate the use of restrictive practices in NSW. Submissions express dissatisfaction with the current regulatory model, and tend to prefer a consistent and comprehensive approach across sectors, including disability, mental health, education and aged care.
- 12.35 In this Report, we recommend that the new Assisted Decision-Making Act expressly provides that assisted decision-making arrangements can include decision-making about the use of restrictive practices.⁵⁸ Despite the support for more comprehensive legislation, we have decided not to make further recommendations, for the following reasons.

The disability sector and the NDIS

- 12.36 We acknowledge the concerns about potential gaps and inadequacies in the NDIS framework. However, given the legislation will not commence until July 2018, it is not yet clear how it will operate.
- 12.37 The NDIS Rules can require certain types of NDIS-funded supports to be provided only by registered NDIS providers, effectively making those providers subject to its extensive regulatory regime.⁵⁹ We understand that the NDIS Rules will classify restrictive practices for this purpose; and that providers will be required to keep records and provide monthly reports about the use of restrictive practices. We also understand there will be minimum requirements for behaviour support plans and obligations on providers to review and prepare plans, and lodge plans containing a restrictive practice with the Commissioner. However, the precise elements of the scheme are not yet publically available. Nor do we know, for example, what policy and guidance materials about the use of restrictive practices the Commissioner intends to release, or the type of information that will be made available to help providers deliver behaviour supports.
- 12.38 In our view, and particularly given the Commonwealth's intention to regulate the field, it is premature for NSW to regulate restrictive practices until the NDIS is operational and its effectiveness can be properly evaluated. This is the basis for Recommendation 12.1(1), which a number of submissions support.⁶⁰
- 12.39 Behaviour support plans will still need the "authorisation (however described) of a State or Territory". As noted, FACS will be responsible for authorising the use of restrictive practices by all NDIS registered disability service providers operating in NSW.
- 12.40 The *Guardianship Act* mechanisms for obtaining legal consent where a person does not have decision-making ability will continue to operate. Under our recommendations, both the Tribunal and representatives appointed to make decisions about the use of restrictive practices will have to consider factors including:

58. See Recommendation 4.7, 7.14, 8.1, 9.1.

59. *National Disability Insurance Scheme Act 2013* (Cth) s 73B to be inserted by *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Cth) sch 1 cl 48.

60. Physical Disability Council of NSW, *Submission GA143*, 5; Mental Health Commission of NSW, *Submission GA148*, 4; Medical Insurance Group Australia, *Submission GA153*, 5; National Disability Services, *Submission GA155*, 7.

- giving effect to the person’s will and preferences where possible
 - recognising their right to live free from neglect, abuse and exploitation, and
 - recognising their right to have their autonomy restricted as little as possible.⁶¹
- 12.41 We have also recommended strengthening other aspects of the assisted decision-making regime. For example, our recommendation about emergency orders⁶² would apply to the urgent authorisation of restrictive practices.
- 12.42 Even if we were to consider specific legislation for restrictive practices at this time, submissions express no clear preference for where this legislation should sit, or what it should look like. While a few favour particular aspects of the Victorian and Northern Territory models,⁶³ we note the NSW Public Guardian’s concerns:
- The introduction of yet more separate coercive legislation such as in Victoria is unwarranted and has done nothing in that jurisdiction to reduce the use of restrictive practices or to necessarily improve the management of challenging behaviour generally. It has effectively shifted the emphasis from a rights based approach to regulation of restrictive practices to one of clinical supervision. It should be noted that the Public Advocate in Victoria retains some oversight of restrictive practices to ensure a person’s human rights are not being breached.⁶⁴
- 12.43 In Chapter 13, we set out our recommendations for a Public Advocate in NSW. These include enhanced investigation powers in cases of suspected abuse, neglect and exploitation.

Restrictive practices in the education, mental health and aged care sectors

- 12.44 The specific and complex considerations that apply to the use of restrictive practices in the mental health and education sectors take the task of considering appropriate regulation for these sectors beyond the scope of this review.
- 12.45 We note, however, recent reviews in these areas. In August 2017, the NSW Ombudsman made detailed recommendations about the use of restrictive practices in schools.⁶⁵ In December 2017, NSW Chief Psychiatrist Dr Murray Wright made recommendations about the use of seclusion and restraint of people with a mental illness in health facilities.⁶⁶
- 12.46 In principle, we support consistent regulation of restrictive practices across NSW while recognising that certain differences in clinical contexts might lead to justifiable variations. Given the broad reach of the NDIS, and the fact that it is the only scheme with a statutory framework that may guide the use of restrictive practices,

61. Recommendation 5.2.

62. Recommendation 9.9.

63. See, eg, B White, L Willmott and P Neller, *Submission GA88*, 6;; National Disability Services, *Submission GA100*, 7; NSW Disability Network Forum, *Submission GA127*, 9.

64. NSW Public Guardian, *Submission GA108*, 13.

65. See NSW Ombudsman, *NSW Ombudsman Inquiry into Behaviour Management in Schools* (2017) 87-94.

66. See M Wright, *Review of Seclusion, Restraint and Observation of Consumers with a Mental Illness in NSW Health Facilities* (NSW Ministry of Health, 2017) 7-8, 42-43.

NSW should closely monitor its implementation. The purpose should be to consider if NSW should apply comparable regulation in state-regulated sectors, such as education and mental health. The findings and recommendations coming out of the reviews by NSW Health and the NSW Ombudsman should be considered as part of this process.

- 12.47 We support the Australian Law Reform Commission’s recommendation that the Commonwealth should regulate restrictive practices in residential aged care, and that the regulations should be consistent to those operating under the NDIS.⁶⁷

Informal settings

- 12.48 In addition to the disability, education, mental health and aged care sectors, restrictive practices are sometimes used in informal settings, such as in the family home. Apart from criminal sanctions and tort law, there is no regulation of restrictive practices in informal settings.

- 12.49 We agree with the submission of the NSW Disability Network Forum that “it would be inappropriate for a law governing restrictive practices to apply to informal carers who lack training and support to implement positive behaviour supports”.⁶⁸ We also agree that education could make families, carers and community groups more aware of restrictive practices and the need to reduce and eliminate them.⁶⁹ We have therefore recommended that the Public Advocate have such a role.⁷⁰ The Public Advocate’s education function would also extend to representatives who have a restrictive practices decision-making function.

A further reference

- 12.50 We heard strong support in submissions for a consistent regulatory framework for restrictive practices across NSW.⁷¹ In light of the fact that the NDIS is not yet fully operative, and to ensure we can consider the relevant issues outside those directly relevant to this reference — such as the specific clinical contexts in the mental health and education spheres — we suggest that the government give us a further reference on the use and regulation of restrictive practices in NSW.
- 12.51 This should occur once the NDIS is rolled out and all details of the scheme are known, so that we can analyse the framework of operation and give the topic of restrictive practices the consideration that it deserves.

67. Australian Law Reform Commission, *Elder Abuse: A National Legal Response*, Report 131 (2017) rec 4-10, rec 4-11.

68. NSW Disability Network Forum, *Submission GA127*, 7.

69. National Disability Services, *Submission GA100*, 3.

70. Recommendation 13.1(3)(b)(ii).

71. See, eg, Mental Health Coordinating Council, *Submission GA87*, 12; B White, L Willmott and P Neller, *Submission GA88*, 3; National Disability Services, *Submission GA100*, 6; Mental Health Commission of NSW, *Submission 116B*, 9.

13. The Public Advocate

In brief

This Chapter recommends that NSW establish a new independent statutory position known as the Public Advocate. The role of the Public Advocate would be to advocate for people in need of decision-making assistance, mediate decision-making disputes, provide information, advice and assistance about decision-making, and investigate cases of potential abuse, neglect and exploitation.

A Public Advocate	207
Mediation functions	210
Systemic advocacy functions	211
Decision-making advice and assistance functions	214
Training functions and guidelines.....	215
Investigative powers	216
Search and entry powers	218
Power to compel information.....	219
Sharing information.....	220
Investigating the need for support or representation.....	220
Intervening in proceedings.....	220
Referral of potential offences	221
The framework for a Public Representative	221

- 13.1 In this Chapter, we recommend a new independent statutory position known as the Public Advocate with a broad range of powers and responsibilities to help people in need of decision-making assistance. Our recommendations draw upon public advocate models in other jurisdictions. Submissions support such a position.¹
- 13.2 The idea of establishing a Public Advocate in NSW is not new. In 2010, the Legislative Council Standing Committee on Social Issues (“Standing Committee”) recommended that the NSW government consult on and develop a proposal for

1. Seniors Rights Service, *Submission GA90A*, 11-13; NSW Council of Social Service, *Submission GA95*, 1-2; NSW Public Guardian, *Submission GA108*, 6-7; Cognitive Decline Partnership Centre, *Submission GA112A*, 8; NSW Trustee and Guardian, *Submission GA117*, 9; Being, *Submission GA119A*, 8; Mental Health Carers NSW Inc, *Submission GA121A*, 11-12; NSW Young Lawyers Civil Litigation Committee, *Submission GA122*, 8; NSW Disability Network Forum, *Submission GA126*, 2; NSW Ombudsman, *Submission GA136*, 1-2; Mental Health Coordinating Council, *Submission GA138*, 2; Dementia Australia, *Submission GA141*, 5-6; Physical Disability Council of NSW, *Submission GA143*, 5; NSW Council for Intellectual Disability, *Submission GA144*, 2; Australian Association of Gerontology, *Submission GA146*, 1; Mental Health Commission of NSW, *Submission GA148*, 5; Multicultural Disability Advocacy Association, *Submission GA151*, 4; Medical Insurance Group Australia, *Submission GA153*, 5; National Disability Services, *Submission GA155*, 7; Royal Australian and New Zealand College of Psychiatrists, *Submission GA157*, 2; Justice Connect, *Submission GA159*, 16; Carers NSW, *Submission GA161*, 1; Legal Aid NSW, *Submission GA163*, 12; Law Society of NSW, *Submission GA164*, 3; NSW Department of Family and Community Services, *Submission GA167*, 7.

establishing such an office.² In 2016, the Legislative Council General Purpose Standing Committee recommended that the NSW government introduce legislation to establish one along the lines of the Victorian model.³

- 13.3 Recommendation 13.1 proposes an Office of the Public Advocate with functions to reduce the need for formal assisted decision-making arrangements, and in cases where formal arrangements are required, to ensure the least restrictive option is employed (for example, a personal support agreement rather than a representation agreement). We recommend the Public Advocate have investigative functions to obtain evidence about neglect, abuse and exploitation of people who need decision-making assistance and, if appropriate, to apply to the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal (“Tribunal”) for a representation order. We recommend advocacy functions to complement the current work of community groups by providing a vehicle for broad systemic advocacy as well as representation, where appropriate.

A Public Advocate

- 13.4 In Chapter 4, we recommended that the Public Guardian be known as the Public Representative. In this Chapter, we recommend that NSW combines the Public Advocate and the Public Representative to form a single agency with dual functions, under the name of the Office of the Public Advocate.
- 13.5 Some submissions favour keeping the Public Representative separate from a new Office of the Public Advocate.⁴ Arguments in favour of such a model include that it would:
- avoid certain conflicts of interest, such as a high representation workload influencing decisions about whether to investigate a particular matter⁵
 - guard against a disproportionate focus on representation functions at the expense of advocacy functions,⁶ and
 - enable proper advocacy of people subject to representation by the Public Representative who might be unhappy with decisions made on their behalf.⁷
- 13.6 Other submissions support combining the Public Representative and the Public Advocate into a single agency.⁸ On balance, we recommend a combined model for the following reasons:

-
2. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 32.
 3. NSW, Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales* (2016) rec 11.
 4. NSW Young Lawyers Civil Litigation Committee, *Submission GA122*, 8; Mental Health Carers NSW Inc, *Submission GA121A*, 11-12; Being, *Submission GA119A*, 8; Mental Health Commission NSW, *Submission GA116A*, 3-4; Seniors Rights Service, *Submission GA90A*, 12-13; Cognitive Decline Partnership Centre, *Submission GA112A*, 8.
 5. Mental Health Commission NSW, *Submission GA116A*, 3-4.
 6. Being, *Submission GA119A*, 8-9.
 7. Being, *Submission GA119A*, 8.

- It would allow the Public Advocate to have a full range of response options, from investigation to seeking orders, depending on the situation.
- It would allow a more streamlined, efficient approach to individual cases by avoiding referrals to multiple agencies.
- The new office could take advantage of the expert knowledge and skills already held by the office of the Public Guardian.
- A combined model is more cost effective than two separate agencies.

13.7 In our view, adequately resourcing each of the separate functions can overcome many of the perceived shortcomings of a combined model. For example, a review by the Victorian Law Reform Commission (“VLRC”) found that, despite the potential for conflict between its functions, Victoria’s Public Advocate operated effectively, through the organisation’s own internal management policies.⁹

13.8 Many submissions attest to the importance of independence for the Public Advocate.¹⁰ This was also stated by the VLRC in its review of guardianship.¹¹ The role of the Office would be to investigate complaints, including those about government agencies, and advocate for systemic change from government service providers. Ideally, therefore, the Public Advocate would have minimal conflicts of interest in performing these functions. However, we acknowledge the challenges of complete independence for the Office, particularly when we anticipate its funding will come from government. In those circumstances, we suggest that the Public Advocate have security of tenure, a dedicated staff and a duty to report to Parliament, as measures to ensure effectiveness of the Office.¹²

13.1 New advocacy and investigative functions

- (1) The new Act should introduce new advocacy and investigative functions.
- (2) The new Act should provide that these functions are to be carried out by a new statutory agency known as the Public Advocate.
- (3) The new functions should be to:
 - (a) mediate disputes about assisted decision-making, including between:
 - (i) parties to a court or tribunal application
 - (ii) enduring representatives, representatives and/or persons responsible, and
 - (iii) formal and informal supporters

8. Law Society of NSW, *Submission GA164*, 3; NSW Council for Intellectual Disability, *Submission GA144*, 2; NSW Public Guardian, *Submission GA108*, 6-7; Mental Health Coordinating Council, *Submission GA138*, 2-3.

9. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [20.63]-[20.65].

10. NSW Council of Social Service, *Submission GA137*, 1; Physical Disability Council of NSW, *Submission GA143*, 5; NSW Council for Intellectual Disability, *Submission GA144*, 2-3; Multicultural Disability Advocacy Association of NSW Inc, *Submission GA151*, 4.

11. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2013) [20.7], rec 324.

12. NSW Council of Social Service, *Submission GA137*, 1; Physical Disability Council of NSW, *Submission GA143*, 5; NSW Council for Intellectual Disability, *Submission GA144*, 2-3; Multicultural Disability Advocacy Association of NSW Inc, *Submission GA151*, 4.

- (b) undertake systemic advocacy for people in need of decision-making assistance through:
 - (i) educating the community and public agencies about the decision-making framework and the role of family and friends
 - (ii) educating and advising families, carers and community groups about restrictive practices and the need for their reduction and eventual elimination
 - (iii) supporting organisations that promote advocacy and undertake community education
 - (iv) monitoring, investigating, researching, reporting, making recommendations and advising on any aspect of the system the relevant Minister refers to it, and
 - (v) having standing in court and tribunal matters of general interest to people who need decision-making assistance
- (c) provide decision-making advice and assistance to people who do not have access to formal decision-making support, including:
 - (i) seeking help for people who need decision-making assistance from government agencies (including the NDIS), institutions, welfare organisations and service providers, and negotiating on their behalf to resolve issues
 - (ii) advising people on making applications for support and representation orders
 - (iii) advising people on and facilitating the development of support and representation agreements, and
 - (iv) administering and/or promoting decision-making assistance services and facilities (including its own)
- (d) provide information and training to supporters and representatives
- (e) set guidelines for supporters and representatives
- (f) investigate suspected abuse, neglect and exploitation on its own motion or in response to a complaint, with powers to:
 - (i) apply to an authorised officer under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (“LEPRA”) for a search warrant of any premises, if the Public Advocate has reasonable grounds to believe that a person in need of decision-making assistance is at risk of abuse, neglect or exploitation on the specified premises or that the new Act is being contravened
 - (ii) execute a search warrant issued by an authorised officer under LEPRA including by entering specified premises, inspecting those premises for evidence of abuse, neglect or exploitation and seizing any evidence relevant to abuse, neglect or exploitation of a person in need of decision-making assistance
 - (iii) require people, departments, authorities, service providers, institutions and organisations to provide documents, answer questions, and attend compulsory conferences
 - (iv) refer complaints or allegations of abuse and neglect to Public Advocates (or equivalent) outside NSW for investigation or other

- appropriate action in response to alleged victims and/or alleged abusers moving across borders
- (v) exchange information with the relevant bodies (including the Tribunal, the NSW Ombudsman's office, the National Disability Insurance Agency, the NDIS Quality and Safeguarding Commissioner, and relevant non-government organisations) on matters affecting the safety of a person in need of decision-making assistance – such as information relating to allegations of abuse and neglect, and
 - (vi) have read-only access to the police (COPS) and child protection (KiDS) databases
 - (g) when an application for a support or representation order is before the court or Tribunal, investigate, on its own motion or by request from the court or Tribunal, whether there is a need for a support or representation order and if it is the least restrictive option being taken
 - (h) intervene in court or Tribunal proceedings in certain cases (for example, if the Public Advocate has been closely connected with the person subject to the hearing), and
 - (i) refer possible offences under the new Act to law enforcement and prosecuting authorities.
- (4) The new Act should provide that it is an offence to fail to produce documents, answer questions or attend a conference in response to a request from the Public Advocate, except where doing so would result in self-incrimination or disclosure of material that is the subject of legal professional privilege.

Mediation functions

- 13.9 Recommendation 13.1(3)(a) is that the Public Advocate has the function of mediating disputes about assisted decision-making.
- 13.10 Currently, the Guardianship Division of the NSW Civil and Administrative Tribunal ("Tribunal") can require parties to use dispute resolution mechanisms like mediation to resolve disagreements in certain situations. However, this power extends only to parties who have made an application to the Tribunal for orders. The recommended function would extend beyond matters in which the Tribunal has jurisdiction.
- 13.11 A person in need of decision-making assistance could seek mediation without applying to the Tribunal, and informal decision-makers could access dispute resolution support without having to make formal decision-making arrangements. For example, two siblings who disagree about accommodation for a parent who needs decision-making assistance might approach the Public Advocate for mediation. Mediation could also be used where parties need help to agree on the interpretation of a supported decision-making or representation agreement. The person requiring decision-making assistance would be able to contribute their views as part of the process.

- 13.12 Giving the Public Advocate this function would result in less reliance on the resource-intensive Tribunal process, greater convenience for parties, and a better chance of preserving relationships that are important to people who need decision-making assistance.¹³
- 13.13 A number of submissions support giving a NSW Public Advocate mediation functions.¹⁴ Mediation is available in other Australian jurisdictions in limited circumstances. In South Australia, the Public Advocate can mediate disputes relating to advance care directives¹⁵ and consent to medical treatment.¹⁶ In Queensland, the Public Guardian can mediate and conciliate between adults with “impaired capacity”,¹⁷ substitute decision-makers and other parties such as health providers, “if the public guardian considers this appropriate to resolve an issue.”¹⁸
- 13.14 Our recommendation would see the Public Advocate adopting a broad mediation function that encompasses disputes between parties to court or tribunal applications that relate to assisted decision-making, enduring representatives, representatives, persons responsible and supporters. Matters that could be appropriate for mediation include issues arising from decisions made with assistance, as well as questions about the duties and limitations contained in a formal decision-making agreement. If the Public Advocate considers the disputed matter is not appropriate for mediation, the Public Advocate could refer the matter to the Tribunal.

Systemic advocacy functions

- 13.15 Recommendation 13.1(3)(b) empowers the Public Advocate to advocate for changes to legislation, policy and practice, in the interests of people who need decision-making assistance. This might include, for example, advocating against barriers to services or other discriminatory practices.
- 13.16 Presently, there is no formal or holistic “voice” for people who need decision-making assistance. The Public Guardian undertakes limited systemic advocacy through its functions of providing community education and ministerial reporting,¹⁹ and participating in a range of networks, committees and forums.²⁰
- 13.17 Particularly in light of the significant changes we have recommended to decision-making frameworks and concepts, systemic advocacy will be instrumental in shifting thinking about decision-making ability.²¹ We also see a role for the Public Advocate

13. See South Australia, Office of the Public Advocate, *2016-17 Annual Report* (2017) 6.

14. See, eg, Cognitive Decline Partnership Centre, *Submission GA112A*, 8; Mental Health Coordinating Council, *Submission GA34*, 4.

15. See *Advance Care Directives Act 2013* (SA) s 44-45.

16. See *Consent to Medical Treatment and Palliative Care Act 1995* (SA) pt 3A “Dispute resolution, reviews and appeals”.

17. See *Guardianship and Administration Act 2000* (Qld) sch 4 definition of “impaired capacity”.

18. *Public Guardian Act 2014* (Qld) s 12(1)(d).

19. NSW Public Guardian, Submission 7 to the NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity* (21 August 2009) 9-10. See also *Guardianship Act 1987* (NSW) s 79-80.

20. NSW Public Guardian, Submission 7 to the NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity* (21 August 2009) 11; NSW Public Guardian, *Public Guardian Advocacy Report 2016* (2016) 23.

21. Mental Health Commission of NSW, *Submission GA116A*, 3.

in the new National Disability Insurance Scheme (“NDIS”) environment, in ensuring people can access services and assisting them with any problems they experience as NDIS funding recipients. Legislation in other states and territories specifies forms of systemic advocacy that public guardians or public advocates can undertake, including:

- recommending new programs, or improvements to existing programs, to meet the needs of people who require decision-making assistance²² and encouraging the greatest practicable degree of autonomy²³
- promoting access to support services and facilities²⁴
- monitoring and reviewing services and facilities²⁵
- supporting and encouraging the development of programs and organisations that assist people in need of decision-making assistance²⁶
- promoting the protection of people in need of decision-making assistance from neglect, exploitation and abuse²⁷
- speaking for and promoting the rights of people in need of decision-making assistance,²⁸ and
- supporting and promoting the interests of the carers of people in need of decision-making assistance.²⁹

13.18 Submissions strongly support formalised systemic advocacy in NSW.³⁰ They suggest that a Public Advocate should be empowered to:

- advocate where situations call for systemic solutions³¹
- investigate suspected cases of abuse, exploitation or neglect³²
- assist the court where a matter is of “broader interest” for people in need of decision-making assistance³³

22. *Guardianship and Administration Act 1993* (SA) s 21(1)(b).

23. *Guardianship and Administration Act 2000* (Qld) s 209(1)(c).

24. *Guardianship and Administration Act 2000* (Qld) s 209(1)(d); *Guardianship of Adults Act* (NT) s 61(1)(c); *Guardianship and Administration Act 1995* (Tas) s 15(1)(a).

25. *Guardianship and Administration Act 2000* (Qld) s 209(1)(e).

26. *Guardianship and Administration Act 1995* (Tas) s 15(1)(b)-(c); *Guardianship and Administration Act 1986* (Vic) s 15(1)(b).

27. *Guardianship and Administration Act 2000* (Qld) s 209(1)(b).

28. *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).

29. *Guardianship and Administration Act 1993* (SA) s 21(1)(e).

30. Mental Health Commission of NSW, *Submission GA116A*, 3; Law Society of NSW, *Submission GA118A*, 10; Being, *Submission GA119A*, 7; NSW Department of Family and Community Services, *Submission GA125*, 13; NSW Disability Network Forum, *Submission GA126*, 10-11.

31. NSW Disability Network Forum, *Submission GA126*, 10.

32. Mental Health Coordinating Council, *Submission GA87*, 8; Law Society of NSW, *Submission GA118A*, 10.

33. NSW Public Guardian, *Submission GA108*, 6.

- contribute to “public awareness campaigns, advocacy for development of organisational policies, and professional training”,³⁴ and
 - oversee processes within relevant agencies to improve outcomes for people in need of decision-making assistance.³⁵
- 13.19 Our recommendation builds upon the above suggestions. In particular, we see the Public Advocate as having a significant role in educating the community about the new framework, through targeted information sessions for the public and professionals, and community initiatives³⁶ such as recruiting and training of volunteer supporters.³⁷
- 13.20 We also see the Public Advocate as having a role in researching and making recommendations to government about improving the lives of people in need of decision-making assistance. For example:
- In Victoria, the Public Advocate contributed to the development of the *Medical Treatment Planning and Decisions Act 2016* (Vic) and made submissions to various NDIS-related inquiries.³⁸
 - In South Australia, the Public Advocate is contributing to the new State Plan for Mental Health and has assisted in developing a code of practice for the use of restrictive practices in residential aged care and disability settings including minimising their use, and ensuring consent and appropriate reviews.³⁹
 - In Queensland, the Public Advocate has published reports on deaths of disabled people in care and on supported decision-making, and has also engaged in research on the rights of people in need of decision-making assistance regarding relationships and sexuality.⁴⁰
- 13.21 Another way in which we recommend the Public Advocate seek systemic change is through advocacy in court and tribunal proceedings. In 2016/2017, the South Australian Public Advocate provided advocacy services in matters regarding accommodation services, access to healthcare and support services for clients in prison.⁴¹ In Victoria, an advocate from the Office of Public Advocate is onsite at the Victorian Civil and Administrative Tribunal (“VCAT”) to assist clients, provide advice about functions of the Public Advocate and improve liaison between the Public Advocate and VCAT.⁴²
- 13.22 Importantly, we do not see the Public Advocate’s systemic advocacy as overtaking or substituting the role of non-government organisations and community advocacy

34. Cognitive Decline Partnership Centre, *Submission GA112A*, 7.

35. NSW Young Lawyers Civil Litigation Committee, *Submission GA122*, 7.

36. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [20.30].

37. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 326, [20.68].

38. Victoria, Office of the Public Advocate, *Annual Report 2016-17* (2017) 50-51.

39. South Australia, Office of the Public Advocate, *2016-17 Annual Report* (2017) 12. See also South Australia, Office of the Public Advocate, *Guardian Consent for Restrictive Practices in Residential Aged Care Settings* (2012).

40. See Queensland, Office of the Public Advocate, *Annual Report 2015-16* (2016) 12-19.

41. South Australia, Office of the Public Advocate, *2016-17 Annual Report* (2017) 13.

42. Victoria, Office of the Public Advocate, *Annual Report 2016-17* (2017) 18.

organisations. A number of submissions raise this concern.⁴³ We see these community organisations as essential for ensuring that people who require decision-making assistance have access to suitable representation and can express their views. We do not intend the Public Advocate to disrupt the services that community organisations provide. Rather, the Public Advocate should play a role in referring people who need decision-making assistance to appropriate community organisations and/or assisting those organisations with providing advocacy support. The Public Advocate's focus would be on effecting cultural and societal change more broadly, rather than on advocacy in individual cases. In this way, we intend the Public Advocate to complement existing advocacy services.

Decision-making advice and assistance functions

- 13.23 Recommendation 13.1(3)(c) is that the Public Advocate provide decision-making advice and assistance to people who do not have access to formal decision-making support. This recommendation is designed to reduce the need for formal assisted decision-making arrangements, and if formal arrangements are required, to ensure the least restrictive option (for example, a support agreement rather than a representation order) is pursued. This recommendation does not intend to confer supporter or representative functions on the Public Advocate.
- 13.24 Submissions suggest that the role of the Public Advocate should extend to people who are not the subject of orders.⁴⁴ We agree and recommend that the Public Advocate assist people to develop decision-making arrangements including with government agencies and service providers. Importantly, we see the Public Advocate assisting people to apply to the Tribunal for support or representation.⁴⁵
- 13.25 The Public Advocate might consider establishing an information and advice service as part of this assistance function. The Public Guardian currently runs an information service for the general public about guardianship, medical consent and the role of the Public Guardian.⁴⁶ The Victorian Public Advocate runs a service that provides information and advice about a range of topics including administration and guardianship, applications to VCAT, powers of attorney, medical consent, allegations of financial and physical abuse, and end-of-life decisions.⁴⁷ Many of the callers to the service are family and friends of people with a disability and professionals from the health, legal and community sectors.⁴⁸ Public Advocates in South Australia and Western Australia also have similar advice services.⁴⁹

43. NSW Council of Social Service, *Submission GA137*, 2; Mental Health Coordinating Council, *Submission GA138*, 2; Physical Disability Council of NSW, *Submission GA143*, 6; Multicultural Disability Advocacy Association of NSW Inc, *Submission GA151*, 4; National Disability Services, *Submission GA155*, 7.

44. NSW Disability Network Forum, *Submission GA126*, 10; Mental Health Carers NSW Inc, *Submission GA121A*, 9; NSW Department of Family and Community Services, *Submission GA125*, 11-12.

45. See Seniors Rights Service, *Submission GA158*, 16.

46. NSW Public Guardian, *Information and Support Service*, Fact Sheet (2014).

47. Victoria, Office of the Public Advocate, *Annual Report 2016-17* (2017) 32.

48. Victoria, Office of the Public Advocate, *Annual Report 2016-17* (2017) 32.

49. South Australia, Office of the Public Advocate, *2016-17 Annual Report* (2017) 14; Western Australia, Office of the Public Advocate, *Annual Report 2016/2017* (2017) 44.

- 13.26 Where the Public Advocate identifies systemic issues, its office could negotiate with service providers and government agencies on behalf of people who need decision-making assistance, as the Public Advocate in Victoria does.⁵⁰ This will be particularly important as people navigate the NDIS.
- 13.27 Some submissions oppose the Public Advocate negotiating with service providers and government agencies on an individual's behalf, on the basis that community advocacy groups are better placed to negotiate with government agencies⁵¹ and advocates should be independent of government.⁵² One submission also says that people who have had bad experiences with government agencies might feel more comfortable with being assisted by a non-government organisation.⁵³
- 13.28 However, there are many government agencies that assist people to deal with issues that might arise from decisions made by another branch of government. An example is Legal Aid NSW, which often assists clients in criminal and civil legal proceedings in which the State is the opposing party. As an independent agency, we do not anticipate that such a function will create a conflict of interest. It will still be open to people to seek assistance from community organisations if they wish.

Training functions and guidelines

- 13.29 Recommendations 13.1(3)(d) and 13.1(3)(e) are that the Public Advocate provide training and establish guidelines to assist supporters and representatives. Submissions support the Public Advocate having such functions.⁵⁴
- 13.30 Assuming the Offices of the Public Representative and Public Advocate are combined, the Public Advocate would be able to build upon the training programs that the Public Guardian has designed and delivered previously. For example, as part of the second phase of its supported decision-making pilot project, the Public Guardian delivered information sessions and workshops to service providers. An evaluation of the project indicates that the training was well-received, reached hundreds of service provider organisations and staff across NSW and increased service provider understanding of supported decision-making strategies.⁵⁵
- 13.31 Importantly, the evaluation suggests ongoing supported decision-making training would benefit the disability services sector:

50. See Victoria, Office of the Public Advocate, *Annual Report 2016-17* (2017) 19.

51. NSW Council of Social Service, *Submission GA137*, 2; Physical Disability Council of NSW, *Submission GA143*, 6; NSW Council for Intellectual Disability, *Submission GA144*, 2; Multicultural Disability Advocacy Association of NSW Inc, *Submission GA151*, 4.

52. Physical Disability Council of NSW. *Submission GA143*, 6; People with Disability Australia Inc, *Submission GA154*, 10-11.

53. Physical Disability Council of NSW, *Submission GA143*, 6.

54. NSW Public Guardian, *Submission GA108*, 7; NSW Trustee and Guardian, *Submission GA117*, 9; NSW Ombudsman, *Submission GA136*, 1; Mental Health Coordinating Council, *Submission GA138*, 2; Carers NSW, *Submission GA161*, 1.

55. C Purcal and others, *Evaluation of the Supported Decision Making Phase 2 (SDM2) Project*, Final Report (UNSW Social Research and Policy Centre, 2017) 40, 43.

The project indicates that a group of people who are skilled in [supported decision-making], have knowledge of the sector and can co-ordinate training and support for service providers would be helpful.⁵⁶

- 13.32 Public Advocates in Victoria and South Australia have also developed training materials for supporters for their respective supported decision-making pilot programs.⁵⁷ The Public Advocate in Western Australia conducts training, education and information sessions for stakeholders in the guardianship framework including private administrators, service providers and health professionals.⁵⁸
- 13.33 Giving the Public Advocate a role in developing guidelines will enable it to assist supporters and representatives undertake their functions and promote consistent application of the new laws. As a part of this function, the Public Advocate could also provide supporters and representatives with strategies to deal with difficult situations by suggesting appropriate responses, as the Victorian Public Advocate has done, for example, in developing an Interagency Guideline for Addressing Violence, Neglect and Abuse.⁵⁹

Investigative powers

- 13.34 Recommendation 13.1(3)(f) is that the Public Advocate should have broad powers to investigate and obtain information about suspected abuse, neglect or exploitation. Submissions support the Public Advocate having such powers.⁶⁰
- 13.35 Investigative powers are common to public guardians and public advocates in other states and territories.⁶¹ In Victoria, the Public Advocate has investigated a range of matters including an allegation by an estranged family member about the inadequate care of a represented person, notification from a service provider about no longer being able to maintain a person at their home, and a referral by a healthcare professional about a patient's declining capacity to live independently.⁶²

56. C Purcal and others, *Evaluation of the Supported Decision Making Phase 2 (SDM2) Project*, Final Report (UNSW Social Research and Policy Centre, 2017) 48.

57. See Victoria, Office of the Public Advocate, *The OVAL Project: Volunteer Programs of Support for Decision-Making: Lessons and Recommendations* (2017) 48-50; South Australia, Office of the Public Advocate, *Developing a Model Practice for Supported Decision Making* (2011).

58. Western Australia, Office of the Public Advocate, "Training" (19 January 2018) <<http://www.publicadvocate.wa.gov.au/T/training.aspx>> (retrieved 10 May 2018).

59. Victoria, Office of the Public Advocate, *Interagency Guideline for Addressing Violence, Neglect and Abuse (IGUANA)* (2013) 2.

60. Seniors Rights Service, *Submission GA90A*, 10; NSW Disability Network Forum, *Submission GA126*, 11; Legal Aid NSW, *Submission GA109A*, 10; Cognitive Decline Partnership Centre, *Submission GA112A*, 7-8; Mental Health Commission of NSW, *Submission GA116A*, 3; NSW Trustee and Guardian, *Submission GA117*, 9; Mental Health Carers NSW Inc, *Submission GA121A*, 1, 11; NSW Department of Family and Community Services, *Submission GA125*, 13; Law Society of NSW, *Submission GA164*, 3, 5; Justice Connect, *Submission GA159*, 16; NSW Council for Intellectual Disability, *Submission GA144*, 2; Physical Disability Council of NSW, *Submission GA143*, 5; Dementia Australia, *Submission GA141*, 5-6; Mental Health Coordinating Council, *Submission GA138*, 2; NSW Ombudsman, *Submission GA136*, 1.

61. *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).

62. Victoria, Office of the Public Advocate, *Annual Report 2016-17* (2017) 16-17.

- 13.36 We see the NSW Public Advocate as having a wide scope for investigation. The Tribunal might use the results of a Public Advocate investigation when reviewing a decision-making arrangement. Investigations could also be an opportunity to proactively address issues affecting the sector and raise public awareness.⁶³
- 13.37 Importantly, we recommend allowing the Public Advocate to act in response to a complaint or on its own motion. Submissions strongly supported this,⁶⁴ with some noting that many people who are isolated and vulnerable may have difficulty instigating an investigation on their own. In those circumstances, it is important to have a Public Advocate who can commence an investigation, on their own initiative, without the need for a complaint, allegation or direction from another party.
- 13.38 We acknowledge that some other NSW agencies already have powers to investigate relevant matters in certain circumstances, including the NSW Police. The NSW Ombudsman also has investigative powers, such as the power to investigate reportable allegations and convictions⁶⁵ under the *Ombudsman Act 1974* (NSW)⁶⁶ and complaints about service providers under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW).⁶⁷ However, the NSW Ombudsman cannot investigate suspected abuse that is occurring in a private home, for example, or investigate a situation where a person is not receiving (or is not eligible to receive) community services.⁶⁸
- 13.39 Under the NDIS, the Quality and Safeguarding Commissioner will have a role in investigating breaches of the *National Disability Insurance Scheme Act 2013* (Cth) (“*NDIS Act*”), but no powers in relation to people who do not receive services through the NDIS.
- 13.40 In cases where it is more appropriate for another agency to conduct an investigation, we see the Public Advocate’s role as providing a central point of contact to receive complaints or allegations and refer them to the appropriate agency. In cases where there is no other avenue to pursue investigations, the Public Advocate would lead the investigation.

63. NSW Disability Network Forum, *Submission GA126*, 11.

64. Mental Health Coordinating Council, *Submission GA87*, 8; Seniors Rights Service, *Submission GA90A*, 11; NSW Disability Network Forum, *Submission GA126*, 10; NSW Public Guardian, *Submission GA108*, 7; Legal Aid NSW, *Submission GA109A*, 11; NSW Council for Intellectual Disability, *Submission GA113*, 7; Mental Health Commission of NSW, *Submission GA116A*, 3; Law Society of NSW, *Submission GA118A*, 10; Mental Health Carers NSW Inc, *Submission GA121A*, 11.

65. *Ombudsman Act 1974* (NSW) s 25O definitions of “reportable allegation” and “reportable conviction”, s 25P definition of “reportable incident”.

66. *Ombudsman Act 1974* (NSW) s 25W.

67. *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) s 4 definition of “service provider”, s 11(1)(f), s 24, s 27.

68. *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) s 4 definition of “community service”.

Search and entry powers

- 13.41 We recommend that the Public Advocate has the power to apply for and execute a search warrant obtained from an “authorised officer”⁶⁹ under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), on any premises. Before applying for a search warrant, the Public Advocate should be satisfied that there are reasonable grounds for believing that a person in need of decision-making assistance is being abused, neglected or exploited on the specified premises, or that the new Assisted Decision-Making Act (“the new Act”) is being breached. We recommend that a search warrant give the Public Advocate power to enter the specified premises, inspect those premises for evidence of abuse, neglect or exploitation, and seize any such evidence.
- 13.42 Many submissions support a Public Advocate having such powers.⁷⁰ We anticipate that the Public Advocate would seek police assistance to execute the warrant. The Public Advocate would use the evidence obtained under the warrant to apply to the Tribunal for a representation order for a person in need of decision-making assistance in appropriate cases.
- 13.43 Submissions that oppose giving the Public Advocate such powers do so on the basis that entry onto premises without consent should remain the domain of police.⁷¹ The Australian Law Reform Commission holds this position.⁷² However, giving the Public Advocate powers to search and enter complements the powers of entry search and removal of a person from premises that we recommend in Chapter 17. This should help the Public Advocate to identify and prevent the exploitation of vulnerable people in the community.⁷³ We view this as a significant benefit.
- 13.44 Currently, community members who have concerns about potential abuse or exploitation can request a “welfare check” from the police. However, this is not always a suitable option as the police do not necessarily have the skills to recognise the signs of abuse and neglect, or the expertise to communicate with people who have a cognitive impairment in order to accurately assess the situation. Additionally, people might be reluctant to engage police for a variety reasons, particularly, for seemingly less serious matters.⁷⁴
- 13.45 The NDIS Quality and Safeguards Commissioner will have the power to enter premises and conduct investigations⁷⁵ in relation to certain civil penalty provisions under the *NDIS Act*, such as the requirement for registered NDIS providers to

69. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3 definition of “authorised officer”. This includes a Magistrate, Local Court registrar or an authorised employee of the Attorney-General.

70. Mental Health Coordinating Council, *Submission GA87*, 9; Seniors Rights Service, *Submission GA90A*, 11; NSW Council for Intellectual Disability, *Submission GA113*, 6-7; Mental Health Commission of NSW, *Submission GA116A*, 3; NSW Trustee and Guardian, *Submission GA117*, 9. See also Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [20.77] rec 332-334.

71. Legal Aid NSW, *Submission GA109A*, 11; Law Society of NSW, *Submission GA118A*, 11.

72. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [3.42].

73. NSW Disability Network Forum, *Submission GA126*, 12.

74. Justice Connect, *Submission GA159*, 16.

75. See *National Disability Insurance Scheme Act 2013* (Cth) s 73ZF to be inserted by *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Cth) sch 1 cl 48; *Regulatory Powers (Standard Provisions) Act 2014* (Cth) pt 3 “Investigation”.

comply with conditions of their registration.⁷⁶ As with the NSW Ombudsman, these powers are limited in their scope and may leave many people, including those outside of the NDIS, without an avenue for protection; for example, where there is an allegation of abuse by family members rather than by service providers.

- 13.46 The Victorian Public Advocate has suggested that the NDIS Quality and Safeguards Commissioner have a broader power to conduct investigations where there are allegations of abuse, neglect or exploitation.⁷⁷ Similarly, the Australian Guardianship and Administration Council has suggested that an independent statutory authority, either nationally or state-based, conduct investigations where there are allegations of abuse, neglect or exploitation of people with a disability.⁷⁸ However, to date, these recommendations have not been adopted.

Power to compel information

- 13.47 We recommend that the Public Advocate be empowered to compel information by requiring people and organisations to provide documents, answer questions and attend compulsory conferences. The Public Advocate should be able to exercise these functions regardless of whether the suspected abuse, neglect and/or exploitation relates to a decision-making order or agreement.
- 13.48 Public Advocates in other jurisdictions have similar powers to compel information.⁷⁹ Many submissions favour such powers.⁸⁰ We also recommend that failing to comply with the Public Advocate's exercise of these powers is an offence under the new Act, unless a person or organisation can demonstrate a lawful excuse such as protection from self-incrimination or legal professional privilege.⁸¹ We see the creation of this offence as an important way of ensuring compliance.
- 13.49 We also recommend that the Public Advocate have "read only" access to police and child protection databases, which will in some cases avoid the need for the Public Advocate to use its more onerous powers to compel information. We expect the exercise of this power to be subject to appropriate privacy and confidentiality obligations and restrictions.

76. See *National Disability Insurance Scheme Act 2013* (Cth) s 73J to be inserted by *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Cth) sch 1 cl 48.

77. Victoria, Office of the Public Advocate, Submission to the Senate Community Affairs Legislation Committee, *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017* (July 2017) 9.

78. Australian Guardianship and Administration Council, Submission to *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework Consultation Paper* (28 April 2015) 5.

79. See *Guardianship and Administration Act 1986* (Vic) s 16(1)(ha); *Guardianship and Administration Act 2000* (Qld) s 210A.

80. Mental Health Coordinating Council, *Submission GA87*, 8; Seniors Rights Service, *Submission GA90A*, 11; NSW Disability Network Forum, *Submission GA126*, 11; Legal Aid NSW, *Submission GA109A*, 11; NSW Council for Intellectual Disability, *Submission GA113*, 7; Mental Health Commission of NSW, *Submission GA116A*, 3; NSW Trustee and Guardian, *Submission GA117*, 9; Law Society of NSW, *Submission GA118A*, 10.

81. Recommendation 13.1(4).

Sharing information

- 13.50 We recommend that the Public Advocate have powers to share information with counterparts in other jurisdictions and federal agencies as well as relevant state government and non-government bodies. This would enable the Public Advocate to respond to allegations of abuse and exploitation of a vulnerable person including if they move interstate.
- 13.51 The NSW Ombudsman supports the Public Advocate having this power which is consistent with activities currently performed by the Ombudsman.⁸² For example, the Ombudsman holds meetings with non-government service providers and agencies in order to identify risks and ways to improve safety for people. We see the Public Advocate using these powers in a similar way to complement its investigative functions.

Investigating the need for support or representation

- 13.52 Recommendation 13.1(3)(g) is that the Public Advocate have the power to investigate, either on its own motion or on referral by the Tribunal, whether a person requires support or representation. Broadly favoured by submissions,⁸³ this power would enable the Public Advocate to assist the court or Tribunal to make appropriate orders and encourage people to use the least restrictive options for assisted decision-making.
- 13.53 Some submissions advocate for Tribunal staff to perform this role rather than the Public Advocate. Reasons provided include that it better aligns with the Tribunal's inquisitorial role⁸⁴ and it would avoid any potential conflict of interest arising from an increased caseload for the Public Representative.⁸⁵ Another submission cautions against interfering with people's autonomy and decision-making ability.⁸⁶ However, we are persuaded that the power fills a gap in the current framework. It does not preclude the Tribunal or the court from exercising their respective powers. Instead, we see this as a way to assist a resource-constrained tribunal and court system.

Intervening in proceedings

- 13.54 Recommendation 13.1(3)(h) is that the Public Advocate be able to intervene in court or Tribunal proceedings in certain circumstances. This might occur where the Public Advocate recognises a matter of public interest or a systemic issue in a Tribunal case such as whether a person is able to access services or employment in the community.

82. See NSW Ombudsman, *Submission GA136*, 2.

83. Seniors Rights Service, *Submission GA90A*, 12; NSW Public Guardian, *Submission GA108*, 6; Cognitive Decline Partnership Centre, *Submission GA112A*, 7; Law Society of NSW, *Submission GA118A*, 10; Mental Health Carers NSW Inc, *Submission GA121A*, 10; NSW Department of Family and Community Services, *Submission GA125*, 13.

84. NSW Council for Intellectual Disability, *Submission GA144*, 2.

85. NSW Disability Network Forum, *Submission GA126*, 11; NSW Council for Intellectual Disability, *Submission GA113*, 6; NSW Council of Social Service, *Submission GA137*, 2; Multicultural Disability Advocacy Association of NSW Inc, *Submission GA151*, 4.

86. Being, *Submission GA119A*, 7-8.

- 13.55 Public Advocates in other jurisdictions undertake a similar function.⁸⁷ We regard this function as critical to the position's ability to advocate for people who need decision-making assistance and effect change.

Referral of potential offences

- 13.56 Recommendation 13.1(3)(i) would give the Public Advocate the power to refer offences under the new Act to law enforcement and prosecuting authorities. We anticipate that the Public Advocate, in investigating suspected abuse, neglect and exploitation, and interacting with vulnerable people, may become aware of circumstances that could amount to offences under the new Act or other legislation. In those situations, we see the Public Advocate as having a role in ensuring that law enforcement and prosecuting authorities are notified so that they may take appropriate action.

The framework for a Public Representative

13.2 The Public Representative

In addition to incorporating the new functions proposed in **Recommendation 13.1**, the new Act should apply the provisions currently in part 7 (the Public Guardian) of the *Guardianship Act 1987* (NSW) insofar as they are consistent with the new framework.

- 13.57 We recommend that the powers and responsibilities of the Public Guardian provided for in part 7 of the *Guardianship Act 1987* (NSW) are retained and transposed to the Public Representative in a way that is consistent with the new framework.

87. *Guardianship and Administration Act 1986* (Vic) s 16(1)(f), Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [20.94] rec 340, *Guardianship and Administration Act 2000* (Qld) s 210(2); *Guardianship and Administration Act 1990* (WA) s 97(1)(a), s 97(1) (b)(i); *Human Rights Commission Act 2005* (ACT) s 27B(1)(c).

14. Provisions of general application

In brief

The recommendations in this Chapter would apply generally across a new Assisted Decision-Making Act. They include recommendations about the disclosure of personal information, registration of decision-making arrangements and dispute resolution.

Directions to supporters and representatives.....	222
Personal information	223
Access to personal information	224
Non-disclosure of personal information.....	224
Protection from liability where an agreement or order does not have effect.....	225
Resolving disputes between substitute decision-makers	226
Adoption information directions	227
Adoption information provisions in the Adoption Act.....	228
Adoption information directions under the Guardianship Act	228
Our conclusion	229
Provisions in part 9 of the Guardianship Act	229
Provisions that should be retained	229
The offences of obstruction and making false or misleading statements.....	230
Provisions that should not be included in the new Act	231
Proof of certain matters.....	231
Evidentiary certificates	232
Registration	232
Suggested benefits of registration.....	233
Our conclusions	234
Mandatory or voluntary registration.....	234
Costs.....	236
Other approaches	237
Remedies against representatives	237
The Tribunal option	238
The District Court option	239

- 14.1 In this Chapter, we set out some recommendations that would apply generally across a new Assisted Decision-Making Act (“the new Act”). These recommendations are largely consistent with and expand upon provisions that already exist in the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”). However, there are some provisions that we have recommended are not transferred to the new Act.

Directions to supporters and representatives

14.1 Directions to supporters, representatives and persons responsible

The new Act should provide that:

- (1) Supporters, representatives and persons responsible can apply to the Tribunal for directions about the exercise of their functions.

- (2) Where a person is authorised to take a particular action by an order of the Supreme Court acting in its inherent protective jurisdiction, and a Tribunal direction might conflict with this order, the Tribunal may only give directions if the Supreme Court consents.
- (3) Supporters, representatives and persons responsible are not liable for any acts or omissions carried out in good faith in accordance with such a direction.
- (4) If the Tribunal gives a direction under this section, it should ensure a copy is forwarded to the Public Representative and/or NSW Trustee, as appropriate.

- 14.2 We recommend that supporters, representatives and persons responsible can apply to the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal (“Tribunal”) for directions about their functions. They should not be liable for any acts or omissions carried out in good faith in accordance with any such directions.
- 14.3 This recommendation is consistent with provisions that apply to guardians under part 4 of the *Guardianship Act 1987*,¹ except in one respect. It excludes the requirement that the Tribunal take into account certain matters (for example, the views of the person’s guardian) that must be considered under s 28(2) of the *Guardianship Act*. We have excluded these considerations because they are inconsistent with the new framework or otherwise covered by the recommended general principles.
- 14.4 While we understand that the Tribunal does not receive many applications for directions, the option should be preserved and extended to supporters and persons responsible as well as representatives. The Victorian Law Reform Commission (“VLRC”) in its review of *Guardianship* acknowledged that the Tribunal’s powers to give directions were useful and recommended that supporters, representatives and persons responsible should all be able to seek directions from the Tribunal.²

Personal information

- 14.5 The *Guardianship Act* provides that it is an offence to disclose information obtained in connection with the Act except in certain circumstances.³ Recommendations 14.2 and 14.3 set out entitlements under the new Act to access personal information and the circumstances in which personal information, once obtained, can be disclosed. These recommendations complement a new general principle that explicitly protects a person’s right to privacy and confidentiality.⁴

1. *Guardianship Act 1987* (NSW) s 26-29.

2. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [21.183] rec 399, rec 400.

3. See *Guardianship Act 1987* (NSW) s 101.

4. See Recommendation 5.2(h).

Access to personal information

14.2 Access to personal information

The new Act should provide that:

- (1) A representative, supporter or person responsible should be entitled to access, collect or obtain personal information (including financial and health information) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions.
- (2) A person holding that information, on being satisfied that a person is entitled to access that information, must allow them to access that information.

- 14.6 This recommendation simply clarifies that a representative, supporter or person responsible is entitled to obtain personal information about the person they are representing or assisting, where it is relevant to their role. It aims to facilitate effective support and assistance, while protecting the privacy of represented and supported people and is consistent with the approach recommended by the VLRC.⁵
- 14.7 Several submissions support this general approach.⁶ Some note that it is important to clarify the guidelines and laws on information sharing, especially as the National Disability Insurance Scheme is rolled out.⁷
- 14.8 The NSW Office of the Privacy Commissioner suggests that agencies should be required to establish internal procedures to guide this process, which would strengthen the rights of both the person to whom the information relates and the person seeking the information.⁸ We encourage agencies and other organisations to establish such internal procedures.

Non-disclosure of personal information

14.3 Non-disclosure of personal information

The new Act should provide that it is an offence for a person, including a representative or supporter, to disclose any information obtained in connection with the administration or execution of the Act unless it is:

- (a) for the purpose of acting as the person's representative or supporter, including, where relevant, to seek legal or financial advice, or counselling, advice or other treatment
- (b) in connection with the administration or execution of the Act

5. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 191.

6. Mental Health Coordinating Council, *Submission GA87*, 16; Seniors Rights Service, *Submission GA90C*, 9; NSW Public Guardian, *Submission GA108*, 17-18; Legal Aid NSW, *Submission GA109C*, 7; Carers NSW, *Submission GA111*, 3; NSW Trustee and Guardian, *Submission GA117*, 14. See also Law Society of NSW, *Submission GA118B*, 7-8.

7. Mental Health Review Tribunal, *Preliminary Submission PGA21*, 2; Mental Health Coordinating Council, *Preliminary Submission PGA8*, 3.

8. NSW Office of the Privacy Commissioner, *Submission GA124*, 2.

- (c) necessary for proceedings under the Act
- (d) authorised by law
- (e) authorised by the person to whom the information relates if they have decision-making ability to do so
- (f) authorised by a court or tribunal in the interests of justice, or
- (g) disclosed to authorities as necessary to prevent serious risk to life, health or safety or to report a suspected serious indictable offence.

- 14.9 We recommend that disclosing any personal information obtained in connection with the new Act should be an offence, consistent with provisions in *Guardianship Act*. We have, however, recommended some specific exceptions.
- 14.10 In the *Guardianship Act*, disclosure of personal information is not an offence if the person has the consent of the person from whom the information was obtained, it is connected with the administration of, or legal proceedings under the *Guardianship Act* or the *Civil and Administrative Tribunal Act 2013* (NSW), or there is any “other lawful excuse”.⁹ Some of the further exceptions we recommend are consistent with provisions in Queensland legislation.¹⁰
- 14.11 There is some support for the Queensland model in submissions¹¹ and we have heard no objections to a provision of this kind.
- 14.12 Recommendation 14.3(e), unlike the provisions in the *Guardianship Act*, contains a proviso that makes it clear that a person can only consent to the disclosure of their personal information if they have the decision-making ability to do so.

Protection from liability where an agreement or order does not have effect

14.4 Protection from liability where an agreement or order does not have effect

The new Act should provide that:

- (1) A person who:
 - (a) purports to act as a supporter or representative under a relevant agreement or order, and
 - (b) does so in good faith, and without knowing the agreement or order does not have effect,
 can rely on the agreement or order in any case.
- (2) A third party who:

9. *Guardianship Act 1987* (NSW) s 101. A similar provision is contained in *Mental Health Act 2007* (NSW) s 189.

10. *Guardianship and Administration Act 2000* (Qld) s 249, s 249A.

11. Seniors Rights Service, *Submission GA90C*, 9; Law Society of NSW, *Submission GA118B*, 8.

- (a) relies on a person who purports to act as a supporter or representative under a relevant agreement or order, and
 - (b) does so in good faith, and without knowing the agreement or order does not have effect,
- can rely on the agreement or order in any case.

- 14.13 This recommendation seeks to protect supporters, representatives and third parties who act in reliance on purported agreements or orders, so long as they act in good faith without knowing that the relevant agreement or order does not have effect. Victoria makes similar provision in relation to supportive attorney appointments and enduring powers of attorney.¹²
- 14.14 The *Powers of Attorney Act 2003* (NSW) allows an attorney and certain third parties to rely on a power of attorney if they are unaware that it has been suspended or terminated, but does not expressly require them to do so in good faith.¹³ No such provision is contained in the *Guardianship Act* in relation to guardianship. The *Guardianship Act* does, however, exclude liability for any person that performs an action for the “purposes of executing [the] Act” if “done in good faith and with reasonable care”.¹⁴
- 14.15 Our recommendation in line with submissions we received¹⁵ and is consistent with the comparable Victorian provisions.

Resolving disputes between substitute decision-makers

14.5 Resolving disputes between substitute decision-makers

The new Act should provide that, if there are 2 or more people who can make a decision under the Act and they cannot agree about one or more decisions that need to be made, after attempting to resolve the disagreement (whether informally or through mediation), a person may apply to the Tribunal for directions to resolve any such disagreement by dispute resolution processes.

- 14.16 We recommend that substitute decision-makers such as representatives or persons responsible, who cannot resolve a disagreement, should be able to ask the Tribunal to direct them to undertake dispute resolution. For example, this could happen when joint representatives cannot reach a majority decision, or when representatives with different functions need to align their decisions, or when a person responsible consents to a form of healthcare that the patient’s representative with financial decision-making powers is unwilling to pay for.
- 14.17 There is no legislative provision in NSW that addresses dispute resolution between substitute decision-makers outside of disputes related to proceedings in the

12. *Powers of Attorney Act 2014* (Vic) s 15, s 75, s 114.

13. *Power of Attorney Act 2003* (NSW) s 47, s 48.

14. *Guardianship Act 1987* (NSW) s 100.

15. Disability Advocacy and Mid North Coast Community Legal Centre, *Submission GA56*, 13; Medical Insurance Group Australia, *Submission GA153*, 3.

Tribunal.¹⁶ Our recommendation would allow the Tribunal, on application, to refer appointed representatives and/or a person responsible to a compulsory dispute resolution process, where there has been an unsuccessful attempt to resolve the dispute informally (for example, because one person refuses to engage in the process).¹⁷

- 14.18 Other states and territories allow substitute decision-makers to apply to their relevant tribunal when they have been unable to reach a unanimous decision. For example, in the Northern Territory (“NT”), although there is an obligation for multiple substitute decision-makers to make decisions unanimously,¹⁸ if there is a dispute that they cannot resolve by themselves, the NT Tribunal can make orders to facilitate the resolution of their differences.¹⁹
- 14.19 Submissions generally support informal resolution or mediation in the first instance, followed by a return to the Tribunal for formal orders to resolve a dispute.²⁰ The Law Society of NSW suggests that this option provides greater flexibility than simply giving one decision-maker primacy over the others.²¹ It also contrasts with the VLRC’s recommendation that unless the parties agree otherwise, the decision of a guardian would be preferred to that of a financial manager.²²

Adoption information directions

14.6 No separate provision for exercising rights under adoption laws

The new Act should not make separate provision for people who need help exercising their rights under adoption laws.

- 14.20 We recommend that the new Act does not make separate provision for people who need help exercising their rights under adoption laws.
- 14.21 Part 4A of the *Guardianship Act* provides unique arrangements for a person who requires decision-making assistance to exercise their rights relating to adoption information under the *Adoption Act 2000* (NSW) (“*Adoption Act*”). Our recommendations do not include such provisions but this should not prevent people who need decision-making assistance from exercising their rights under the *Adoption Act*. They will be able to exercise their rights through the range of assisted decision-making arrangements under the new Act.

16. See *Civil and Administrative Tribunal Act 2013* (NSW) s 37; *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1.

17. This differs from the Public Advocate’s power to conduct mediation (Recommendation 13.1) because that power requires both parties to agree to participate.

18. *Guardianship of Adults Act 2016* (NT) s 22(2).

19. *Guardianship of Adults Act 2016* (NT) s 33(2)(b).

20. Seniors Rights Service, *Submission GA90C*, 7; Legal Aid NSW, *Submission GA109C*, 6; Carers NSW, *Submission GA111*, 3; Law Society of NSW, *Submission GA118B*, 7.

21. Law Society of NSW, *Submission GA118B*, 7.

22. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 196(c)(i).

Adoption information provisions in the Adoption Act

- 14.22 The *Adoption Act* entitles a variety of people, including adopted people, their birth and adoptive parents, and their non-adopted siblings, to obtain certain information about their birth and adoption.²³ For example, an adopted person is entitled to receive their original birth certificate, their birth record and other prescribed information.²⁴
- 14.23 Adopted people, birth parents and adoptive parents can also request a delay to the release of their personal information to give them time to prepare for the release and any impact this might have on them or their family or associates.²⁵ Additionally, birth parents and adopted people can prevent contact by lodging a contact veto in certain circumstances.²⁶

Adoption information directions under the Guardianship Act

- 14.24 Part 4A of the *Guardianship Act* deals with how people who need decision-making assistance may exercise their rights in relation to adoption information. It was introduced in 1995 in response to a recommendation we made as part of our review of the *Adoption Information Act 1990* (NSW).²⁷ We had received a number of submissions about “difficulties arising where persons having rights under [NSW adoption laws] suffered from intellectual or emotional disabilities which made it impossible or unreasonable for them to exercise their rights”.²⁸ In making our recommendation, we were particularly mindful of “people whose disabilities are not such as to bring them within the jurisdiction of the Guardianship Board, but nevertheless create some practical problems in the exercise of their rights”.²⁹
- 14.25 Under part 4A, anyone may apply to the Tribunal for an adoption information direction on behalf of the person with a disability.³⁰ After a hearing, the Tribunal may give directions about the adoption information actions that the applicant or another person may take on behalf of the person with a disability.³¹ The Tribunal must consider the views of the person with a disability and the views of the applicant, as well as the objects of the *Adoption Act*.³²
- 14.26 It appears that the part 4A provisions have rarely, if ever, been used. The Tribunal cannot identify any record of an application requesting it to exercise its powers under part 4A.³³ The Benevolent Society, which has provided state-wide

23. See *Adoption Act 2000* (NSW) ch 8 (“Adoption Information”).

24. *Adoption Act 2000* (NSW) s 133C.

25. *Adoption Act 2000* (NSW) s 144, s 146, s 147.

26. *Adoption Act 2000* (NSW) s 154.

27. *Adoption Information Amendment Act 1995* (NSW) sch 2.

28. NSW Law Reform Commission, *Review of the Adoption Information Act 1990*, Report 69 (1992) [8.30] (footnotes omitted).

29. NSW Law Reform Commission, *Review of the Adoption Information Act 1990*, Report 69 (1992) [8.33].

30. *Guardianship Act 1987* (NSW) s 31B.

31. *Guardianship Act 1987* (NSW) s 31D(1).

32. *Guardianship Act 1987* (NSW) s 31D(2).

33. NSW Civil and Administrative Tribunal, *Submission GA110*, 4.

Post Adoption Services in NSW for over 26 years, is similarly unaware of the provisions having ever being used.³⁴

Our conclusion

- 14.27 In our view, the provisions are out of step with the policy underlying the new Act. For example, the application of the Part to a person who is unable to act because of a disability is discriminatory, and goes beyond any question of relevant decision-making ability. The requirement that the Tribunal consider equally the views of the applicant and those of the person whose rights the application relates to is inconsistent with the will and preferences approach that we have recommended. The provision that the Tribunal consider the objects of the *Adoption Act*, which assert that paramount consideration be given to the “best interests” of the adopted person, is also inconsistent with the will and preferences approach.
- 14.28 Under the new Act, a supporter, representative or enduring representative with personal functions would be able to provide the help necessary for a person to exercise their rights under the *Adoption Act*. We can, therefore, see no reason why there would need to be a separate provision requiring application to the Tribunal for an adoption information direction, even if such a provision otherwise aligned with the policy underlying the new Act.
- 14.29 The Benevolent Society supports omitting the provisions from the new framework.³⁵ The Law Society of NSW does not oppose their omission.³⁶
- 14.30 This will require consequential amendment of s 199(2) of the *Adoption Act 2000* (NSW).

Provisions in part 9 of the Guardianship Act

Provisions that should be retained

14.7 Provisions in part 9 of the *Guardianship Act 1987* (NSW)

The new Act should incorporate the substance of the provisions contained in part 9 of the *Guardianship Act 1987* (NSW), except where to do so would contradict another recommendation, and with adjustments to ensure consistency with the new framework.

- 14.31 We recommend that the new Act should broadly retain the provisions contained in the *Guardianship Act* relating to:
- the service of notices and instruments³⁷

34. Benevolent Society, *Submission GA162*.

35. Benevolent Society, *Submission GA162*.

36. Law Society of NSW, *Submission GA164*, 60.

37. *Guardianship Act 1987* (NSW) s 98.

- the protection from liability of people who perform an action for the “purposes of executing [the] Act” if “done in good faith and with reasonable care”³⁸
- the offence of obstructing a person exercising functions under the Act³⁹
- the offence of falsely representing to be an employee of the Tribunal⁴⁰
- the offence of making false or misleading statements⁴¹
- proceedings for offences under the Act⁴²
- procedural matters,⁴³ and
- making regulations.⁴⁴

14.32 Our recommendations relating to the disclosure of information⁴⁵ and the use of search warrants⁴⁶ are set out at Recommendation 14.3 and Recommendation 17.1 respectively.

The offences of obstruction and making false or misleading statements

14.33 A number of participants in our consultations were concerned that people can make false or misleading statements in Tribunal proceedings without any clear consequences.⁴⁷ Submissions also stress the importance of ensuring that the evidence considered by the Tribunal is truthful.⁴⁸ In addition, some people commented that service providers appeared to be deliberately obstructing them in their role as a guardian or person responsible, by preventing them from making decisions and advocating for the person lacking decision-making ability.⁴⁹

14.34 Part 9 of the *Guardianship Act* contains two offences that are relevant to these concerns. The first makes it an offence to “wilfully hinder, obstruct, delay, assault or threaten with violence” a person who is exercising their functions under the *Guardianship Act* (subject to a maximum penalty of 10 penalty units and/or imprisonment for 12 months).⁵⁰ The second makes it an offence for a person to make a statement or furnish information that they know to be “false or misleading in a material particular” when making an application under the *Guardianship Act* or

38. *Guardianship Act 1987* (NSW) s 100.

39. *Guardianship Act 1987* (NSW) s 103.

40. *Guardianship Act 1987* (NSW) s 104.

41. *Guardianship Act 1987* (NSW) s 105.

42. *Guardianship Act 1987* (NSW) s 106.

43. *Guardianship Act 1987* (NSW) s 107.

44. *Guardianship Act 1987* (NSW) s 108.

45. *Guardianship Act 1987* (NSW) s 101.

46. *Guardianship Act 1987* (NSW) s 102.

47. *Confidential Consultation CGAC01*; Peak Bodies, *Consultation GAC11*; Parramatta Public Consultation, *Consultation GAC18*.

48. M and M Watts, *Preliminary Submission PGA01*, 1-2; J Walker, *Preliminary Submission PGA30*, 6; J Walker, *Submission GA99*, 6, 23.

49. *Confidential Preliminary Submission PGA06*; *Confidential Submission GA132*; Peak Bodies, *Consultation GAC11*; Sydney Public Consultation, *Consultation GAC16*; Parramatta Public Consultation, *Consultation GAC18*.

50. *Guardianship Act 1987* (NSW) s 103.

responding to an inquiry by a Tribunal employee (subject to a maximum penalty of 5 penalty units).⁵¹ We recommend similar provisions for the new Act.

- 14.35 We could not find any evidence of convictions for these offences. To address the concerns raised, we have made two recommendations elsewhere in this Report:
- The Public Advocate should have the power to refer relevant complaints to law enforcement and prosecution authorities.⁵²
 - The Tribunal should consider whether its procedures need to be changed to ensure parties to a Tribunal hearing give their evidence under oath or on affirmation where the Tribunal considers there are material factual matters in dispute.⁵³

Provisions that should not be included in the new Act

14.8 Proof of certain matters and evidential certificates

Provisions to the effect of s 107 and s 107A of the *Guardianship Act 1987* (NSW) concerning proof of certain matters and evidential certificates should not be included in the new Act.

Proof of certain matters

- 14.36 Section 107 of the *Guardianship Act* provides that, in the absence of proof to the contrary, the authority of the Minister, the Secretary, the Public Guardian or an employee of the Tribunal shall be presumed. It also provides that a statement in any application is prima facie evidence of the facts claimed if it relates to the effect of an instrument under the Act, the Minister for Family and Community Service's authority to an employee to act for the purposes of the Act, a person being under guardianship on a specified date, or a person being an employee of the Tribunal on a specified date.
- 14.37 This section has its origins in the *Child Welfare Act 1939* (NSW);⁵⁴ portions of which applied to adults before the *Guardianship Act*. As such, it only applies to situations involving guardianship and makes no mention of people who might be under financial management, the NSW Trustee and Guardian ("NSW Trustee") or employees of the NSW Trustee.
- 14.38 This section is unnecessary. The need to facilitate proof of certain matters does not arise in the Tribunal, since it "is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice".⁵⁵ We recommend against provisions of this kind.

51. *Guardianship Act 1987* (NSW) s 105.

52. Recommendation 13.1(3)(i)

53. Recommendation 16.6.

54. *Child Welfare Act 1939* (NSW) s 125.

55. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).

Evidentiary certificates

- 14.39 Section 107A of the *Guardianship Act* allows an evidentiary certificate issued by the Public Guardian to be used to prove whether or not a person was under a guardianship order at a particular time. This provision was introduced in 2002, in the context of reforms to allow the then Administrative Decisions Tribunal to hear appeals from the then Guardianship Tribunal.⁵⁶ The previous arrangement had been that such appeals were heard by the Supreme Court.
- 14.40 Since 2013, the work of the Guardianship Tribunal has been carried out by the NSW Civil and Administrative Tribunal (“NCAT”) with appeals heard by an Appeal Panel of NCAT. An Appeal Panel will have access to records of orders through internal processes. There no longer appears to be a need for the Public Guardian to issue a formal certificate to provide evidence to an Appeal Panel that a person was or was not subject to an order of the Guardianship Division on a specified date.
- 14.41 In other cases, we cannot see why a duly sealed order of the Tribunal would not be sufficient proof that a person was or was not under guardianship at a particular date.
- 14.42 In our view, this section no longer serves any clear function and should not form part of the new Act.
- 14.43 There is a similar provision in the *Trustee and Guardian Act 2009* (NSW),⁵⁷ and the matters we raise above may also be relevant. We have not made a specific recommendation about this provision, in light of its broader application to all people under the management of the NSW Trustee.

Registration

14.9 No mandatory registration

- (1) The new Act should not require registration of any agreement or order.
- (2) The new Act should provide that:
- (a) an enduring representation agreement that includes financial functions may be registered as though it were a power of attorney under s 51 or s 52 of the *Powers of Attorney Act 2003* (NSW)
 - (b) it does not limit a requirement or option for registration for the purposes of any other Act.
- 14.44 We recommend that the new Act should not require registration of any agreement or order. However, in doing so, we do not wish to affect any existing provisions that require or allow registration.
- 14.45 There is currently no general system of registration for guardianship or financial management arrangements in NSW. The *Powers of Attorney Act 2003* (NSW) provides that a document that creates or revokes a power of attorney can be

56. *Guardianship and Protected Estates Legislation Amendment Act 2002* (NSW) sch 1 [9].

57. *NSW Trustee and Guardian Act 2009* (NSW) s 122.

registered with the Registrar General.⁵⁸ However, it is only necessary to register a power of attorney document that concerns dealings with land (such as a sale, mortgage, or lease of more than 3 years).⁵⁹

- 14.46 There are different approaches to registration across jurisdictions. In Tasmania and the NT, all enduring powers of attorney must be registered before an attorney can exercise their powers,⁶⁰ while in other Australian jurisdictions, registration is required if the attorney is going to undertake transactions involving land.⁶¹ However, in England and Wales and Scotland, all enduring documents must be registered.⁶² In Ireland, enduring documents must be registered when they come into effect (in other words, when the person making the appointment loses decision-making ability).⁶³
- 14.47 The issue of whether there should be a register of decision-making arrangements has generated considerable debate across Australia.⁶⁴ Some inquiries have recommended such a system⁶⁵ while others have opposed it.⁶⁶
- 14.48 Although many submissions support a registration system, opinions are split on whether registration should be optional or mandatory, and several suggest that a register would not adequately address cases of misuse or false representation. Privacy is also a concern.

Suggested benefits of registration

- 14.49 A majority of the submissions on this question support some form of registration.⁶⁷ Some of the suggested benefits of a registration scheme are as follows:

-
58. *Powers of Attorney Act 2003* (NSW) s 51.
59. *Powers of Attorney Act 2003* (NSW) s 52. See also NSW, Land and Property Information, *Powers of Attorney in New South Wales*, Fact Sheet (2016) 6.
60. *Powers of Attorney Act 2000* (Tas) s 4; *Powers of Attorney Act* (NT) s 13(c).
61. See, eg, *Powers of Attorney Act 1998* (Qld) s 60; *Powers of Attorney Act 2006* (ACT) s 29(1); *Land Titles Act 1925* (ACT) s 130.
62. *Mental Capacity Act 2005* (UK) s 9(2)(b), sch 1 pt 2; *Adults with Incapacity (Scotland) Act 2000* (Scotland) s 19.
63. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 68, s 70, s 72.
64. 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].
65. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) rec 5-3; 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.
66. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [16.257]-[16.259] rec 16-15.
67. L Barry, *Preliminary Submission PGA02*, 4; Supreme Court of NSW, *Preliminary Submission PGA15*, 5; Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 5-6; Mental Health Coordinating Council, *Submission GA87*, 3; Seniors Rights Service, *Submission GA90A*, 5-6; B Pace, *Submission GA92*, 23-24; J Walker, *Submission GA99*, 18; Multicultural NSW, *Submission GA102*, 3; P Deane, *Submission GA103*, 5; Cognitive Decline Partnership Centre, *Submission GA112A*, 5; Medical Insurance Group Australia, *Submission GA115*, 14-15; Mental Health Carers NSW Inc, *Submission GA121A*, 1; NSW Department of Family and Community Services, *Submission GA125*, 2, 8-9. See also NSW Civil and Administrative Tribunal Guardianship Division, *Consultation GAC01*; Legal Roundtable, *Consultation GAC21*; NCOSS Conference - Wagga Wagga, *Consultation GAC29*.

- It would promote recognition of decision-making and support arrangements and encourage the use of personal appointments.⁶⁸
- It would allow third parties (for example banks, hospitals) to verify representatives and supporters.⁶⁹
- It would reduce the risk of fraud and abuse. The Australian Law Reform Commission (“ALRC”)’s recent *Elder Abuse* report suggested that, based on experience in the United Kingdom, a register may reduce instances of fraud by assisting to confirm the existence of enduring agreements, the identity of representatives and that the person’s lack of decision-making ability has been verified.⁷⁰ It has also been suggested that a register could facilitate greater oversight of personal appointments.⁷¹
- It would support recognition of appointments across Australian states and territories.⁷²

Our conclusions

- 14.50 The findings of other law reform bodies and the comments in submissions suggest that a registration scheme would have to be mandatory and inexpensive in order to be effective.⁷³ In our view, there is significant doubt that a mandatory system is desirable and that it can be inexpensive.

Mandatory or voluntary registration

- 14.51 Among the submissions that support some form of registration, there was no consensus on whether registration should be mandatory or voluntary. Some submissions indicate that the registration of agreements or advance care directives should be voluntary.⁷⁴ This is because the added costs and complexity of a mandatory registration scheme could discourage people from entering into formal

-
68. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.4]-[16.5].
69. Seniors Rights Service, *Submission GA90A*, 5; Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.118]-[5.119]; Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) [16.207], [16.210].
70. See, eg, Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.124]-[5.125].
71. L Barry, *Preliminary Submission PGA02*, 4; NCOSS Conference – Wagga Wagga, *Consultation GAC29*; T Ryan, B B Arnold and W Bonython, “Protecting the Rights of Those with Dementia through Mandatory Registration of Enduring Powers? A Comparative Analysis” (2015) 36 *Adelaide Law Review* 355, 362-363; Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.99]-[5.102].
72. In the case of a national register: see Seniors Rights Service, *Submission GA90A*, 5; B Pace, *Submission GA92*, 3; Cognitive Decline Partnership Centre, *Submission GA112A*, 5; Mental Health Carers NSW Inc, *Submission GA121A*, 6; NSW Department of Family and Community Services, *Submission GA125*, 8; Seniors Rights Service, *Submission GA90C*, 6.
73. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.99], [5.101]; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.92], [16.96]; Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) [16.259]; Legal Aid NSW, *Submission GA109A*, 6; NSW Trustee and Guardian, *Submission GA117*, 5-6..
74. Mental Health Coordinating Council, *Submission GA87*, 3; Medical Insurance Group Australia, *Submission GA115*, 14.

decision-making or support arrangements.⁷⁵ Privacy concerns could also deter people from entering into agreements if they are required to place personal details on a searchable register.⁷⁶ For example, in the United Kingdom any member of the public can search the register for a fee and may receive information including personal information about the appointor, the nature of the representative's powers and their contact details.⁷⁷

- 14.52 A mandatory scheme could also create the potential for uncertainty if agreements are only valid upon registration.⁷⁸ For example, the VLRC recommended that any act performed under a personal appointment should have no legal effect until the document is registered, subject to some exceptions.⁷⁹ Enduring representatives would also be required to notify the Registrar when a registered appointment is “activated” — in other words, when the person loses decision-making ability.⁸⁰ This would not easily accommodate circumstances where a person's decision-making ability fluctuates.
- 14.53 The Law Society of NSW notes that “specific procedures to be followed ... would be impractical” and “a system of registration ... would cause uncertainty, particularly in circumstances involving delay between the execution and registration of the document”.⁸¹
- 14.54 On the other hand, some of the key benefits of registration may be lost if the scheme is voluntary.⁸² For example, third parties could not rely on a register to verify representatives and supporters if only a small cohort of these agreements is registered or if agreements are not updated each time they change. Several submissions note that registration would need to be mandatory in order to achieve some of the claimed benefits of registration,⁸³ and both the VLRC and the ALRC recommended mandatory registration of appointments.⁸⁴
- 14.55 If either approach was adopted, there would need to be effective education and awareness campaigns to encourage uptake, without pressuring people to formalise arrangements that are already working well. For example, it is currently possible for

75. Supreme Court of NSW, *Preliminary Submission PGA15*, 5; Legal Aid NSW, *Submission GA109A*, 6; NSW Trustee and Guardian, *Submission GA117*, 5-6; Law Society of NSW, *Submission GA118A*, 5; Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.137]; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [16.259].

76. NSW Trustee and Guardian, *Submission GA117*, 6.

77. T Ryan, B B Arnold and W Bonython, “Protecting the Rights of Those With Dementia Through Mandatory Registration of Enduring Powers? A Comparative Analysis” (2015) 36 *Adelaide Law Review* 355, 371.

78. Law Society of NSW, *Submission GA118A*, 5; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.40]-[16.44].

79. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.96]-[16.97].

80. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.123]-[16.125].

81. Law Society of NSW, *Submission GA118A*, 2.

82. Legal Aid NSW, *Submission GA109A*, 6; NSW Trustee and Guardian, *Submission GA117*, 6; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.96].

83. Seniors Rights Service, *Submission GA90A*, 2, 5, 6; B Pace, *Submission GA92*, 8, 24; Mental Health Carers NSW Inc, *Submission GA121A*, 1, 6; NSW Trustee and Guardian, *Submission GA117*, 6; Legal Aid NSW, *Submission GA109A*, 6.

84. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.96] rec 261; Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) rec 5-3.

people to upload advance care directives to a voluntary online register called My Health Record.⁸⁵ However, there is evidence that “awareness of eHealth systems is low in the disability sector” and more generally “a relatively low proportion of both patients and healthcare providers” are using My Health Record.⁸⁶ This suggests that many people are not aware that the scheme exists, or have chosen not to use it.

14.56 Importantly, several submissions acknowledge that a register is not an effective safeguard against abuse.⁸⁷ For example, 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 for the decision that needs to be made, or
- prevent an enduring guardian, guardian or financial manager from exercising their authority inappropriately.

Costs

14.57 There are also unanswered questions around the cost of maintaining a register and associated fees to use and access it.⁸⁸

14.58 In its *Elder Abuse* report, the ALRC commented that for an online register of enduring documents to be successful, the cost of registering documents and accessing the register “must be kept low”.⁸⁹

14.59 The VLRC also commented that “even nominal fees are likely to discourage people from making and registering personal appointments”.⁹⁰

14.60 Some submissions suggest a registration scheme should be free to use.⁹¹ However, we did not receive any detailed suggestions around how this could be achieved in practice.

14.61 Establishing and monitoring a register may have significant resourcing implications. The Tribunal notes that requiring it to act as a registration body would have

85. See *My Health Records Rule 2016* (Cth) cl 19, cl 32A.

86. B Hemsley and others, “Legal, Ethical, and Rights Issues in the Adoption and Use of the ‘My Health Record’ by People with Communication Disability in Australia” (2017) *Journal of Intellectual and Developmental Disability* 1, 2.

87. Mental Health Coordinating Council, *Submission GA87*, 3; Legal Aid NSW, *Submission GA109A*, 6; NSW Trustee and Guardian, *Submission GA117*, 6; Law Society of NSW, *Submission GA118A*, 5. See also Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) [16.257].

88. NSW Trustee and Guardian, *Submission GA117*, 5-6; Law Society of NSW, *Submission GA118A*, 5; Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) [16.222]-[16.223].

89. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [5.152].

90. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [16.119].

91. Seniors Rights Service, *Submission GA90A*, 6; J Walker, *Submission GA99*, 18.

“significant resource implications”.⁹² Legal Aid NSW agrees that this would “add to the workload of the Tribunal”.⁹³

Other approaches

- 14.62 Other approaches may promote greater recognition of representatives and supporters without the problems associated with a registration scheme.
- 14.63 For example, we have recommended formal support agreements and orders, which will allow supporters to prove that they are authorised to assist the person and/or collect information on their behalf.⁹⁴ We have also recommended that third parties be protected from liability where they rely on support and representation orders or agreements in good faith and without knowing the order/agreement does not have effect.⁹⁵
- 14.64 Another option we considered was to require that enduring guardians either notify or obtain a declaration from the Tribunal before they can exercise their powers. While this could provide a formal safeguard, any additional role for the Tribunal will have resource implications and could complicate the personal appointment process. Some submissions reject the idea that the effect of enduring personal appointments should depend on a Tribunal decision.⁹⁶
- 14.65 It is possible that some of the concerns underlying calls for registration can only be addressed by promoting awareness and understanding of decision-making arrangements in the community — particularly in financial institutions and hospitals.⁹⁷

Remedies against representatives

- 14.66 In our Draft Proposals, we suggested giving the District Court jurisdiction to hear cases against supporters or representatives who abuse or misuse their power, or fail to perform their duties, and award damages or equitable relief.
- 14.67 The aim was to provide an option for litigation that is more convenient and cheaper than commencing proceedings in the Supreme Court.
- 14.68 The current Supreme Court process can be expensive and complex. In its *Elder Abuse* report, the ALRC observed that taking a case to the Supreme Court can be very difficult for older people who have suffered financial abuse:

such actions are lengthy processes that may take many years to be resolved. Where an older person has lost their home and has limited funds, they need

92. NSW Civil and Administrative Tribunal, *Submission GA101A*, 3.

93. See Legal Aid NSW, *Submission GA109A*, 3.

94. See Chapter 7.

95. Recommendation 14.4.

96. B Pace, *Submission GA92*, 4-5; J Walker, *Submission GA99*, 6; NSW Trustee and Guardian, *Submission GA117*, 2; Legal Aid NSW, *Submission GA109A*, 3.

97. T Ryan, B B Arnold and W Bonython, “Protecting the Rights of Those with Dementia through Mandatory Registration of Enduring Powers? A Comparative Analysis” (2015) 36 *Adelaide Law Review* 355, 386.

access to a remedy quickly. In addition, older people may be put off by the prospect of lengthy and protracted civil litigation.⁹⁸

- 14.69 The ALRC recommended that state and territory civil and administrative tribunals have “the power to order any remedy available to the Supreme Court” in relation to any cause of action or claim for equitable relief that is available against a substitute decision-maker for abuse, or misuse of power, or failure to perform their duties.⁹⁹ Some submissions likewise suggest that a Division of NCAT should have the power to make compensation orders against guardians and financial managers.¹⁰⁰
- 14.70 Currently, in Victoria, both the Supreme Court and the Victorian Civil and Administrative Tribunal (“VCAT”) can make compensation orders where an attorney contravenes the *Powers of Attorney Act 2014* (Vic) and causes the principal to suffer loss.¹⁰¹ Similar provisions are proposed in the Guardianship and Administration Bill 2018 (Vic) for guardians and administrators.¹⁰² Similarly, in Queensland, the tribunal or a court may order a guardian or administrator to pay compensation for loss caused by their failure to comply with the *Guardianship and Administration Act 2000* (Qld).¹⁰³

The Tribunal option

- 14.71 Proposals to give NCAT powers to grant compensation or other relief appear to assume that it will exercise them as the Assisted Decision-Making Division (currently the Guardianship Division) at the same time as it is considering or reviewing orders for people in need of decision-making assistance. Such proposals are attractive because they appear to provide a quick and simple means of redress for people who have been wronged by their representatives. However, there are a number of problems with having NCAT determine such questions, chiefly related to the powers of NCAT in general and the composition of the members of the Tribunal in particular.
- 14.72 First, the Tribunal functions as a specialised, quasi-judicial body whose duty is to act in the interests of people in need of decision-making assistance. When the Tribunal sits as a panel of three members, the panel consists of a lawyer, a person with a professional qualification, and a person with a community based qualification. In cases where the Tribunal sits as a single member, for example, when conducting reviews, it is possible that a member without legal qualifications will sit alone. It would be unusual that any Tribunal member would have experience in determining compensation or property entitlements, or applying equitable remedies. The VLRC’s recommendation that gave rise to the existing Victorian provisions was premised on the idea that VCAT had sufficient judicial expertise to determine such matters,

98. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [6.24].

99. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) rec 5-2. See also Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 303-304.

100. Seniors Rights Service, *Submission GA90A*, 9; Legal Aid NSW, *Submission GA109A*, 9; NSW Council for Intellectual Disability, *Submission GA113*, 5; NSW Trustee and Guardian, *Submission GA117*, 8; Mental Health Carers NSW Inc, *Submission GA121A*, 9.

101. *Powers of Attorney Act 2014* (Vic) s 77.

102. Guardianship and Administration Bill 2018 (Vic) cl 181.

103. *Guardianship and Administration Act 2000* (Qld) s 59.

having a President who is a Supreme Court judge and having deputy presidents who are County Court judges.¹⁰⁴ However, in order to achieve the convenience of dealing with questions of compensation and relief at the same time as making decisions about people in need of decision-making assistance, division members with judicial experience would need to sit in all cases.

- 14.73 Second, NCAT is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.¹⁰⁵ If it were to make decisions about compensation and relief, it might be expected to observe the rules of evidence as NCAT currently must do when it exercises its enforcement jurisdiction and in proceedings where it imposes a civil penalty.¹⁰⁶ This would potentially require a separate hearing where the rules of evidence are applied.
- 14.74 Third, NCAT has limited power to enforce orders. Currently, when NCAT orders that an amount be paid, a certificate of a registrar to that effect must be filed in the registry of a court that has jurisdiction for that amount in order to operate as a judgment.¹⁰⁷ For example, in order to enforce money orders in the Consumer and Commercial Division of NCAT, a person must take a copy of the order to the Local Court, or to the District Court (if the amount awarded exceeds \$100,000).¹⁰⁸
- 14.75 Finally, the NSW system is distinct from that in Victoria where VCAT was considered a “more attractive jurisdiction” because it supervises financial representatives.¹⁰⁹ In NSW, the NSW Trustee carries out this role and should continue to carry out this role under our recommendations.
- 14.76 In our view, the solution to the perceived problem of timely and effective remedies does not lie in giving broad powers to a body whose role and composition are not designed to deal with such matters.

The District Court option

- 14.77 In proposing the District Court as a reasonable alternative to the expense and inconvenience of a Supreme Court action, we took into account that:
- the District Court already has some jurisdiction in equity proceedings, including for any equitable claim up to the court’s jurisdictional limit of \$750,000¹¹⁰
 - the District Court operates in a number of suburban and regional locations, allowing parties to resolve their matters without the trouble or expense of travelling to Sydney or engaging lawyers who have Supreme Court practices, and
 - the filing fees for the originating process are lower in the District Court than they are in the Supreme Court.¹¹¹

104. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [18.66].

105. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).

106. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(3).

107. *Civil and Administrative Tribunal Act 2013* (NSW) s 78(1)-(3).

108. NSW Civil and Administrative Tribunal, *Enforcing Orders*, Fact Sheet (2015) 1.

109. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [18.62].

110. *District Court Act 1973* (NSW) s 4 definition of “jurisdictional limit”, s 134.

- 14.78 Submissions note that the District Court does not often deal with equitable matters and the costs involved in District Court proceedings are still relatively high.¹¹² There will always be cases where the Supreme Court is the most appropriate jurisdiction, especially in larger and more complex matters. We note that the Victorian models give both the Supreme Court and VCAT the power to act and allow for matters to be transferred to the Supreme Court.¹¹³
- 14.79 It is also worth noting that both the District and Local Courts can already enforce a person's rights in smaller, less complex matters without the need for them to go to the Supreme Court. For example, the District Court has jurisdiction in relation to civil actions and equitable claims up to the court's jurisdictional limit of \$750,000.¹¹⁴ Additionally, the Local Court has jurisdiction in relation to money claims and recovery of detained goods up to the court's jurisdictional limit of \$100,000 in its General Division and \$10,000 in its Small Claims Division.¹¹⁵
- 14.80 We note that these provisions and any other possible solutions will be ineffective in cases where the money or property in question has been dissipated or is untraceable.
- 14.81 For these reasons, we are not recommending any changes to the current avenues for seeking remedies against representatives.

111. See *Civil Procedure Regulation 2017* (NSW) sch 1 pt 1 item 1, sch 1 pt 3 item 1.

112. NSW Trustee and Guardian, *Submission GA140*, 12; NSW Bar Association, *Submission GA160*, 6.

113. Guardianship and Administration Bill 2018 (Vic) cl 185; *Powers of Attorney Act 2014* (Vic) s 80. See also Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [18.66].

114. See, eg, *District Court Act 1973* (NSW) s 44, s 134(1)(h).

115. *Local Court Act 2007* (NSW) s 29, s 30.

15. The Supreme Court

In brief

The recommendations in this Chapter preserve the Supreme Court's inherent protective jurisdiction, and consolidate and align limited and uncertain provisions in the *Guardianship Act* to clarify what should happen when the Tribunal and the Supreme Court make orders or receive applications about the same matters.

Supreme Court's inherent protective jurisdiction	242
Interactions between the Supreme Court and the Tribunal	244
Jurisdiction to make orders	244
Review of representation agreements	245

- 15.1 The Supreme Court of NSW has a range of powers to deal with people who may need its protection. These powers come from the Court's inherent protective jurisdiction, and through various Acts including the *Guardianship Act 1987* (NSW) ("*Guardianship Act*") and the *NSW Trustee and Guardian Act 2009* (NSW) ("*Trustee and Guardian Act*"). The Court also has powers to review administrative decisions made under the *Guardianship Act* and the *Trustee and Guardian Act* and to hear appeals against some decisions of the Guardianship Division of the NSW Civil and Administrative Tribunal ("Tribunal").
- 15.2 Our recommendations preserve the Court's inherent protective jurisdiction. They also consolidate and align the limited and uncertain provisions in the *Guardianship Act* to clarify what should happen when the Tribunal and the Supreme Court make orders or receive applications about the same matters.

Supreme Court's inherent protective jurisdiction

15.1 Supreme Court's inherent protective jurisdiction

The new Act should state that it does not limit the Supreme Court's inherent protective jurisdiction, including its *parens patriae* jurisdiction.

- 15.3 This recommendation proposes an express provision that preserves the Supreme Court's inherent protective jurisdiction.
- 15.4 The Supreme Court has the power to make decisions in the best interests of people in need of the Court's protection.¹ This power, referred to as the Court's inherent protective (or *parens patriae*) jurisdiction, exists in the background of all guardianship matters, in addition to powers given to the Court under the *Guardianship Act*.

1. Derived from *New South Wales Act 1823* (Imp), the Third Charter of Justice, and the *Australian Courts Act 1828* (Imp); preserved and reinforced by *Supreme Court Act 1970* (NSW) s 22, s 23; *A v A* [2015] NSWSC 1778 [43].

- 15.5 It has been stated that the Supreme Court’s protective jurisdiction “is directed to administration of the affairs of a person in need of protection, without strife in the simplest and least expensive way”.² In exercising its protective jurisdiction, the Court is not bound by the technical rules of evidence, although it must have due regard to considerations of good practice and procedural fairness.³
- 15.6 The protective jurisdiction is unaffected by subsequent statutes, unless expressly overridden.⁴ The *Guardianship Act* states that part 3, part 4 and part 4A do not limit the Court’s jurisdiction “with respect to the guardianship of persons”.⁵ However, these provisions apply only to three parts of the Act and appear to be narrower than provisions in other NSW Acts. For example, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides that “[n]othing in this Act limits the jurisdiction of the Supreme Court”.⁶
- 15.7 The Court’s protective jurisdiction is not usually invoked in the ordinary run of guardianship cases. The provisions and procedures in the *Guardianship Act* and related statutes have generally been sufficient to protect a person’s interests. The Court has previously noted that it would be highly inappropriate to challenge decisions of a specialist tribunal under the guise of invoking its protective jurisdiction, and has observed that it would only exercise its jurisdiction “in the most extraordinary circumstances” to set aside or affect such a decision.⁷
- 15.8 Similarly, the Victorian Supreme Court has observed that the fact that its inherent jurisdiction exists “provides no logical justification for bypassing” Victoria’s guardianship laws and has doubted whether “it should play any current role in the day to day administration of guardianship matters”.⁸
- 15.9 Nonetheless, the Court’s inherent jurisdiction continues to play a useful role, for example, in situations not dealt with by the *Guardianship Act*. The Queensland Law Reform Commission described the inherent protective jurisdiction as an “additional safety net”,⁹ and we note its use in urgent situations where no other forum is immediately available.¹⁰
- 15.10 Other jurisdictions have more comprehensive provisions in their guardianship laws that expressly preserve the relevant Supreme Court’s inherent jurisdiction. For example, the *Guardianship and Administration Act* (2000) (Qld) provides that it “does not affect the court’s inherent jurisdiction, including its *parens patriae* jurisdiction”.¹¹

2. *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 [5]; *M v M* [2013] NSWSC 1495 [50](f).

3. *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 [7]–[14].

4. *Re WM* (1903) 3 SR (NSW) 552. See also *Northridge v Central Sydney Area Health Service* [2000] NSWSC 1241, 50 NSWLR 549 [15]–[19]; *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 [12].

5. *Guardianship Act 1987* (NSW) s 8, s 31, s 31G.

6. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 247.

7. *Re Victoria* [2002] NSWSC 647 [31].

8. *Re BWV; Ex parte Gardner* [2003] VSC 173, 7 VR 487 [99]–[100].

9. Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for People with a Decision-making Disability*, Report 49 (1996) 452.

10. See, eg, *Re Elizabeth* [2007] NSWSC 729 [17].

11. *Guardianship and Administration Act 2000* (Qld) s 240.

- 15.11 The Supreme Court states in its preliminary submission to this review that “nothing should be done to limit the [Court’s] inherent, protective jurisdiction”.¹² Only a few other submissions deal with the issue. Some consider the current situation satisfactory.¹³ One prefers the Queensland formulation.¹⁴ Another proposes abolishing the Supreme Court’s inherent jurisdiction, preferring it to be exercised by a multi-member expert tribunal.¹⁵
- 15.12 We expect that in exercising its inherent jurisdiction, the Supreme Court would be guided by our recommended general principles, which include the requirement to give effect, where possible, to a person’s will and preferences, and the statutory objects of the new Assisted Decision-Making Act (“the new Act”).¹⁶

Interactions between the Supreme Court and the Tribunal

Jurisdiction to make orders

15.2 Jurisdiction to make orders

The new Act should provide:

- (1) The Tribunal does not have jurisdiction to make a support order or representation order where:
 - (a) an application in respect of anything that can be the subject of the support order or representation order is before the Supreme Court, or
 - (b) an appeal resulting from such an application is before a court.
- (2) Where the Supreme Court has made an order, a subsequent representation order or support order by the Tribunal in respect of the same subject matter will take effect only in accordance with an order of the Supreme Court. The original Supreme Court order then ceases to have effect with respect to that subject matter.
- (3) Where the Tribunal has made a representation order or support order, a subsequent order by the Supreme Court will cause the Tribunal order to have no effect to the extent that it covers the same subject matter.
- (4) The Supreme Court may:
 - (a) on application by the Tribunal, or by a party in relation to any proceedings before the Tribunal, order that the proceedings before the Tribunal be transferred to the Supreme Court;
 - (b) on its own motion, or on application, order that any proceedings before it be transferred to the Tribunal to be dealt with under the new Act.

12. Supreme Court of NSW, *Preliminary Submission PGA15*, 4.

13. See, eg, Seniors Rights Service, *Submission GA90C*, 10; Medical Insurance Group Australia, *Submission GA115*, 16; Law Society of NSW, *Submission GA118B*, 8.

14. NSW Trustee and Guardian, *Submission GA117*, 14-15.

15. NSW Council for Intellectual Disability, *Submission GA113*, 17.

16. Recommendation 5.1, 5.2.

- 15.13 The *Guardianship Act* sets out what happens in those cases when the Supreme Court is asked to exercise its protective jurisdiction to make an order and the Tribunal is already hearing an application for a guardianship or financial management order or has already made an order. There are separate provisions on this topic for guardianship orders¹⁷ and financial management orders¹⁸ and the provisions do not align. For example, there is no provision for situations where the Tribunal has been asked to make a financial management order and a relevant Supreme Court order already exists. Some submissions particularly note the absence of such a provision.¹⁹ Under our recommendations, the Tribunal could make a representation order covering financial decision-making where a relevant Supreme Court order already exists, subject to the approval of the Supreme Court.
- 15.14 Recommendation 15.2 sets out all of the circumstances contemplated by the existing provisions and applies them to representation orders (which effectively combine guardianship and financial management orders) and, where relevant, to support orders. Some adjustments have been made to the language to accommodate the fact that orders may be limited to certain kinds of decision-making (for example, financial decision-making or healthcare decision-making).
- 15.15 The different parts of the recommendation are consistent with provisions in the *Guardianship Act 1987* (NSW) that currently apply to either financial management orders²⁰ or guardianship orders.²¹ Where necessary, they have been adjusted to align better with current practice.²² Recommendation 15.2(4) applies to all relevant applications that may be made to the Tribunal or the Supreme Court, not just applications for representation orders or support orders. Recommendation 15.3(4), below, deals with the referral between the Supreme Court and the Tribunal of applications for review of representation agreements.

Review of representation agreements

15.3 Review of representation agreements

The new Act should provide:

- (1) The Supreme Court may review part or all of an enduring representation agreement (or purported agreement), provided that an application for review of the same matter is not before the Tribunal.
- (2) The Tribunal may review part or all of an enduring representation agreement (or purported agreement), provided that an application for review of the same matter is not before the Supreme Court.
- (3) An application for review may be withdrawn with the leave of:

17. *Guardianship Act 1987* (NSW) s 15(1)(b), s 22, s 23(b).

18. *Guardianship Act 1987* (NSW) s 25K(1), s 25L.

19. Seniors Rights Service, *Submission GAC90C*, 10; NSW Trustee and Guardian, *Submission GA117*, 15.

20. *Guardianship Act 1987* (NSW) s 25K(1), s 25L.

21. *Guardianship Act 1987* (NSW) s 15(1)(b), s 22, s 23(b).

22. See, eg, *Civil Procedure Act 2005* (NSW) s 140(1).

- (a) the Supreme Court (if the application was made to the Supreme Court), or
 - (b) the Tribunal (if the application was made to the Tribunal).
- (4) If an application for review is made:
- (a) to the Supreme Court, the Supreme Court may (on its own motion or on request) refer the application to the Tribunal;
 - (b) to the Tribunal, the Tribunal may (on its own motion or on request) refer the application to the Supreme Court.
- 15.16 Recommendation 15.3 aims to ensure that review proceedings for the same matter are not pursued at the same time in both the Supreme Court and the Tribunal. It also provides a way to refer applications for review between the two jurisdictions. It covers enduring representation agreements. Recommendations about the powers of the Tribunal to review orders are set out in Chapter 9.²³
- 15.17 The recommendation fills gaps in the existing law, which makes no such express provision for the interaction between Supreme Court and Tribunal reviews of enduring guardianships²⁴ and makes only limited provision for the interaction between the Supreme Court and Tribunal when reviewing powers of attorney.²⁵ It is broadly consistent with current provisions for managing appeals to the Supreme Court and the Appeal Panel of the Tribunal.²⁶

23. Recommendation 9.16.

24. Under *Guardianship Act 1987* (NSW) s 6J, s 6L.

25. *Powers of Attorney Act 2003* (NSW) s 26, s 27.

26. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 12, formerly under *Guardianship Act 1987* (NSW) s 67. See also *EB v Guardianship Tribunal* [2011] NSWSC 767 [181]; *P v D1* [2011] NSWSC 257 [53].

16. Tribunal composition and procedures

In brief

We recommend ways of improving and clarifying Tribunal procedures, including changes designed to clarify when a young person may be a party to proceedings, and to ensure that a person who is the subject of an application is entitled to representation without leave.

Overview of Tribunal procedures	249
Our recommendations.....	250
Composition of Assisted Decision-Making Division and Appeal Panels.....	250
Parties to proceedings	251
Parties to a hearing.....	251
People under 18.....	252
The process for appointing parents as representatives.....	253
Notice and service requirements.....	255
Representation at a hearing.....	256
Legal representation for people the subject of an application	256
Representation and capacity	258
Separate representatives.....	259
Giving evidence under oath or on affirmation.....	260
Privacy	261
Access to documents.....	262
Efficient finalisation of proceedings.....	262
Appeals.....	264

- 16.1 The recommendations in this Chapter relate to the procedures and composition of a division of the NSW Civil and Administrative Tribunal (“NCAT”). For consistency with the approach of the new Assisted Decision-Making Act (“the new Act”), we have recommended that this division, currently called the “Guardianship Division”, be named the “Assisted Decision-Making Division”.¹ When we refer to this division, we generally use the term “Tribunal”. Some of the procedures we consider in this Chapter apply generally to all divisions of NCAT, while some apply only to the current Guardianship Division. Therefore, we use “NCAT” when we talk about provisions that also apply to NCAT’s other divisions.
- 16.2 Our recommendations seek to strike the right balance between safeguarding people who are the subject of proceedings and their right to procedural fairness, while ensuring that the Tribunal remains a forum for the quick, inexpensive and informal resolution of disputes.²

1. Recommendation 4.3(1).

2. *Civil and Administrative Tribunal Act 2013* (NSW) s 3(d), s 36(1).

Overview of Tribunal procedures

- 16.3 NCAT differs in important ways from courts in NSW.³ NCAT's purpose is to "facilitate the just, quick and cheap resolution of the real issues in the proceedings".⁴ To achieve this, it must act with as little formality as possible,⁵ while ensuring that it follows the rules of natural justice.⁶
- 16.4 Natural justice (also known as "procedural fairness") does not have a precise definition. However, it requires NCAT to meet an appropriate standard of fair procedure and to make decisions with "fairness and detachment".⁷
- 16.5 NCAT has considerable flexibility to decide its own procedures. It is free to make inquiries and inform itself as it sees fit.⁸ Unlike a court, NCAT can call and question any witness itself.⁹ NCAT is not required to follow the rules of evidence.¹⁰ However, it *is* required to assist people to engage meaningfully with its processes, for example, by ensuring that the parties understand what is happening, have a reasonable chance to be heard and have their views considered.¹¹ If asked, NCAT must explain any aspect of its procedure or any decisions or ruling it makes to the parties.¹²
- 16.6 The Guardianship Division of NCAT has several practices that make it accessible, quick and inexpensive, including:
- using video and teleconferencing for parties who cannot attend in person¹³
 - not charging a fee for applications under the *Guardianship Act 1987* (NSW) ("*Guardianship Act*")
 - holding hearings in aged care facilities and hospitals, where appropriate,¹⁴ and

3. G Appleby, A Reilly and L Grenfell, *Australian Public Law* (Oxford University Press, 2nd ed, 2014) 224.

4. *Civil and Administrative Tribunal Act 2013* (NSW) s 36(1).

5. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(4).

6. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).

7. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 366-367; *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, 211 CLR 476 [25].

8. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).

9. *Civil and Administrative Tribunal Act 2013* (NSW) s 46(1).

10. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).

11. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(5)(a), s 38(5)(c).

12. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(5)(b).

13. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2016-2017* (2017) 22.

14. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2014-2015* (2015) 40.

- holding hearings outside the Sydney central business district, including in regional areas.¹⁵

Our recommendations

Composition of Assisted Decision-Making Division and Appeal Panels

16.1 Composition of the Assisted Decision-Making Division and Appeal Panels

The composition of the Assisted Decision-Making Division and Appeal Panels of the NSW Civil and Administrative Tribunal should be determined by the provisions of Schedule 6 of the *Civil and Administrative Tribunal Act 2013* (NSW).

- 16.7 We recommend that the composition of the Assisted Decision-Making Division and Appeal Panels of NCAT should continue to be determined in accordance with Schedule 6 of the *Civil and Administrative Tribunal Act 2013* (NSW) (“NCAT Act”), which requires:
- three members for all “substantive” proceedings, including a lawyer, a relevant professional, and a community member¹⁶
 - one or two members in the Assisted Decision-Making Division for reviews of existing orders, consent for major or minor medical treatment, or the recognition of an interstate order,¹⁷ and
 - three members for appeals, including two lawyers (except where making an ancillary or interlocutory decision, in which case only one member is required).¹⁸
- 16.8 We considered whether the size of panels should be reduced for appeals and substantive decisions to reduce the length and cost of hearings. We have concluded that the current provisions are an important safeguard for protecting a person’s rights. In particular, the composition of a three-person panel for substantive decisions reflects the potential gravity of a Tribunal order, which may curtail the rights and freedoms of the subject person.
- 16.9 A number of submissions support maintaining the current composition of the three member panels for substantive decisions.¹⁹ However, some submissions raise concerns about the expertise of particular Tribunal members in some cases.²⁰ In

15. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2016-2017* (2017) 22.

16. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 1 definition of a “substantive Division function”, cl 1(2)(a)-(b), cl 4(1).

17. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 4(2).

18. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 13, s 13(5)-(6).

19. See, eg, NSW Council for Intellectual Disability, *Submission GA113*, 8; NSW Trustee and Guardian, *Submission GA117*, 9; NSW Disability Network Forum, *Submission GA126*, 12; NSW Public Guardian, *Submission GA108*, 8.

20. Department of Rehabilitation Medicine St Vincent’s Hospital, *Preliminary Submission PGA28*, 2; J Barham, *Preliminary Submission PGA27*, 2.

our view, the current requirements allow for an appropriate mix of experience and skill on the panel. This generally ensures the Tribunal understands expert evidence so it can discharge its fact-finding role and identify any gaps in the evidence.

- 16.10 Multi-member panels can draw on the collective qualities of members with “expertise in a range of areas including medicine, psychiatry, psychology, social work and pharmacology”.²¹ The Australian Law Reform Commission (“ALRC”) suggests that this approach enables members who have specific experience with people with disability or cognitive impairment to engage actively with participants.²²
- 16.11 NCAT supports retaining three member panels for substantive decisions in the Assisted Decision-Making Division and in appeals. In preliminary consultations, NCAT told us that the mix of expertise on the three member panels reduces the need for expert evidence, and is a likely factor in maintaining a low rate of appeal (currently below 1%).²³

Parties to proceedings

16.2 Parties to proceedings

The new Act should:

- (1) retain the definition of a party to Tribunal proceedings set out under s 3F of the *Guardianship Act 1987* (NSW) with amendments to reflect the new framework (including the addition of the Public Advocate as a party in all cases).
- (2) expressly provide that a child or young person is a party to proceedings before the Tribunal if:
 - (i) they are the person to whom the application relates
 - (ii) they are the primary carer of the person to whom the application relates, or
 - (iii) they would be directly affected by any support or representation order.

Parties to a hearing

- 16.12 We recommend that the new Act provide that the following people are parties to Tribunal proceedings:

- the applicant
- the person to whom the application relates
- the husband, wife or de facto partner (if their relationship is close and continuing) of the person to whom the application relates

21. NSW Civil and Administrative Tribunal, *Submission GA101A*, 9.

22. Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (2017) [10.43].

23. NSW Civil and Administrative Tribunal, *Preliminary Consultation PCGA4*.

- any enduring representative, representative, supporter or equivalent of the person to whom the application relates (where relevant)
 - the carer of the person to whom the application relates
 - the Public Representative and (where relevant) NSW Trustee
 - the Public Advocate, and
 - anyone else that the Tribunal “joins” as a party.²⁴
- 16.13 This effectively retains the definition of “party” in the *Guardianship Act* with the addition of the Public Advocate; an entity we propose in Chapter 13. We consider that joining the Public Advocate as a party to Tribunal proceedings is consistent with the advocacy and investigative functions we have recommended.²⁵
- 16.14 Our recommendation is consistent with the broad discretion granted to the Tribunal in the *Guardianship Act* to decide who can be joined as a party. The Tribunal may join anyone it thinks should be a party to a hearing, on its own motion or following an application. The Tribunal might think someone should be a party because they have a concern for the welfare of the subject person, or for any other reason.²⁶ However, the Tribunal has a long-standing practice of placing “a sensible limit on the number of parties”.²⁷
- 16.15 Legal Aid NSW submits that the definition of “party” should include adult children of the person to whom the application relates.²⁸ The NSW Council for Intellectual Disability suggests that the definition include former carers where they have a close and continuing relationship with the subject person.²⁹ Our recommended definition grants the Tribunal discretion to join these people as parties if appropriate.

People under 18

- 16.16 We also recommend that the new Act explicitly state that people under 18 are considered parties to Tribunal proceedings in specific situations.
- 16.17 Currently the *Guardianship Act* allows people under 18 to be parties where they are the subject of the hearing.³⁰ However, it is not clear whether they can also be joined as a party when they are the primary carer of the person to whom the application relates. This is because a person under 18 is considered to be “under legal incapacity”,³¹ placing doubt on their ability to make an application under the *Guardianship Act* or be joined to proceedings without a separate representative or a lawyer.

24. See *Guardianship Act 1987* (NSW) s 3F, s 3 definition of “spouse”.

25. Recommendation 13.1.

26. *Civil and Administrative Tribunal Act 2013* (NSW) s 44(1), sch 6 cl 7(1).

27. DNS [2016] NSWCATGD 6 [22]. See also [26]-[27].

28. Legal Aid NSW, *Submission GA109A*, 12.

29. NSW Council for Intellectual Disability, *Submission GA113*, 8.

30. *Guardianship Act 1987* (NSW) s 3F(2)(b).

31. *Civil Procedure Act 2005* (NSW) s 3(1) definition of “person under legal incapacity”. See also *Minors (Property and Contracts) Act 1970* (NSW) s 11.

- 16.18 The Mental Health Coordinating Council raises concerns that the Tribunal does not take into account the views of people under 18, and often fails to acknowledge that there might be a person under 18 acting as a primary carer.³² They suggest that in cases of family conflict, the voices of people under 18 are often drowned out by those of adults.³³
- 16.19 Submissions support including the views of people under 18 where the order is likely to have an impact on them.³⁴ Submissions also largely support people under 18 having standing if the application relates to them, or if they are the primary carer for the subject person.³⁵
- 16.20 Our recommendation is also consistent with the United Nations *Convention on the Rights of Persons with Disabilities* (“UN Convention”) and the United Nations *Convention on the Rights of the Child*, which require that the law respects the right of children capable of forming their own views to have the opportunity to be heard in proceedings affecting them.³⁶

The process for appointing parents as representatives

16.3 The appointment process for representatives who are parents

Under the new Act, the appointment process for parents of people who do not have decision-making ability, where this has been the case since before the person turned 18, should be the same process as the appointment process for other representatives.

- 16.21 We considered the possibility of a streamlined appointment process for parents of people who have not had decision-making ability since before they were 18. However, we ultimately decided that the appointment process should be the same for everyone.
- 16.22 Until a person turns 18, their parents can make decisions for them. However, once they turn 18, they are legally an adult with the right to make their own decisions. For young people with lifelong profound intellectual disability and complex needs, turning 18 does not alter their decision-making ability, but it can prevent parents who have been making decisions on their behalf from continuing to do so.
- 16.23 In consultations and submissions, we heard from a number of people, including parents of people with profound intellectual disability, who expressed a desire for a simpler, less burdensome process for parents to be appointed as representatives for their children.³⁷ The Tribunal process was described by parents “as haphazard,

32. Mental Health Coordinating Council, *Preliminary Submission PGA08*, 7.

33. Information provided by Mental Health Coordinating Council (14 December 2016).

34. Seniors Rights Service, *Submission GA90C*, 4; Legal Aid NSW, *Submission GA109C*, 5; Carers NSW, *Submission GA111*, 3.

35. Senior Rights Service, *Submission GA90C*, 4; Legal Aid NSW, *Submission GA109C*, 5.

36. *Convention on the Rights of the Child*, 1577 UNTS 3 (entered into force 2 September 1990) art 12. See also *Convention on the Rights of People with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 3 General Principles.

37. Confidential, *Preliminary Submission PGA06*; M Carter, *Preliminary Submission PGA37*, 1, 3; Seniors Rights Service, *Submission GA90C*, 4; P Deane, *Submission GA103*, 2-3; Carers NSW, *Submission GA111*, 3; NSW Department of Family and Community Services, *Submission*

- ad-hoc and likely [to be] stressful³⁸ as well as onerous and undignified.³⁹ Some parents of children with profound intellectual disability and complex needs report problems with government agencies, service providers and financial institutions once their child turns 18.⁴⁰ They face difficulties in opening or operating a bank account, dealing with Centrelink, and accessing information on behalf of their child.
- 16.24 We acknowledge that parents of children with lifelong profound intellectual disability and complex needs fall into a special category. A parent cannot be appointed as their child's enduring guardian or power of attorney due to their child's lifelong disability. In many cases, their children need help making decisions on a daily basis and there is no prospect of them gaining or regaining decision-making ability.
- 16.25 Various submissions support a streamlined application process, consistent with the Guardianship and Administration Bill 2014 (Vic).⁴¹ Under this proposal, a parent can be appointed as their child's guardian or administrator without the need for a hearing as soon as the child turns 18, where the Tribunal was satisfied that:
- the parent has been — and is still — making decisions on the person's behalf on a regular basis
 - supporting medical evidence shows that the person does not have decision-making capacity because of a disability
 - their decision-making capacity is unlikely to improve, and
 - their views cannot be ascertained.⁴²
- 16.26 Ultimately, the Victorian government did not adopt this special arrangement and has not included it in the subsequent Guardianship and Administration Bill 2018 (Vic) currently before the Victorian Parliament.
- 16.27 We consider that, on balance, and in light of the UN *Convention*,⁴³ the safeguards that the current procedures provide should apply in all cases. In particular, we are concerned that a decision without a hearing, as proposed in the 2014 Victorian Bill, may deny the subject person's rights to procedural fairness, as well as their right to express their will and preferences.⁴⁴ Additionally, a hearing places the Tribunal in the best position to ensure that it makes the least restrictive order.⁴⁵ This conclusion is consistent with submissions that generally oppose the Tribunal making decisions

GA125, 31-32; V Browne, *Preliminary Submission PGA293-4*; Our Voice Australia, *Preliminary Submission PGA38*, 4-5; Mental Health Commission of NSW, *Submission GA116C*, 7..

38. P Deane, *Submission GA103*, 3.

39. Families and Carers Roundtable, *Consultation GAC10*.

40. Confidential, *Preliminary Submission PGA6*. See also N Brown, *Preliminary Submission PGA42*, 3-4.

41. Legal Aid NSW, *Submission GA109C*, 5; Law Society of NSW, *Submission GA118B*, 5; Guardianship and Administration Bill 2014 (Vic) cl 35-37. See also NSW Department of Family and Community Services, *Submission GA125*, 31-32.

42. See Victoria, *Parliamentary Debates*, Legislative Assembly, 21 August 2014, 2941-2942; Guardianship and Administration Bill 2014 (Vic) cl 35(1)-(2), cl 36(1)(b)(i), cl 41 (lapsed).

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

44. NSW Civil and Administrative Tribunal, *Submission GA110*, 5.

45. NSW Public Guardian, *Submission GA108*, 16. See also NSW Council for Intellectual Disability, *Submission GA113*, 17.

“on the papers”.⁴⁶ In consultations, the Tribunal observed that decisions “on the papers” may result in substantial prejudice to one or more parties because it is difficult for the Tribunal to assess in advance without seeing the parties, the capacity of the parties to provide effective written submissions and other material.⁴⁷

- 16.28 While we acknowledge that it may be difficult in some cases to ascertain such a child’s will and preferences, we consider that it is fundamental that the Tribunal attempt to do so, in accordance with the UN *Convention* and the general principles of the new Act.⁴⁸
- 16.29 While some people may find a hearing to be intimidating and inconvenient, a decision without a hearing is not necessarily speedier or simpler for the parties. Requiring parties to submit written submissions can be difficult and time consuming. Parties must be given the opportunity and time to respond in writing to the written submissions of the other parties. NCAT notes that where parties are not represented, and there are material facts in dispute, “the time taken for the Tribunal to decide an application [on the papers] and prepare written reasons is usually greater than if an oral hearing were conducted”.⁴⁹

Notice and service requirements

16.4 Notice and service requirements

The new Act should provide that:

- (1) As soon as practicable after making a Tribunal application, the applicant must serve a copy of the application on each of the parties.
- (2) Before conducting a hearing into the application, the Tribunal must notify each party of the date, time and place of the hearing.
- (3) Failing to serve a copy of the application or a notice does not invalidate the Tribunal’s decision on the application.
- (4) The Tribunal should consider whether it needs to change its procedures to ensure that its registry staff:
 - (a) take reasonable efforts to determine and notify people with a genuine interest in the person who is the subject of a hearing
 - (b) have regard to any family violence considerations evident on the face of the available materials when deciding whether to notify family members, and
 - (c) advise all people notified of a hearing of the outcome of the hearing.

- 16.30 Recommendations 16.4(1)-(3) are consistent with provisions in the *Guardianship Act*.⁵⁰

46. Mental Health Commission of NSW, *Submission GA116C*, 7; NSW Public Guardian, *Submission GA108*, 16-17.

47. NCAT Guardianship Division, *Consultation GAC03*.

48. Recommendation 5.2.

49. NSW Civil and Administrative Tribunal, *Submission GA101A*, 10-11.

50. *Guardianship Act 1987* (NSW) s 25(4)-(5), s 25I(4)-(5), s 25N(6)-(7).

- 16.31 We also recommend that the Tribunal consider whether it needs to change its internal procedures to ensure that registry staff make reasonable efforts to notify all people with a genuine interest in the welfare of the person who is the subject of an application, about the application as well as the outcome of the hearing. Not all people who are notified of the application and its outcome will be parties to the proceeding.⁵¹
- 16.32 This recommendation responds to concerns about cases where family members responsible for instigating abuse against a person have succeeded in becoming the person's guardian without the knowledge of other members of the family.⁵² It seeks to ensure that all people who have a legitimate relationship with the person have the opportunity to put their arguments to the Tribunal.
- 16.33 We also heard stories about the inclusion of parties who have a history of family violence towards the subject person.⁵³ When deciding who should be notified, the Registry should have regard to family violence considerations evident on the face of available materials.
- 16.34 The Victorian Law Reform Commission ("VLRC") recommends that a wider range of people receive notice of the hearing date, including the nearest known relative of the person.⁵⁴ Some submissions support all children of the person being notified of the application,⁵⁵ or any person who has a "legitimate relationship" with them.⁵⁶ However, we accept that the registry's resources to locate and notify all people with a legitimate interest in the proceeding is limited, and overzealous attempts to notify relevant parties may result in delays.⁵⁷

Representation at a hearing

16.5 Representation of parties

The new Act should provide:

- (1) A legal representative of the person who is the subject of an application before the Tribunal may appear without seeking leave.
- (2) Separate representatives must act according to the general principles set out in **Recommendation 5.2**.

Legal representation for people the subject of an application

- 16.35 We consider that the person to whom an application relates should be able to have their legal representative — if they have one — appear before the Tribunal without seeking the Tribunal's leave. This is different to the current law, which requires all

51. See discussion of parties above at [16.12]-[16.20].

52. Mental Health Carers NSW Inc, *Submission GA121A*, 13.

53. Family and Carers Roundtable, *Consultation GAC10*; NCOSS Conference - Wagga Wagga, *Consultation GAC29*.

54. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 354.

55. Seniors Rights Service, *Submission GA90A*, 14; Legal Aid NSW, *Submission GA109A*, 12.

56. Mental Health Carers NSW Inc, *Submission GA121A*, 13.

57. NSW Trustee and Guardian, *Submission GA117*, 10.

parties to obtain the Tribunal's leave to be legally represented. We consider that leave for the representatives of other parties to appear before the Tribunal should remain subject to the Tribunal's discretion.

- 16.36 Various submissions support the legal representative of the subject person being entitled to appear without the Tribunal's leave.⁵⁸ Legal Aid NSW in particular strongly supports this, given the potentially serious consequences of a representation order, including the loss of autonomy.⁵⁹
- 16.37 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. In South Australia, the person to whom a case relates is entitled to free legal representation in all reviews and appeals.⁶⁰ The VLRC recommended that parties to guardianship hearings should have a right to legal representation.⁶¹
- 16.38 Our recommendation does not propose a *right* to legal representation for the person to whom the application relates. It merely provides that they need not seek leave from the Tribunal to have their representative appear. This is an important distinction. A right to legal representation would require the State to provide representation to people who cannot afford it. We do, however, note that the subject person may receive a government-funded lawyer as a separate representative in certain circumstances.⁶²
- 16.39 In our view, allowing legal representatives to appear without leave is unlikely to result in a significantly higher number of legal representatives before the Tribunal. We are confident the Tribunal will remain an informal forum for the resolution of most matters.
- 16.40 Recent Law and Justice Foundation of NSW research has observed that where one party is represented in Tribunal proceedings and another is not, representation can create a power imbalance between parties and "introduce an unnecessarily adversarial element to the resolution of matters". However, it observes that lack of representation can also be problematic; for example, in cases "where a power imbalance already exists given the types of parties involved".⁶³
- 16.41 The Tribunal should retain its discretion to grant leave to the other parties to be represented where it considers that they may be disadvantaged in the

58. Cognitive Decline Partnership Centre, *Submission GA112A*, 8; Mental Health Coordinating Council, *Submission GA87*, 8; Legal Aid NSW, *Submission GA163*, 14; Law Society of NSW, *Submission GA118A*, 12; R Lewis, *Submission GA129*, 9; NSW Council for Intellectual Disability, *Submission GA144*, 3; Law Society of NSW, *Submission GA164*, 4, 55.

59. Legal Aid NSW, *Submission GA109A*, 12..

60. *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 10 May 2018).

61. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 372; Queensland Law Reform Commission.

62. See [16.47]-[16.51].

63. C Mirrlees-Black, *Data Insights in Civil Justice: NSW Civil and Administrative Tribunal Administrative and Equal Opportunity Division and Occupational Division (NCAT Part 3)* (Law and Justice Foundation of NSW, 2016) 27.

proceedings.⁶⁴ Parties should continue to be able to seek the assistance of a lawyer for advice or preparation of documents before a hearing,⁶⁵ and to have their lawyer attend a hearing to support them as a “McKenzie Friend”, without Tribunal leave.⁶⁶

Representation and capacity

- 16.42 Legally representing a person who is the subject of an application is a complex task. This is because a lawyer is obliged to act on the “lawful, proper and competent instructions” of their client,⁶⁷ but whether a person is “competent” to make decisions is often a key issue in such proceedings. This can make it hard for a lawyer to know how to act.
- 16.43 The UN *Convention* recognises the right of people with disability to equal recognition before the law. This means that people with disability “must be recognized as persons ... with equal standing in courts and tribunals”, should “have access to legal representation on an equal basis”⁶⁸ and should be provided with support to exercise their legal capacity.⁶⁹
- 16.44 Recommendation 6.2 proposes a statutory presumption that a person has decision-making ability. This necessarily includes a presumption that the person has capacity to instruct a lawyer. Presumption of capacity is consistent with the common law⁷⁰ and the NDIS Quality and Safeguarding Framework,⁷¹ and is supported by submissions.⁷²
- 16.45 The ALRC recommends focusing “on whether, and to what extent, a person can be supported to play their role in the justice system, rather than on whether they have capacity to play such a role at all”.⁷³ The ALRC notes that under this model, the focus should shift from “the challenges facing a person with disability to the

64. See *Civil and Administrative Tribunal Act 2013* (NSW) s 45(1)(b).

65. NSW Civil and Administrative Tribunal, *Guardianship Division Guideline: Representation* (August 2017) [9].

66. A “McKenzie Friend” is a lawyer who provides support but not representation: NSW Civil and Administrative Tribunal, *Guardianship Division Guideline: Representation* (August 2017) [9]. See also *McKenzie v McKenzie* [1971] P 33.

67. *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (NSW) r 8.

68. United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 13: Access to Justice* (2014) [38].

69. United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12 Equal recognition Before the Law* (2014) [16].

70. *Borthwick v Carruthers* (1787) 1 Term Reports 648, 99 ER 1300;; *L v Human Rights and Equal Opportunity Commission* [2006] FCAFC 114, 233 ALR 432 [26]; *Re Erdogan* [2012] VSC 256, 36 VR 579 [49]. See also *Re Cumming* (1852) 1 De G M & G 537, 557, 42 ER 660, 668.

71. Australia, Department of Social Services, *NDIS Quality and Safeguarding Framework* (2016)11-12.

72. NSW Council for Intellectual Disability, *Submission GA113*, 10; NSW Disability Network Forum, *Submission GA126*, 13; Legal Aid NSW, *Submission GA109A*, 14. See also Cognitive Decline Partnership Centre, *Submission GA112A*, 8; Law Society of NSW, *Submission GA118A*, 13; Mental Health Carers NSW Inc, *Submission GA121A*, 14.

73. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [7.4].

supports that should be provided to enable them to make decisions and exercise their legal capacity”.⁷⁴

- 16.46 We encourage the Tribunal to continue to use its general power to inform itself,⁷⁵ and to call expert advice, about assistive technology and supports that may help a person to instruct a lawyer. Where a person cannot be supported to instruct a legal representative, a “separate representative” can be appointed by the Tribunal — and often is.

Separate representatives

- 16.47 Where a person cannot be supported to instruct a legal representative, the Tribunal may order that a party be “separately represented”.⁷⁶ Under the current law, a separate representative might be appointed for a subject person 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.⁷⁷

- 16.48 A separate representative is independent and does not act on the instructions of the person they 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. They can also seek the views of other people involved in the case.⁷⁸

- 16.49 Recommendation 16.5(2) is that separate representatives be required to act in accordance with the new Act’s general principles set out in Recommendation 5.2. This recommendation changes the role of the separate representative from one that makes submissions about a person’s “welfare and interests”⁷⁹ to one that seeks to give effect to the person’s subjective will and preferences, and acts in accordance with the other new general principles. This is broadly consistent with the ALRC’s recommendations regarding “litigation representatives” in Commonwealth cases.⁸⁰

74. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [3.23] quoting Office of the Public Advocate (Qld), *Submission 05*.

75. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).

76. *Civil and Administrative Tribunal Act 2013* (NSW) s 45(4)(c).

77. NSW Civil and Administrative Tribunal, *Guardianship Division Guideline: Representation* (August 2017) [43].

78. NSW Civil and Administrative Tribunal, *Guardianship Division Guideline: Representation* (August 2017) [45]-[48].

79. NSW Civil and Administrative Tribunal, *Guardianship Division Guideline: Representation* (August 2017) [48].

80. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 7-4.

- 16.50 Legal Aid NSW is notified when an order for separate representation is made.⁸¹ While there is no entitlement to legal aid for separate representation,⁸² Legal Aid NSW appoints a separate representative in most cases.⁸³ This appointment is not means tested and the question of funding is controversial. Legal Aid NSW suggests that s 60 of the *NCAT Act* should be amended to require the Tribunal to order Legal Aid be paid from the person's estate where this would not cause hardship.⁸⁴ Some other submissions support this.⁸⁵
- 16.51 However, on balance, we consider that it would be improper to charge people for a representative that they did not necessarily request,⁸⁶ and who does not always act on their instructions. The provision of these services by Legal Aid NSW is an important safeguard in Tribunal proceedings for some people. Therefore, we would like to see Legal Aid NSW provided with adequate funding to support this important function.

Giving evidence under oath or on affirmation

16.6 Requirement to give evidence under oath or on affirmation

The Tribunal should consider whether it needs to change its procedures to ensure parties to a Tribunal hearing give their evidence under oath or on affirmation where the Tribunal considers that there are material facts in dispute.

- 16.52 Recommendation 16.6 seeks to ensure that parties have confidence in the Tribunal process when it comes to the evidence the Tribunal hears and accepts. While parties have an obligation not to give false information or statements to the Tribunal,⁸⁷ a number of people have expressed concern about false evidence being given in hearings, and the difficulty in proving that a party gave false evidence.⁸⁸
- 16.53 Some people are concerned that the Tribunal is not bound by the rules of evidence, and suggest that the Tribunal should either be made to observe the rules of evidence, or require parties to provide evidence under oath, by way of affidavit or statutory declaration.⁸⁹
- 16.54 We agree with submissions that a requirement that the Tribunal hear evidence under oath in all circumstances would make Tribunal proceedings unnecessarily

81. Legal Aid NSW, *Preliminary Submission PGA13*, 7.

82. *Civil and Administrative Tribunal Act 2013* (NSW) s 45(5).

83. Legal Aid NSW, *Preliminary Submission PGA13*, 7.

84. Legal Aid NSW, *Submission GA109A*, 14.

85. Mental Health Coordinating Council, *Submission GA87*, 9-10; Mental Health Carers NSW Inc, *Submission GA121A*, 14.

86. NSW Council for Intellectual Disability, *Submission GA113*, 10.

87. *Civil and Administrative Tribunal Act 2013* (NSW) s 71.

88. Family and Carers Roundtable, *Consultation GAC10*; J Walker, *Preliminary Submission PGA30*, 3-4. See also K Jefferson, *Preliminary Submission PGA12*, 3-4.

89. Family and Carers Roundtable, *Consultation GAC10*.

rigid and formal.⁹⁰ It is important that the Tribunal retain a certain level of flexibility so that proceedings remain quick, informal and cost effective.

- 16.55 We note that NCAT has a duty to rely on evidence that is “credible and tend[s] to prove the facts it claims to support”,⁹¹ and must base its findings on “logically probative material”.⁹² We also note that under the *Guardianship Act* it is an offence for a person to make a statement or furnish information that they know to be “false or misleading in a material particular” when making an application or responding to an inquiry by a Tribunal employee.⁹³ We are recommending that this offence be retained.⁹⁴ For these reasons, we think that there is adequate protection for parties without a requirement in the new Act that the Tribunal hear certain evidence under oath or affirmation.
- 16.56 Nevertheless, we recommend that the Tribunal considers whether it needs to change its procedures to ensure that where there are material facts in dispute, the Tribunal exercises its discretion to require evidence to be given under oath or affirmation.

Privacy

- 16.57 We consider that the current law sufficiently protects the privacy of parties by allowing the Tribunal to:
- hold hearings in private where necessary⁹⁵
 - prohibit the publication of the identities of participants without the Tribunal’s permission,⁹⁶ and
 - prohibit or limit the publication or broadcast of any report of a case.⁹⁷
- 16.58 The current law also prohibits the disclosure of information obtained in connection with the administration or execution of the *Guardianship Act* without the consent of the person from whom the information was obtained, or other lawful excuse.⁹⁸ Submissions consider that these provisions sufficiently protect the privacy of the parties.⁹⁹

90. NSW Council for Intellectual Disability, *Submission GA144*, 3; Law Society of NSW, *Submission GA164*, 55.

91. *OLL* [2014] NSWCATGD 40 [79]. See also *R v War Pensions Entitlement Appeal Tribunal; Ex Parte Bott* (1933) 50 CLR 228, 256; *Rodriguez v Telstra Corporation* [2002] FCA 30, 66 ALD 579 [25].

92. *Minister for Immigration and Ethnic Affairs v Pochi* (1981) 149 CLR 139, 141.

93. *Guardianship Act 1987* (NSW) s 105.

94. Recommendation 14.7.

95. *Civil and Administrative Tribunal Act 2013* (NSW) s 49(2).

96. *Civil and Administrative Tribunal Act 2013* (NSW) s 65.

97. *Civil and Administrative Tribunal Act 2013* (NSW) s 64.

98. *Guardianship Act 1987* (NSW) s 101. See also *Civil and Administrative Tribunal Act 2013* (NSW) s 64(1)(d).

99. NSW Civil and Administrative Tribunal, *Submission GA101A*, 12-13; NSW Council for Intellectual Disability, *Submission GA113*, 10.

16.59 NCAT notes that the discretion to hold hearings in private “is exercised sparingly”, but argues that the current non-disclosure provisions, and the Tribunal’s powers to “make non-disclosure orders ... strikes an appropriate balance between the public interest in open justice and the need to protect the personal information of the parties to proceedings”.¹⁰⁰ Several submissions support the current approach.¹⁰¹

Access to documents

16.60 We also consider that the current law sufficiently protects the interests of the parties to proceedings by allowing:

- parties to inspect documents in their case held by the Tribunal registry, and
- a person who is not a party to apply to inspect “public access documents” from a finalised proceeding.¹⁰²

16.61 We heard concerns about:

- the admission of confidential evidence in Tribunal proceedings, especially where a person objects to the admission of that evidence,¹⁰³ and
- the release of medical reports and other personal information about people who cannot consent.¹⁰⁴

16.62 On the other hand, concerns were expressed about the possibility of certain confidential evidence being withheld from the person to whom the application relates.¹⁰⁵

16.63 We consider that such concerns can be addressed through better education about the Tribunal’s discretion in this area, or a practice direction for the Tribunal, rather than by legislation.

Efficient finalisation of proceedings

16.64 We do not consider that any legislative changes are required to support the timely finalisation of Tribunal proceedings. In particular, we do not think introducing a time limit for proceedings is appropriate.

16.65 In 2016-2017, the Guardianship Division finalised 10,628 cases.¹⁰⁶ In a review of the Guardianship Division, the Law and Justice Foundation found that the mean number of days it took to finalise disputes in 2015 were as follows:

100. NSW Civil and Administrative Tribunal, *Submission GA101A*, 11-12.

101. NSW Trustee and Guardian, *Submission GA117*, 10-11; Law Society of NSW, *Submission GA118A*, 13; Mental Health Carers NSW Inc, *Submission GA121A*, 14; Seniors Rights Service, *Submission GA90A*, 16.

102. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(1)-(2), r 42(4)-(5), r 42(8), r 3 definition of “originating document”.

103. Legal Aid NSW, *Submission GA109A*, 15.

104. R Lewis, *Submission GA129*, 10.

105. Legal Aid NSW, *Submission GA109A*, 15.

106. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2016-2017* (2017) 33.

- Guardianship Application: 65 days
 - Financial Management Application: 74 days
 - Procedural matters/directions: 12 days
 - Request for reviews/recognition of orders: 80 days, and
 - Others (consent for/medical dental treatment, clinical trials others): 23 days.¹⁰⁷
- 16.66 Submissions note the risk to the subject person, and in certain cases, the costs to the public health system that can result from delays in finalisation.¹⁰⁸ To keep delays to a minimum, some suggest setting targets for finalising proceedings, which the Tribunal would have the discretion to extend if necessary.¹⁰⁹
- 16.67 On balance, we do not think a time limit is an appropriate solution. First, it could limit procedural fairness. Second, we are satisfied that the Tribunal's current processes are sufficient to ensure the efficient handling of matters.
- 16.68 The Tribunal has a triage system in place, through which the registry considers the person against five risk categories to decide if the application requires an immediate listing. The registry ensures that high-risk urgent matters will be listed for hearing within days.¹¹⁰ In preliminary consultations, the Tribunal informed us that 87% of matters are finalised within 3 months or less.¹¹¹
- 16.69 In addition, we note that NSW Ministry of Health and the Tribunal are engaged in a project that aims to have all guardianship applications from NSW Health inpatient facilities finalised within 21 days.¹¹²
- 16.70 We also considered whether alternative dispute resolution ("ADR") could be used to better effect to reduce delays and the need for lengthy Tribunal hearings. NCAT has the power to use ADR procedures¹¹³ and we understand that it integrates aspects of ADR into its processes already. It piloted a specific ADR program two years ago, but found that it did not improve efficiency. While NCAT can "make orders to give effect to any agreement or arrangement arising out of a mediation session,"¹¹⁴ it must consider the interests of any "vulnerable person" that may be affected by the proceedings when deciding whether to make such orders.¹¹⁵ To decide these

107. M Karras and S A Williams, *Data Insights in Civil Justice: NSW Civil and Administrative Tribunal: Guardianship Division (NCAT Part 4)* (Law and Justice Foundation of NSW, 2016) 17.

108. NSW Health, *Preliminary Submission PGA49*, 8; Seniors Rights Service, *Submission GA90A*, 15. See also Department of Rehabilitation Medicine St Vincent's Hospital, *Preliminary Submission PGA28*, 1.

109. NSW Health, *Preliminary Submission PGA49*, 8-9; Mental Health Carers NSW, *Submission GA121A*, 14; Legal Aid NSW, *Submission GA109A*, 14.

110. NSW Civil and Administrative Tribunal, *Preliminary consultation PCGA4*. See also NSW Civil and Administrative Tribunal, "Application Process" <www.ncat.nsw.gov.au/Pages/guardianship/application_process/application_process.aspx> (retrieved 4 January 2017).

111. NSW Civil and Administrative Tribunal, *Preliminary Consultation PCGA4*.

112. NSW Health, *Preliminary Submission PGA49*, 9.

113. See *Civil and Administrative Tribunal Act 2013* (NSW) s 25, s 37, sch 7 cl 22.

114. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 9(1). See also cl 7.

115. See *Civil and Administrative Tribunal Rules 2014* (NSW) r 37.

interests, NCAT must conduct a hearing in most cases. The Tribunal found that the use of ADR procedures in fact lengthened Tribunal proceedings.¹¹⁶

- 16.71 Therefore we do not recommend that ADR be used as a means of reducing delays. However, we note that we have made recommendations about using ADR for other reasons elsewhere in this report. Recommendation 14.5 proposes using ADR where appropriate to resolve disputes between substitute decision-makers. Recommendation 13.1 proposes that the Public Advocate be able to mediate disputes about assisted decision-making between the parties to a Tribunal application.

Appeals

- 16.72 We do not recommend any changes to the appeal process from a Tribunal decision.
- 16.73 If a party is unhappy with a decision or believes the Tribunal has made a mistake, they may appeal to either an Appeal Panel of NCAT or to the NSW Supreme Court.¹¹⁷ A person cannot appeal the same case to both jurisdictions.¹¹⁸
- 16.74 A party has a right to appeal when they think that NCAT has misunderstood or misapplied the law. If they wish to appeal the decision on any other ground (for example, that NCAT has misunderstood the facts or evidence), they need to seek leave from the Appeal Panel or the Supreme Court.¹¹⁹
- 16.75 The Appeal Panel can make the orders it considers appropriate. For instance, the Appeal Panel might confirm, vary or set aside the original decision.¹²⁰
- 16.76 NCAT also has a separate power to order that a decision be set aside or varied. NCAT can do this if all of the parties consent, or the decision was made in the absence of a party and NCAT is satisfied this meant the party's case was not argued adequately.¹²¹
- 16.77 Several submissions consider the current process adequate¹²² and we agree it should not change.

116. NCAT Guardianship Division, *Consultation GAC03*.

117. See *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 12(1). See also *Supreme Court Act 1970* (NSW) s 69.

118. *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 12(3)-(4).

119. *Civil and Administrative Tribunal Act 2013* (NSW) s 80(2)(b), sch 6 cl 14(1)(b).

120. *Civil and Administrative Tribunal Act 2013* (NSW) s 81(1).

121. *Civil and Administrative Tribunal Regulation 2013* (NSW) cl 9(1).

122. Seniors Rights Service, *Submission GA90A*, 16; NSW Trustee and Guardian, *Submission GA117*, 10; Law Society of NSW, *Submission GA118A*, 13. See also Mental Health Carers NSW Inc, *Submission GA121A*, 14.

17. Powers of entry, search and removal

In brief

We recommend a mechanism for removing people in need of decision-making assistance from premises when they are at immediate risk of unacceptable harm and the harm can be mitigated by removal from those premises.

The existing provisions.....	266
Our recommendations.....	267
Only Tribunal may make an order.....	268
Who may apply for an order.....	268
Who may be protected.....	268
Immediate risk of unacceptable harm	268
Use of force.....	269
Who may implement the order	269
Further action.....	270

- 17.1 In this Chapter, we recommend that the new Assisted Decision-Making Act (“the new Act”) provides a mechanism for removing people in need of decision-making assistance from premises when they are at immediate risk of unacceptable harm and that harm can be mitigated by removal from those premises. We anticipate that this mechanism will be used in very limited circumstances.

The existing provisions

- 17.2 Entry, search and removal powers are contained in sections 11-13 of the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”). Submissions support retaining provisions of this nature because they provide last resort protection for people in need of decision-making assistance.¹ However, we have concluded that the provisions need to be updated to reflect better the approach of the new Act, and to deal better with the circumstances of risk of immediate harm which cannot be dealt with effectively by applying to the Tribunal for an order or even an emergency order.
- 17.3 Section 12 of the *Guardianship Act* allows a Tribunal employee or police officer to apply to an authorised officer² under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (“LEPRA”) for a search warrant to remove a person from premises. That person must be in need of a guardian and being unlawfully detained against his or her will, or “likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken”.

1. Seniors Rights Service, *Submission GA90C*, 7; NSW Department of Family and Community Services, *Submission GA125*, 32-33.

2. An authorised officer is a magistrate, children’s magistrate, registrar of the Local Court, or authorised employee of the Attorney-General’s Department: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3 definition of “authorised officer”.

- 17.4 Section 11 of the *Guardianship Act* grants the Tribunal the power to order the removal of a person, who is subject to a guardianship application, from any premises if it is “appropriate in the circumstances of the case”.
- 17.5 The result of removal under either section is that it is mandatory that the person be placed in the care of the Secretary of the Department of Family and Community Services (“Secretary”).
- 17.6 These provisions had their origins in the *Child Welfare Act 1939* (NSW) (“*Child Welfare Act*”), which applied to some adults in need of protection before the current guardianship system was established.³ The *Child Welfare Act* provisions have since been replaced by a scheme under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which gives the Secretary and police officers powers to remove children and young people from premises without a warrant in cases where they are at immediate risk of serious harm.⁴

Our recommendations

17.1 Powers of entry, search and removal

The new Act should provide:

- (1) If the Tribunal is satisfied, on application or its own motion, that a person in need of, or receiving, decision-making assistance under the new Act, is at immediate risk of unacceptable harm (that can be mitigated by removal from premises), the Tribunal may order that an employee of the Public Advocate or a police officer enter and search premises and remove the person from those premises, using such force as is reasonably necessary in the circumstances.
- (2) A police officer or medical practitioner, or both, may accompany an employee of the Public Advocate executing a search and may take all reasonable steps to assist the employee.
- (3) When a person is removed from premises, the Public Advocate must, if necessary, assist them to find alternative accommodation and may, if necessary, apply to the Tribunal for a support order or representation order.

- 17.7 The aim of our recommendation is to make removal a last resort and to align the relevant provisions with the objectives and principles underlying the new Act.
- 17.8 We do not expect that the Tribunal will need to exercise this power frequently. We understand that the existing powers are rarely used. The Tribunal reports that it is aware of only one case where it issued a removal order under s 11 of the *Guardianship Act*.⁵

3. *Child Welfare Act 1939* (NSW) s 146; NSW, *Parliamentary Debates*, Legislative Assembly, 12 November 1987, 15937-15938.

4. See *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 43-45.

5. NSW Civil and Administrative Tribunal, *Submission GA110*, 7.

Only Tribunal may make an order

- 17.9 We recommend that only the Tribunal be able to make an order for search of premises and removal of a person. The Tribunal is best placed to understand the position of a person in need of decision-making assistance and the options available to them. This may not be the case, for example, with officers under LEPR, especially given the rarity of such applications.
- 17.10 We also considered, but rejected, the option of allowing officers to act without further authority if satisfied that a person is at immediate risk of unacceptable harm. While such action may be appropriate in a protective regime for children, we consider that some procedural safeguards are necessary in the case of adults.
- 17.11 We are satisfied that the Tribunal will be able to respond quickly to authorise action in the urgent circumstances envisaged.

Who may apply for an order

- 17.12 We have not placed any limits on who may apply for an order for search and removal. Given the protective nature of the power, we could not see a good reason for limiting the people who can apply, so long as the order is made in favour of a designated employee of the Public Advocate or a police officer.
- 17.13 Consistent with s 11 of the *Guardianship Act*, the Tribunal should be able to act on its own motion when it becomes aware in the course of an application that circumstances exist that would warrant an order being made.

Who may be protected

- 17.14 We are expanding the group of people who may be protected. The existing provisions offer protection to a very limited group of people — that is, only those who have an application for an order in the Tribunal⁶ and those who are in need of a guardian but do not yet have one.⁷
- 17.15 Both sections appear to assume that a person will not be in need of the search and removal provisions if they have a guardian. Our recommendation recognises that there may be cases where people who are already under a representation order may be subject to abuse or neglect.
- 17.16 In our view, requiring that the person be in need of decision-making assistance or be receiving decision-making assistance provides a sufficient ground for the Tribunal to consider whether the person is then at immediate risk of unacceptable harm (that can be mitigated by removal from premises).

Immediate risk of unacceptable harm

- 17.17 By limiting the operation of the new provisions to circumstances where there is an immediate risk of unacceptable harm (that can be mitigated by removing the person

6. *Guardianship Act 1987* (NSW) s 11(1).

7. *Guardianship Act 1987* (NSW) s 12(1).

from premises), we are aiming to meet the concerns of some stakeholders about the potential for the existing provisions to be used inappropriately.⁸

- 17.18 As we mention above, we do not expect such situations of immediate risk of unacceptable harm to arise frequently.
- 17.19 Circumstances that involve a risk of unacceptable harm that is not immediate, or that cannot be mitigated by removal from premises, can be dealt with by applying for a personal support order, representation order or emergency representation order. In extreme cases, a representative can be granted such powers as are necessary to enforce an order of the Tribunal.⁹ Other circumstances could be dealt with by seeking enforcement of the criminal law or by applying for an apprehended violence order.
- 17.20 In contrast to s 12 of the *Guardianship Act*, we have not included reference to people being held unlawfully against their will. Where there is no immediate risk of unacceptable harm, we consider that the matter can be dealt with by applying to the Tribunal for an order, for example, giving a representative the power to enforce a decision about residence.
- 17.21 Using the standard of “risk of unacceptable harm” aligns with the grounds under the new Act for potentially overriding the will and preferences of a person who does not have decision-making ability.¹⁰

Use of force

- 17.22 We have referred to the use of such force “as is reasonably necessary in the circumstances”. This reflects concerns raised in submissions about the use of force.¹¹ It contrasts with the more permissive “all reasonable force” which is used in the existing provisions.

Who may implement the order

- 17.23 The Tribunal may designate an employee of the Public Advocate or a police officer to act under an order.
- 17.24 In our view, it is not appropriate for an employee of the Tribunal to exercise these powers. The Tribunal advises us that it is not aware that any Tribunal staff have carried out any roles under the current provisions and that it currently does not have any employees who would be capable of executing a search warrant.¹² The Public Guardian submits that its employees are better placed to fulfil this function.¹³ We envisage that the Public Advocate would seek the assistance of police in most, if not all, cases.

8. See, eg, Being, *Submission GA119C*, 5.

9. Recommendation 9.20.

10. Recommendation 5.4(d).

11. See, eg, Seniors Rights Service, *Submission GA90C*, 7-8; Being, *Submission GA119C*, 5-6.

12. NSW Civil and Administrative Tribunal, *Submission GA110*, 7.

13. NSW Public Guardian, *Submission GA108*, 17.

- 17.25 We have retained police officers separately as people who can act under an order, on the basis that employees of the Public Advocate may not be able to cover all regions of the State adequately in emergency situations.
- 17.26 Recommendation 17.1(2) is consistent with the existing provision in s 12(4) of the *Guardianship Act*, which has its origins in the child welfare provisions. It gives any police and medical practitioners recognition (and, therefore, protection from liability) where they are called on to provide assistance under a Tribunal order.
- 17.27 In line with our recommendation to retain the effect of s 100 of the *Guardianship Act*,¹⁴ any person acting under a Tribunal order for search and removal will not be personally subject to any action, liability, claim or demand, so long as they have acted in good faith and with reasonable care for the purposes of executing the Act.

Further action

- 17.28 Section 13 of the *Guardianship Act* places a person who has been removed from premises into the care of the Secretary. The care comes to an end after three days, unless the Secretary applies to the Tribunal for a guardianship order.
- 17.29 With the introduction of the National Disability Insurance Scheme, the NSW Department of Family and Community Services may not be the appropriate agency for ensuring the protection of people in need of decision-making assistance. We consider that the Public Advocate is best placed to commence an application to the Tribunal for a support order or representation order, and to help the person find temporary alternative accommodation through collaboration with other agencies such as Housing NSW and the National Disability Insurance Agency, if such actions are necessary. This forms the basis for Recommendation 17.1(3).

14. Recommendation 14.7.

18. Interaction with mental health legislation

In brief

This Chapter makes recommendations that are designed to ensure the new Act interacts effectively with the *Mental Health Act 2007* (NSW) and the *Mental Health (Forensic Provisions) Act 1990* (NSW).

Our recommendations.....	273
Interaction with the Mental Health Act.....	273
Interaction with the Mental Health (Forensic Provisions) Act.....	274
Decision-making for “mental health treatment”	274
Consent for special healthcare.....	276
Financial arrangements for involuntary patients.....	279

- 18.1 Our recommendations in this Chapter clarify the relationship between the new Assisted Decision-Making Act (“the new Act”), the *Mental Health Act 2007* (NSW) (“*Mental Health Act*”) and the *Mental Health (Forensic Provisions) Act 1990* (NSW) (“*Mental Health (Forensic Provisions) Act*”).
- 18.2 In understanding this exercise, we have been mindful of the principles underlying the new Act. These include giving effect to a person’s will and preferences and acknowledging the fluctuating nature of decision-making ability. Our recommendations seek to promote the autonomy and self-determination of people with mental illness, noting that this is often overlooked when it comes to treatment options.¹ This approach aligns with the United Nations *Convention on the Rights of Persons with Disabilities* as well as the more recent Human Rights Council Resolution on Mental Health and Human Rights, of which Australia was a co-sponsor.²
- 18.3 As an overarching principle, we recommend that orders made under the *Mental Health Act* and *Mental Health (Forensic Provisions) Act* prevail over orders or agreements for supported decision-making or representation. However, orders or agreements for supported decision-making or representation should continue to function in areas that are not the subject of orders under the *Mental Health Act* or *Mental Health (Forensic Provisions) Act*.
- 18.4 We have also designed recommendations to streamline the process for decision-making around mental health treatment and special healthcare. We recommend that the authorised medical officer at the relevant mental health facility should make “mental health treatment” decisions, including for patients who are represented or supported. All other healthcare decisions should be made in accordance with the new Act, including for people subject to orders under the *Mental Health Act* or the *Mental Health (Forensic Provisions) Act*.

1. See B McSherry and Y Maker, “International Human Rights and Mental Health: Challenges for Law and Practice” (2018) 25 *Journal of Law and Medicine* 315, 319.

2. Human Rights Council, *Resolution on Mental Health and Human Rights*, 36th session, Agenda Item 3, A/HRC/36/L.25 (11-29 September 2017).

- 18.5 One of the main issues raised in submissions is the disparity between the process of admission and discharge for voluntary patients under the *Mental Health Act*. In response, we recommend that the *Mental Health Act* be amended so that a represented person cannot be voluntarily admitted by their representative if they object to the admission.
- 18.6 We also recommend removing the Mental Health Review Tribunal's ("MHRT") jurisdiction over the financial matters of a detained patient and empowering the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal ("Tribunal") to deal with these matters.

Our recommendations

Interaction with the Mental Health Act

18.1 Interaction with the Mental Health Act

The new Act should provide:

- (1) An order or agreement for support or representation may be made in respect of a patient or affected person within the meaning of the *Mental Health Act 2007* (NSW).
- (2) An order or agreement for support or representation made under the new Act is not suspended or revoked if the supported or represented person becomes subject to the *Mental Health Act 2007* (NSW).
- (3) If a supported or represented person is, or becomes, subject to orders under the *Mental Health Act 2007* (NSW), any order or agreement for support or representation made under the new Act is only effective to the extent it does not conflict with orders made under the *Mental Health Act 2007* (NSW).

- 18.7 This recommendation clarifies that matters addressed by orders under the *Mental Health Act* prevail over orders or agreements for representation or supported decision-making.
- 18.8 Support and representation should be available to everyone who needs decision-making assistance, including people who are subject to the *Mental Health Act*. However, the *Mental Health Act* serves a different purpose to the new Act and in situations where the *Mental Health Act* applies, the new Act should not interfere with that purpose. This recommendation expressly provides that orders or agreements for supported decision-making or representation continue to function in areas that are not the subject of orders pursuant to the *Mental Health Act*.
- 18.9 There is support for this recommendation in some submissions,³ particularly for extending the applicability of this principle to "affected persons" under the *Mental Health Act*.⁴ We see this recommendation as important for clarifying the applicable

3. National Mental Health Commission, *Submission GA142*, 2; Law Society of NSW, *Submission GA164*, 58.

4. *Mental Health Act 2007* (NSW) s 50 definition of "affected person"; Law Society of NSW, *Submission GA123*, 13.

law in situations where represented or supported people come under the *Mental Health Act*. It should also ensure that people who need decision-making assistance receive the benefits and protections of the new Act where possible.

Interaction with the Mental Health (Forensic Provisions) Act

18.2 Interaction with the Mental Health (Forensic Provisions) Act

The new Act should provide:

- (1) An order or agreement for supported decision-making or representation may be made in respect of a forensic patient or a correctional patient within the meaning of the *Mental Health (Forensic Provisions) Act 1990* (NSW).
- (2) An order or agreement for supported decision-making or representation made under the new Act is not suspended or revoked if the supported or represented person becomes subject to the *Mental Health (Forensic Provisions) Act 1990* (NSW).
- (3) If a supported or represented person is, or becomes, subject to orders under the *Mental Health (Forensic Provisions) Act 1990* (NSW), any order or agreement for supported decision-making or representation made under the new Act is only effective to the extent it does not conflict with orders made under the *Mental Health (Forensic Provisions) Act 1990* (NSW).

- 18.10 Submissions note that the *Guardianship Act* does not make clear the effect of guardianship arrangements on forensic patients.⁵ This recommendation clarifies their effect and is consistent with Recommendation 18.1 above. Submissions support this approach.⁶

Decision-making for “mental health treatment”

18.3 Decision-making for “mental health treatment”

- (1) The new Act should provide:
 - (a) An authorised medical officer (as defined in the *Mental Health Act 2007* (NSW)) may give, or authorise:
 - (i) any mental health treatment which they consider appropriate, to a supported or represented person who is detained in a mental health facility (as defined in the *Mental Health Act 2007* (NSW))
 - (ii) any healthcare that is incidental to mental health treatment.
 - (b) “**Mental health treatment**” is a course of action taken to:
 - (i) remedy a mental illness
 - (ii) diagnose a mental illness

5. See, eg, Mental Health Review Tribunal, *Submission GA89*, 5-6; Legal Aid NSW, *Submission GA109B*, 8; NSW Ministry of Health, *Submission GA130*, 19.

6. See, eg, National Mental Health Commission, *Submission GA142*, 2; Law Society of NSW, *Submission GA164*, 58.

- (iii) alleviate or manage the symptoms or reduce the effects of the illness
 - (iv) reduce the risks posed by or to the person with the mental illness, or
 - (v) monitor and evaluate a person's mental health.
- (c) “**Mental illness**” refers to a mental illness or mental disorder as defined in the *Mental Health Act 2007* (NSW) or a mental condition as defined in the *Mental Health (Forensic Provisions) Act 1990* (NSW).
- (d) Any decisions relating to healthcare other than mental health treatment for supported or represented people are subject to the new Act.
- (2) The *Mental Health Act 2007* (NSW) should be amended to include an identical definition for “mental health treatment”.
- 18.11 Currently the *Mental Health Act* provides that an “authorised medical officer” can give or authorise treatment to an involuntary patient, or person awaiting a mental health inquiry, who is detained in a mental health facility.⁷ Submissions note that it is unclear whether this includes both mental health treatment and other healthcare, causing confusion for some medical practitioners.⁸
- 18.12 Under the current legislation, medical officers can prescribe other healthcare to detained patients without the safeguards that guardianship legislation provides,⁹ such as the requirement to seek consent from a substitute decision-maker. In our view, patients under the *Mental Health Act* or the *Mental Health (Forensic Provisions) Act* should be equally entitled to the benefits and protections afforded under the new Act for other healthcare decisions.
- 18.13 The authorised medical officer of the relevant mental health facility should, therefore, make decisions about “mental health treatment” while all other decision-making, including other healthcare decisions, should follow the provisions of the new Act. This means that, for other healthcare, if the patient lacks decision-making ability for a decision, the person responsible should make the healthcare decision.¹⁰
- 18.14 This recommendation maintains a dual system of regulation for mental health treatment and other healthcare. Submissions are divided about this approach.¹¹ Jurisdictions such as Northern Ireland have a single regime.¹² However, in Australia, it is common to have different types of treatment decisions regulated by separate legislation.¹³ We have decided against a single regime because we

7. *Mental Health Act 2007* (NSW) s 84.

8. Mental Health Review Tribunal, *Submission GA89*, 3; NSW Ministry of Health, *Submission GA130*, 17-18.

9. NSW Ministry of Health, *Submission GA130*, 18.

10. See Chapter 10.

11. See, eg, Mental Health Review Tribunal, *Submission GA89*, 5; Mental Health Coordinating Council, *Submission GA87*, 11.

12. See *Mental Capacity Act 2016* (Northern Ireland).

13. See, eg, *Mental Health Act 2014* (Vic); *Guardianship and Administration Act 1986* (Vic); *Mental Health Act 2016* (Qld); *Guardianship and Administration Act 2000* (Qld); *Mental Health Act 2014* (WA); *Guardianship and Administration Act 1990* (WA); *Mental Health Act 2009* (SA); *Consent to Medical Treatment and Palliative Care Act 1995* (SA); *Guardianship and Administration Act 1993* (SA).

acknowledge that the objectives of the *Mental Health Act* and the *Mental Health (Forensic Provisions) Act* are distinct from the new Act and, in our view, it is not appropriate to interfere with the purposes of mental health legislation as part of this review.

- 18.15 The definition of “mental health treatment” that we are recommending is consistent with definitions used in mental health legislation in other Australian jurisdictions.¹⁴ We have framed it broadly so that it does not unnecessarily restrict clinicians treating patients under the *Mental Health Act* or *Mental Health (Forensic Provisions) Act*. For example, Recommendation 18.3(1)(b)(ii) includes diagnostic tests which clinicians might need to perform on patients when admitted to a facility to determine whether their symptoms are the result of a mental illness. Additionally, Recommendation 18.3(1)(c)(iii) allows the authorised medical officer to treat any physical manifestations of a mental illness. This might include nutritional restoration used to treat patients with eating disorders or melancholic depression who have stopped eating and drinking.
- 18.16 Further, under Recommendation 18.3(1)(a), an authorised medical officer may give treatment to patients that is incidental to treatment for a mental illness, for example, treatment prescribed to manage the side effects of an anti-psychotic medication. This should allow clinicians to manage the physical effects of a mental illness and implement “best practice” strategies to monitor physical health, for example, cardiology and blood testing.¹⁵ We have not defined incidental healthcare as we see this as case-specific and likely to be different for each patient. For example, healthcare that is incidental to treatment for anorexia nervosa might be different to that for schizophrenia. In those circumstances, a legislative definition of incidental healthcare might constrain the effectiveness of this recommendation.
- 18.17 We note that the *Mental Health Act* should be amended to ensure consistency with the new Act and to avoid confusion.

Consent for special healthcare

18.4 Consent for special healthcare

- (1) The provisions in the new Act relating to special healthcare should apply to people subject to the *Mental Health Act 2007* (NSW).
- (2) The *Mental Health Act 2007* (NSW) should refer to the new Act for matters relating to special healthcare and all provisions relating to “special medical treatment” in the *Mental Health Act 2007* (NSW) should be repealed.
- (3) The *Mental Health Act 2007* (NSW) should continue to regulate Electro-Convulsive Treatment.

14. See, eg, *Mental Health Act 2013* (Tas) s 6 definition of “treatment”; *Mental Health Act 2014* (Vic) s 6 definition of “treatment”; *Mental Health Act 2014* (WA) s 4 definition of “treatment”.

15. Studies have linked mental illness and poor physical health, and have also suggested that dietary changes can have a therapeutic impact on mental illnesses such as depression: see, eg, R Coghlan and others, *Duty to Care: Physical Illness in People with Mental Illness* (University of Western Australia, 2001); F N Jacka and others, “A randomised controlled trial of dietary improvement for adults with major depression (the ‘SMILES’ trial)” (2017) 15 *BMC Medicine* 1.

- 18.18 In Chapter 10, we make recommendations about consent to “special healthcare” under the new Act. The recommendations are about what is referred to in the *Guardianship Act* as “special treatment.” The term “special treatment” is defined differently in the *Guardianship Act* and *Mental Health Act*.¹⁶ Broadly, it refers to treatment that is intended or reasonably likely to cause permanent infertility or treatment which does not have substantial support in the medical community.
- 18.19 We recommend a single regime for “special healthcare” to avoid confusion and ensure that the same regulation applies to people under the *Mental Health Act* and people under the new Act. This recommendation is supported in submissions and by the MHRT.¹⁷ For consistency, the *Mental Health Act* should refer to the new Act’s provisions on special healthcare.
- 18.20 In line with this recommendation, the Tribunal should have jurisdiction to make any relevant decisions on special healthcare for people under the *Mental Health Act*.

Voluntary patients

18.5 Voluntary patients

Sections 7 and 8 of the *Mental Health Act 2007* (NSW) should be amended to provide that, in cases where a representative has relevant healthcare and/or personal functions:

- (1) a represented person may be admitted to a mental health facility as a voluntary patient if their representative makes a request to an authorised medical officer and the represented person does not object to this request being made
- (2) a represented person must not be admitted as a voluntary patient if they, or their representative, objects to the admission to the authorised medical officer
- (3) an authorised medical officer must discharge a represented person who has been admitted as a voluntary patient if the represented person requests to be discharged, and
- (4) an authorised medical officer must give notice of the discharge of a voluntary patient who is a represented person to the person’s representative.

- 18.21 The *Mental Health Act* currently enables a guardian to seek voluntary admission of a patient who has chosen to self-discharge from a mental health facility.¹⁸ Admission of a patient in this circumstance may not be truly “voluntary” because it relies on the guardian overriding the patient’s wish to be discharged from the facility.

16. See *Mental Health Act 2007* (NSW) s 98; *Guardianship Act 1987* (NSW) s 33(1); *Guardianship Regulation 2016* (NSW) cl 9, cl 14.

17. National Mental Health Commission, *Submission GA142*, 4; Law Society of NSW, *Submission GA164*, 59; Mental Health Review Tribunal, *Consultation GAC30*.

18. See Mental Health Review Tribunal, *Submission GA89*, 4; Mental Health Commission of NSW, *Submission GA116B*, 7. See also *Mental Health Act 2007* (NSW) s 7, s 8.

- 18.22 The Supreme Court has described this as potentially creating a cycle of admission and readmission for voluntary patients.¹⁹ There is also a tension between whether to give weight to the patient's wishes, the representative's request or the view of the treating doctor, when deciding to admit or discharge a patient. For example, in one case, the MHRT approved discharge on the request of a voluntary patient, despite the treating psychiatrist advising that discharge would result in a serious deterioration in the patient's mental health. The MHRT noted that the patient's "clear lack of consent" to remaining in hospital was a "key matter to take into account"²⁰ and gave it more weight than the view of the treating psychiatrist.
- 18.23 The approach taken by the MHRT in this case corresponds with our recommendation that the will and preference of the person needing decision-making assistance should guide treatment decisions. However, this approach may not always be taken since it is not expressly set out in the legislation. In particular, this may not be the approach where the medical professional is the decision-maker.²¹
- 18.24 To provide clarity, we recommend amending the *Mental Health Act* to allow a represented person to be voluntarily admitted to a mental health facility on the request of their representative unless the represented person objects to the admission. We also recommend that an authorised medical officer discharge a represented person who has been admitted as a voluntary patient if the represented person requests a discharge. Some submissions support such an arrangement.²²
- 18.25 The recommendation clarifies the process of admission and discharge for voluntary patients in two significant ways. First, it provides a mechanism to ensure that voluntary admission of patients at the request of their representatives is truly voluntary by prohibiting admissions where the patient objects. This is important because people with mental illness often lose their self-determination, leading to feelings of incompetence and not being valued.²³ In all cases, representatives should, where possible, engage with the represented person to promote voluntary treatment.
- 18.26 Additionally, in allowing a representative to seek the admission of a represented person, the recommendation acknowledges the role that a representative might have in assisting a represented person to find adequate care and treatment. We have sought to balance this against the fluctuating nature of decision-making ability by leaving it open to a represented person to request discharge from a mental health facility. In those cases, the authorised medical officer must grant the requested discharge but retains the ability to admit the patient involuntarily, if necessary. We acknowledge that in some circumstances, involuntary treatment might be beneficial despite objection by the patient or their family, given that these

19. *White v Local Health Authority* [2015] NSWSC 417 [71].

20. *Peters* [2015] NSW MHRT 1.

21. See M B Simmons and P M Gooding, "Spot the difference: shared decision-making and supported decision-making in mental health" (2017) 34 *Irish Journal of Psychological Medicine* 275, 275.

22. National Mental Health Commission, *Submission GA142*, 4; Law Society of NSW, *Submission GA164*, 4, 59.

23. S Eades, "Impact evaluation of an Independent Mental Health Advocacy (IMHA) service in a high secure hospital: a co-produced survey measuring self-reported changes to patient self-determination" (2018) 22 *Mental Health and Social Inclusion* 53, 55.

attitudes can often change during, and after, treatment.²⁴ It is critical that authorised medical officers and other staff who engage with patients have training to navigate this process, particularly in terms of facilitating patient input and understanding changes in decision-making ability.

- 18.27 Our recommendations would allow a supporter to assist the supported person to make decisions relating to voluntary admission and discharge from a mental health facility.

Financial arrangements for involuntary patients

18.6 Financial arrangements for involuntary patients

- (1) The provisions of the *NSW Trustee and Guardian Act 2009* (NSW) that relate to Mental Health Review Tribunal orders for management of estates of mental health patients (s 43-51 and 88) should be repealed to remove the Mental Health Review Tribunal's jurisdiction over a detained patient's financial affairs.
- (2) The new Act should provide that the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal has the power to revoke any orders relating to financial management that were made by the Mental Health Review Tribunal pursuant to the *NSW Trustee and Guardian Act 2009* (NSW) or by a magistrate conducting a mental health inquiry.

- 18.28 This recommendation removes the MHRT's jurisdiction over the financial affairs of a detained patient and leaves arrangements for financial decision-making to the procedures in the new Act. This is not due to any criticism of the MHRT's handling of such matters but rather to streamline the application of the new Act. In doing so, our recommendation ensures that the Tribunal has the power to revoke any financial management orders made by the MHRT under the current legislation, or by a magistrate conducting a mental health inquiry before the enactment of the current legislation.

- 18.29 We received support for this recommendation, including from the MHRT.²⁵

24. P Westmoreland and others, "Involuntary Treatment of Patients With Life-Threatening Anorexia Nervosa" (2017) 45 *Journal of the American Academy of Psychology and Law* 419, 423.

25. See Mental Health Review Tribunal, *Consultation GAC30*, 3; National Mental Health Commission, *Submission GA142*, 5.

19. Recognising appointments made outside NSW

In brief

This Chapter makes recommendations about the recognition of certain decision-making appointments made outside NSW. It also makes recommendations designed to clarify the effect of recognition and to give the Tribunal new powers to review such appointments.

Recognising appointments made outside NSW	281
Maintaining the distinction between orders and personal appointments	281
Updating the Regulations to recognise substantially similar appointments	282
Personal appointments	282
Court or tribunal orders	282
Effect of recognition	283
Scope of functions recognised	284
Supervision by NSW Trustee at discretion of Tribunal	284
Tribunal's powers of review	284
Tribunal's powers to vary, revoke, replace or confirm after review	285
Tribunal discretion for supervision by NSW Trustee	286
Registration	286

- 19.1 The recommendations in this Chapter address how NSW should deal with formal appointments made in other states and territories of Australia and overseas.
- 19.2 Efficient recognition of appointments made outside NSW assists people who move, travel or hold property in more than one jurisdiction. It ensures that their affairs can be conducted, without the need to appoint a representative in each jurisdiction.
- 19.3 In NSW, the process of recognising an appointment made in another jurisdiction depends on whether it is a personal appointment or an appointment made by order of a court or tribunal:
- Personal appointments made under certain specified laws of other jurisdictions, are automatically recognised as having effect in NSW.¹
 - Representatives appointed by order of a court or tribunal under certain specified laws of other jurisdictions, can apply to the Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”) to have their status formally recognised in NSW.²
- 19.4 Our recommendations maintain this distinction between personal appointments and orders. They also clarify the effect of recognising an interstate or overseas appointment and give the Tribunal new powers to review such appointments.

1. *Powers of Attorney Act 2003* (NSW) s 25; *Guardianship Act 1987* (NSW) s 60; *Guardianship Regulation 2016* (NSW) cl 8.

2. *Guardianship Act 1987* (NSW) s 48A, s 48B; *Guardianship Regulation 2016* (NSW) cl 16.

Recognising appointments made outside NSW

19.1 Recognition of appointments made in outside NSW

- (1) The new Act should:
- (a) provide for automatic recognition of valid enduring personal substitute decision-making and supported decision-making appointments made outside NSW, and
 - (b) allow people appointed with substitute decision-making or supported decision-making functions by a court or tribunal under the law of another jurisdiction, which is listed in the regulations, to apply to the Tribunal to have their status recognised.
- (2) The regulations to the new Act should recognise forms of personal substitute decision-making and supported decision-making appointments and orders made outside of NSW that grant powers substantially similar to those that can be lawfully granted in NSW.

Maintaining the distinction between orders and personal appointments

- 19.5 We recommend that the new Assisted Decision-Making Act (“the new Act”) retain the current approach to recognising appointments made in other jurisdictions, as set out in the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) and *Powers of Attorney Act 2003* (NSW) (“*Powers of Attorney Act*”).
- 19.6 We considered whether the new Act should allow automatic recognition of both orders and personal appointments made in other jurisdictions, but decided against extending automatic recognition to orders of courts or tribunals.
- 19.7 Orders can amount to a significant curtailment of a person’s autonomy, and they are usually made without the person’s consent and at a time where the person does not have decision-making ability. This is different from personal appointments, which are made voluntarily and at a time when the person has decision-making ability. We therefore consider that requiring the Tribunal to recognise supporters or representatives appointed under orders made outside NSW will help to protect people who are the subject of such orders. This is because, under our recommendations, the Tribunal has, for example, the power to order:
- that the NSW Trustee supervise a representative with financial functions, where appropriate
 - that the operation of the order in NSW be varied to ensure that the least restrictive arrangement is in effect, and
 - that the NSW Public Representative or NSW Trustee perform the functions of an interstate agency in NSW, where relevant and necessary.
- 19.8 These safeguards are consistent with the new Act’s general principles³ that require the least possible restriction of a person’s rights and autonomy.⁴ The distinction

3. Recommendation 5.2.

between the process of recognising personal appointments and orders is also consistent with laws in a number of other Australian state and territories.⁵

- 19.9 We further note that automatic recognition of orders would be difficult to achieve in practice, particularly where there are multiple orders appointing multiple representatives with different functions in different places. This is possible given that other states in Australia do not automatically recognise interstate orders.⁶ It would not be clear which representative should be recognised in NSW in such a situation.

Updating the Regulations to recognise substantially similar appointments

Personal appointments

- 19.10 Only those personal appointments made outside NSW that are specified in the regulations have automatic recognition in NSW. Currently this includes personal appointments made under corresponding legislation in the Australian Capital Territory (“ACT”), the Northern Territory, Queensland, Victoria, Western Australia, South Australia and Tasmania.⁷ The appointments have effect in NSW to the extent that their powers match those of an enduring guardian under the *Guardianship Act*.⁸ To be recognised, the appointment must comply with the requirements of the state or territory in which it was made.⁹
- 19.11 We recommend that new Regulations list personal appointments that can be made outside of NSW that are substantially similar to appointments made under personal support agreements or enduring representation agreements under the new Act.

Court or tribunal orders

- 19.12 The Tribunal can only recognise those court or tribunal orders made under a “corresponding law” listed in the regulations.¹⁰ There are currently nine state, territory and international laws declared to be corresponding laws in the regulations.¹¹
- 19.13 We recommend that the new Regulations list the corresponding laws of other jurisdictions under which a court or tribunal can make an order substantially similar to a tribunal support order or a representation order under the new Act. This will ensure that people appointed under such an order can apply to the Tribunal for recognition of their status.

4. People with Disability Australia support Tribunal review to ensure that the arrangement be the least restrictive option: People with Disability Australia Inc, *Submission GA154*, 23.

5. See *Powers of Attorney Act 2014* (Vic) s 138; *Guardianship and Administration Act 1986* (Vic) s 63A, s 63E; *Powers of Attorney Act 2006* (ACT) s 89; *Guardianship and Management of Property Act 1991* (ACT) s 12; *Powers of Attorney Act 2000* (Tas) s 42, s 43, s 47; *Guardianship and Administration Act 1995* (Tas) s 81, s 81A; *Powers of Attorney Act 1998* (Qld) s 34, s 40; *Guardianship Act 2000* (Qld) s 166-171.

6. See, eg, *Guardianship and Administration Act 1986* (Vic) s 63A, s 63E; *Guardianship and Management of Property Act 1991* (ACT) s 12; *Guardianship Act 2000* (Qld) s 166-171.

7. *Guardianship Regulation 2016* (NSW) cl 8.

8. *Guardianship Act 1987* (NSW) s 6O(1); *Guardianship Regulation 2016* (NSW) cl 8.

9. *Guardianship Act 1987* (NSW) s 6O(3).

10. *Guardianship Act 1987* (NSW) s 48A, s 48B; *Guardianship Regulation 2016* (NSW) cl 16.

11. *Guardianship Regulation 2016* (NSW) cl 16.

Effect of recognition

19.2 Effect of recognition

The new Act should provide that:

- (1) Recognition does not affect the validity of the original appointment in its originating jurisdiction.
- (2) Recognition gives the applicant the same powers as if they had been appointed in NSW. The applicant can only exercise functions authorised by their original appointment and only if those functions can be authorised in NSW.
- (3) Automatic recognition of a personal enduring appointment made in another jurisdiction will not bring a representative with financial functions under the supervision of the NSW Trustee.

19.14 We recommend that the new Act clearly state the effect of NSW recognition of appointments made interstate or overseas. Currently, several principles on the effect of recognition exist in the common law only.

19.15 The *Guardianship Act* sets out the following principles on the effect of recognition:

- the recognised guardian or financial manager is taken to be appointed under the *Guardianship Act* as a guardian or financial manager of the estate in NSW,¹² and
- the recognised guardian or financial manager may only exercise functions authorised by their original appointment and only if the *Guardianship Act* can also authorise those functions.¹³

19.16 Important principles regarding the effect of recognition at common law include:

- The recognition will not affect the validity or operation of the original appointment or order in its state of origin.¹⁴
- Upon recognition, the representative should be able to deal with property in NSW and carry on proceedings on behalf of the person in NSW, even if the representative or represented person lives interstate.¹⁵
- Recognition gives the applicant the same powers as if they had been appointed in NSW.¹⁶

19.17 We recommend that the principles in the *Guardianship Act* as well as those in the common law be explicit in the new Act.

12. *Guardianship Act 1987* (NSW) s 48B(3) s 6O.

13. *Guardianship Act 1987* (NSW) s 48B(4).

14. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [54]–[58].

15. *HBQ* [2015] NSWCATGD 33 [14]; *FBT* [2014] NSWCATGD 27 [17]; *Uniform Civil Procedure Rules 2005* (NSW) r 7.14.

16. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [54].

Scope of functions recognised

- 19.18 We recommend maintaining current limits in the *Guardianship Act* and the common law that restrict recognition of appointments made interstate or overseas to functions that may be validly granted to a representative in NSW.¹⁷
- 19.19 This means that where an interstate appointment grants powers or decision-making functions that cannot be granted to a supporter or representative in NSW, the supporter or representative will not be authorised to use those powers or functions in NSW.

Supervision by NSW Trustee at discretion of Tribunal

- 19.20 We recommend that the new Act provide that automatic recognition of a personal appointment made elsewhere should not bring a representative with financial functions automatically under the supervision of the NSW Trustee. Instead we recommend that supervision by the NSW Trustee be at the discretion of the Tribunal.¹⁸
- 19.21 This is different from the current law, which places interstate and overseas representatives with financial functions automatically under the supervision of the NSW Trustee when they are recognised in NSW.¹⁹
- 19.22 Both the NSW Trustee and the Tribunal have observed the disadvantages for representatives of duplicate supervision by the NSW Trustee where they are already subject to supervision in their originating jurisdiction.²⁰ It can also be a waste of resources for the NSW Trustee.
- 19.23 We consider that supervision may not always be necessary, and the payment of fees to the NSW Trustee may be unduly onerous in some cases. A 2014 case illustrates this. An administrator appointed under an ACT order applied to have the Tribunal's recognition of the order revoked. The recognition had brought the administrator under the supervision of NSW Trustee, meaning she had to comply with requirements and pay fees. The estate in question was small, consisting only of an aged care pension. The Tribunal was satisfied there was no need for the continued recognition of the appointment. The applicant was complying with the requirements of the ACT order, and a bank and an aged care facility accepted the authority of the ACT order.²¹

17. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [54]; *Guardianship Act 1987* (NSW) s 48B, s 6O.

18. See Recommendation 19.3.

19. See, eg, *TFI* [2014] NSWCATGD 14 [31].

20. NSW Trustee and Guardian, *Submission GA117*, 12; *TFI* [2014] NSWCATGD 14 [33].

21. *TFI* [2014] NSWCATGD 14 [33].

Tribunal's powers of review

19.3 Tribunal review

The new Act should provide:

- (1) The Tribunal has the power, after review in accordance with relevant review provisions in **Recommendations 7.21(1), 7.21(2), 8.11(1), and 9.17(1)**, to vary, revoke, replace or confirm an order or personal appointment made in another jurisdiction as it operates in NSW. This does not affect the operation of the personal appointment or order in its originating jurisdiction.
- (2) The Tribunal has discretion to order that a person with a financial decision-making function under an appointment or order made in another jurisdiction be supervised by the NSW Trustee in relation to their operations in NSW.
- (3) Where the Tribunal varies, revokes, replaces or confirms an order as it operates in NSW, it should notify the relevant court or tribunal in the place where the original order or personal appointment was made.

Tribunal's powers to vary, revoke, replace or confirm after review

- 19.24 We recommend that the Tribunal have broad powers to review the operation in NSW of appointments made elsewhere and that it should have the power to vary, revoke, replace or confirm an appointment as it operates in NSW.
- 19.25 Currently, the Tribunal can review, vary or confirm its recognition of an appointment made in another jurisdiction as if it were an appointment under the *Guardianship Act*,²² but cannot directly review the appointment.²³
- 19.26 It is unclear to what extent the Tribunal can vary a recognition order as it operates in NSW, for example, by replacing the representative with a different representative in NSW.²⁴ There is no case law on this issue. Tribunals in other states may vary interstate orders upon recognition.²⁵
- 19.27 The powers of review we recommend, which are consistent with those in Victoria,²⁶ would allow the Tribunal to appoint a new representative or supporter in NSW where appropriate, such as in response to allegations of abuse. This ensures that representatives and supporters appointed under interstate or overseas arrangements are subject to the same accountability mechanisms as those appointed in NSW, through the prospect of Tribunal revocation or review of their appointment.²⁷ We therefore recommend that the considerations upon review

22. *Guardianship Act 1987* (NSW) s 48B(5).

23. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [55].

24. *TFI* [2014] NSWCATGD 14 [25].

25. See, eg, *QPJ* [2016] NSWCATGD 31 [10].

26. *Guardianship and Administration Act 1986* (Vic) s 61, s 63(1), s 63F.

27. See *QBL* [2014] NSWCATGD 8 [15]-[17]; *NVT* [2015] NSWCATGD 37 [37]-[38].

should be the same for each type of order as the considerations we recommend for reviews of the equivalent enduring appointments and orders.²⁸

- 19.28 The recommended powers of review would also allow the Tribunal to confirm the appointment of a representative or supporter appointed under an interstate or overseas personal appointment. The current provisions in NSW do not allow for this. As a result, under the current provisions, service providers such as hospitals may need to make an application for a representation order where there is uncertainty around the powers of an interstate or overseas appointment.²⁹ This is arguably an inefficient use of Tribunal resources, particularly if the Tribunal concludes that an appointment is unnecessary.
- 19.29 We note that the Tribunal review should not affect the terms of the appointment or order in the place where it was made. Currently, revoking the recognition of an interstate administration order removes the administrator's powers over the estate assets held in NSW. However, the appointment continues to have effect in its state of origin.³⁰

Tribunal discretion for supervision by NSW Trustee

- 19.30 For the same reasons as discussed in relation to Recommendation 19.2, we recommend that it should be at the discretion of the Tribunal to order, upon review, that a person with a financial decision-making function under an interstate or overseas order be subject to supervision by the NSW Trustee.

Registration

19.4 Registration

NSW should not introduce a compulsory register for appointments made in other jurisdictions.

- 19.31 We do not recommend introducing a compulsory register for recognised appointments made in other jurisdictions. To do so would be inconsistent with Recommendation 14.9 that NSW not require support agreements, support orders, enduring representation agreements or representation orders to be registered. It would be unfair to impose the burden of registration on out-of-state representatives or supporters when NSW does not have a system of registration for NSW appointed decision-makers.³¹

28. Recommendations 7.21(1)-(2), 8.11(1), 9.17(1).

29. See, eg, *NVP* [2016] NSWCATGD 1 [2].

30. *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 [54]–[55].

31. See also discussion relating to Recommendation 14.9.

20. Transitional provisions and consequential amendments

In brief

This Chapter sets out our recommendations to facilitate the transition between existing laws and the new legislation, and consequential amendments to other statutes.

Transitional provisions	288
Review of guardianship and financial management orders.....	289
When the Tribunal may review an order	289
Tribunal action on review of orders	290
Review of enduring appointments.....	291
When the Tribunal may review an enduring appointment.....	291
Tribunal action on review of an enduring appointment.....	291
Responsibilities of past appointees.....	292
Consequential amendments to other statutes	292

- 20.1 This Chapter sets out our recommendations to facilitate the transition from guardianship and financial management under the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) to representation and support arrangements under the new Assisted Decision-Making Act (“the new Act”).
- 20.2 It also recommends consequential amendments to other NSW statutes to reflect the proposed changes to the framework.

Transitional provisions

- 20.3 Recommendations 20.1-20.5 broadly preserve orders and arrangements made under old legislation until they come up for review. This is similar to transitional provisions in other jurisdictions.¹

1. See, eg, *Powers of Attorney Act 2014* (Vic) s 142-143; *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 117.

Review of guardianship and financial management orders

When the Tribunal may review an order

20.1 Review of guardianship and financial management orders made under the *Guardianship Act 1987* (NSW)

The new Act should provide:

- (1) On or after the commencement of the Assisted Decision-Making Act, the Tribunal may review a guardianship order or financial management order on its own motion.
- (2) On or after the commencement of the Assisted Decision-Making Act, the Tribunal must review a guardianship order or financial management order if requested to do so by:
 - (a) the represented person
 - (b) a person with a proper interest in the proceedings
 - (c) a person with a genuine interest in the personal and social wellbeing of the represented person
 - (d) the guardian or financial manager, or
 - (e) the Public Representative, the NSW Trustee or the Public Advocate
 unless the request does not disclose grounds that warrant a review.
- (3) A guardianship order made before the commencement of the Assisted Decision-Making Act remains in force until:
 - (a) the order reaches its review date
 - (b) the order reaches the expiry of its term, or
 - (c) the Tribunal reviews the order on its own motion or upon request.
- (4) The Tribunal must review all financial management orders made before the commencement of the Assisted Decision-Making Act that have not otherwise expired within a prescribed period. The prescribed period should be determined after consultation with the Tribunal.

20.4 We recommend that existing guardianship orders remain in place until they come up for periodic review (generally within three years). We understand that non-reviewable guardianship orders tend to be made for specific decisions and then lapse. We do not intend introducing reviews for these types of orders.

20.5 Financial management orders do not come up for periodic review. Considering that representation orders (including those with financial functions) will be subject to regular review, the Tribunal should be required to review all existing financial management orders within a certain period (for example, six years), depending on what is realistically manageable for the Tribunal. The number of people with private financial managers is currently around 4000 and the NSW Trustee and Guardian (“NSW Trustee”) manages an additional 11,000.² The number of people under

2. NSW Trustee and Guardian, *Annual Report 2016-2017* (2017) 12.

financial management is increasing (by around 500) every year. We do not know how many of these people are also under guardianship. In those cases, regular reviews already apply.

- 20.6 Given the number of existing financial management orders, this recommendation has significant workload and resourcing implications for the Tribunal and, to a lesser extent, for the NSW Trustee.³ It will be appropriate to stagger the review deadlines for these orders within the chosen period, depending on when the order came into force or was last reviewed. This should ensure the Tribunal is not faced with an unmanageable number of review applications at the start or end of the chosen period.

Tribunal action on review of orders

20.2 Tribunal action on review of orders

The new Act should provide:

- (1) When reviewing a guardianship or financial management order made under the *Guardianship Act 1987* (NSW), the Tribunal should consider where relevant:
 - (a) whether there is still a need for the order
 - (b) whether the eligibility and suitability criteria for a representative are met, and
 - (c) whether the guardian or financial manager is likely to meet the responsibilities and carry out the functions of a representative under the Assisted Decision-Making Act.
- (2) Upon reviewing a guardianship or financial management order, the Tribunal must:
 - (a) allow the order to lapse
 - (b) make a representation order in the same terms as the original order or in different terms
 - (c) revoke the order and make a support order, or
 - (d) revoke the order.

- 20.7 This recommendation sets out the matters that the Tribunal should consider when reviewing a guardianship order or financial management order and the actions the Tribunal can take at the end of the review. It is consistent with Recommendation 9.17, which sets out our proposals for Tribunal action on review of representation orders. This recommendation takes into account that guardianship orders and financial management orders would no longer be available. It also accounts for new eligibility and suitability criteria, responsibilities, and functions for representatives.

3. See [4.51]-[4.54].

Review of enduring appointments

When the Tribunal may review an enduring appointment

20.3 Review of enduring appointments

The new Act should provide:

- (1) On or after the commencement of the Assisted Decision-Making Act, the Tribunal may review the appointment (or purported appointment) of an attorney under an enduring power of attorney, or an enduring guardian, on its own motion, if requested to do so by:
 - (a) the person making the appointment
 - (b) a person with a proper interest in the proceedings
 - (c) a person with a genuine interest in the personal and social wellbeing of the appointor
 - (d) the enduring guardian or attorney, or
 - (e) the Public Representative, the NSW Trustee or the Public Advocate, unless the request does not disclose grounds that warrant a review.
- (2) The appointment of an enduring guardian or the appointment of an attorney under an enduring power of attorney, made before the commencement of the Assisted Decision-Making Act, remains in force unless the Tribunal decides it should not remain in force (in whole or in part) after such a review.

- 20.8 We recommend that existing enduring guardianship arrangements and enduring power of attorney arrangements simply remain in place. As an enduring appointment is made by the person themselves, we see it as representing their will and preferences. A represented person (or an interested person) should still be able to apply for a review of these arrangements under the terms of the new Act. This might occur, for example, if an interested person believes that the representative is not suitable, or that the represented person could make decisions with support.

Tribunal action on review of an enduring appointment

20.4 Tribunal action on review of an enduring appointment

The new Act should provide:

- (1) When reviewing the appointment or purported appointment of an enduring guardian under the *Guardianship Act 1987* (NSW), or an attorney under an enduring power of attorney, the Tribunal should consider where relevant:
 - (a) whether the appointor met the eligibility criteria for entering into the arrangement, and
 - (b) if the appointor did not meet the eligibility criteria for entering into the arrangement:
 - (i) the fact that the enduring guardian or attorney was chosen by the appointor

- (ii) whether the eligibility and suitability criteria for an enduring representative are met, and
 - (iii) whether the enduring guardian or attorney is likely to meet the responsibilities and carry out the functions of a representative under the Assisted Decision-Making Act.
- (2) Upon reviewing an enduring appointment, the Tribunal may confirm it, vary it, suspend it or revoke it, in whole or in part.
- (3) The Tribunal may make a representation order or support order in accordance with the new Act to supersede an enduring appointment that has been suspended or revoked, in whole or in part.

20.9 This recommendation sets out the matters that the Tribunal should consider when reviewing an enduring appointment and the actions the Tribunal can take at the end of the review. It is consistent with Recommendation 8.11, which sets out our recommendations for Tribunal action on review of enduring representation agreements. This recommendation accounts for the new responsibilities and functions of appointees under the new Act (regardless of when they were appointed, in accordance with Recommendation 20.5).

Responsibilities of past appointees

20.5 Responsibilities of past appointees

The new Act should provide that all guardians, enduring guardians, attorneys under enduring powers of attorney and financial managers must observe the new general principles (**Recommendation 5.2**) from the commencement of the new Act.

- 20.10 We recommend that the general principles of the new Act apply to all existing appointees from commencement of the new Act.
- 20.11 For example, decisions made by the Public Guardian and NSW Trustee before the new Act commences, should be reviewable according to the principles of the new Act, if the review takes place after commencement. Agency staff, and existing private guardians and managers therefore would need education and training about their new responsibilities.

Consequential amendments to other statutes

20.6 Consequential amendments to other statutes

Amendments should be made to NSW statutes that refer to guardianship law and guardianship arrangements, to ensure that the terminology and intent of those references is consistent with the new Act.

- 20.12 There are numerous references to guardianship law and guardianship arrangements throughout NSW legislation. A significant number of statutes make use of the terminology of the *Guardianship Act* and related legislation, in both their current and previous forms. Terms used in other Acts include “guardian”, “guardianship order”, “Guardianship Division”, “NSW Trustee and Guardian”,

“person under guardianship”, “incapable person”, “person incapable of managing his or her own affairs”, “person under legal incapacity” and “protected person”.

- 20.13 NSW statute law should be consistent with the new Act. This will involve a comprehensive audit of the use and intent of guardianship-related language across NSW statute law.

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 (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 Inc (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)

Appendix B

Submissions

- GA1** Mental Health Coordinating Council (24 September 2016)
- GA2** Royal Australasian College of Physicians (13 October 2016)
- GA3** Justice Health and Forensic Mental Health Network (12 October 2016)
- GA4** Seniors Rights Service (14 October 2016)
- GA5** Aged and Community Services NSW and ACT (13 October 2016)
- GA6** NSW Disability Network Forum (13 October 2016)
- GA7** NSW Council for Intellectual Disability (16 October 2016)
- GA8** Bridgette Pace (17 October 2016)
- GA9** Combined Pensioners and Superannuants Association of NSW Inc (17 October 2016)
- GA10** Mental Health Carers NSW Inc (17 October 2016)
- GA11** Alzheimer's Australia NSW (17 October 2016)
- GA12** Carers NSW (17 October 2016)
- GA13** NSW Council of Social Service (17 October 2016)
- GA14** Cognitive Decline Partnership Centre (17 October 2016)
- GA15** Schizophrenia Fellowship of NSW (17 October 2016)
- GA16** Intellectual Disability Rights Service (17 October 2016)
- GA17** Physical Disability Council of New South Wales (18 October 2016)
- GA18** Legal Aid NSW (18 October 2016)
- GA19** NSW Civil and Administration Tribunal - Guardianship Division (18 October 2016)
- GA20** People with Disability Australia Inc (22 October 2016)
- GA21** Synapse (24 October 2016)
- GA22** Stephanie Travers (24 October 2016)
- GA23** Capacity Australia (25 October 2016)
- GA24** Royal Australian and New Zealand College of Psychiatrists (26 October 2016)
- GA25** Mental Health Commission of NSW (27 October 2016)
- GA26** Medical Insurance Group Australia (27 October 2016)
- GA27** The Law Society of NSW Young Lawyers Civil Litigation Committee (28 October 2016)
- GA28** NSW Trustee and Guardian (28 October 2016)
- GA29** The Law Society of NSW (8 November 2016)
- GA30** Mid North Coast Community Legal Centre (31 October 2016)
- GA31** NSW Family and Community Services (9 November 2016)
- GA32** Multicultural NSW (29 November 2016)
- GA33** Scott Bell-Ellercamp (16 December 2016)
- GA34** Mental Health Coordinating Council (21 December 2016)
- GA35** Royal Australian College of GPs NSW and ACT (20 January 2017)
- GA36** Royal Australian College of GPs NSW and ACT (20 January 2017)
- GA37** Lyn Anderson (23 January 2017)
- GA38** Lyn Anderson (23 January 2017)
- GA39** NSW Disability Network Forum (25 January 2017)

- GA40** NSW Disability Network Forum (25 January 2017)
- GA41** Bridgette Pace (27 January 2017)
- GA42** Bridgette Pace (29 January 2017)
- GA43** Aged and Community Services NSW and ACT (30 January 2017)
- GA44** Mental Health Carers NSW Inc (30 January 2017)
- GA45** The NSW Council of Social Service (30 January 2017)
- GA46** The NSW Council of Social Service (30 January 2017)
- GA47** The Disability Council NSW (30 January 2017)
- GA48** Carers NSW QP 2 (31 January 2017)
- GA49** Carers NSW (31 January 2017)
- GA50** Justice Health and Forensic Mental Health Network QP2 (31 January 2017)
- GA51** BEING QP 2 (31 January 2017)
- GA52** John Quinlan (31 January 2017)
- GA53** Royal Australian and New Zealand College of Psychiatrists NSW Branch (31 January 2017)
- GA54** Dawn Coombridge (31 January 2017)
- GA55** NSW Civil and Administrative Tribunal (31 January 2017)
- GA56** Disability Advocacy and Mid North Coast Community Legal Centre (31 January 2017)
- GA57** Disability Advocacy and Mid North Coast Community Legal Centre (31 January 2017)
- GA58** Legal Aid NSW QP 2 and 3 (31 January 2017)
- GA59** NSW Council for Intellectual Disability (31 January 2017)
- GA60** Simon Lewis and Keerthi Muvva (31 January 2017)
- GA61** Seniors Rights Service (31 January 2017)
- GA62** Seniors Rights Service (31 January 2017)
- GA63** Cognitive Decline Partnership Centre (3 February 2017)
- GA64** People with Disability Australia Inc QP2 (6 February 2017)
- GA65** People with Disability Australia Inc QP3 (8 February 2017)
- GA66** Royal Australasian College of Physicians (9 February 2017)
- GA67** John Quinlan (10 February 2017)
- GA68** NSW Mental Health Commission QP2 (10 February 2017)
- GA69** NSW Mental Health Commission QP3 (10 February 2017)
- GA70** Intellectual Disability Rights Service QP2 (12 February 2017)
- GA71** Intellectual Disability Rights Service QP3 (12 February 2017)
- GA72** NSW Public Guardian QP2 (20 February 2017)
- GA73** NSW Public Guardian QP3 (20 February 2017)
- GA74** Law Society of NSW QP2 (21 February 2017)
- GA75** Law Society of NSW QP3 (21 February 2017)
- GA76** NSW Department of Family and Community Services QP2 (24 February 2017)
- GA77** NSW Department of Family and Community Services QP3 (24 February 2017)
- GA78** NSW Trustee and Guardian QP2 (9 March 2017)
- GA79** NSW Trustee and Guardian QP3 (9 March 2017)
- GA80** Confidential (13 March 2017)

- GA81** Justice Health and Forensic Mental Health Network (4 April 2017)
- GA82** Multicultural NSW (5 April 2017)
- GA83** William Kinnaird (13 April 2017)
- GA84** Tasmania, Department of Health and Human Services (19 April 2017)
- GA85** House With No Steps
- GA86** Elizabeth Wall (4 May 2017)
- GA87** Mental Health Coordinating Council (10 May 2017)
- GA88** Ben White, Lindy Willmott and Penny Neller (10 May 2017)
- GA89** Mental Health Review Tribunal (10 May 2017)
- GA90** Seniors Rights Service (11 May 2017)
- GA91** Royal Australasian College of Physicians (11 May 2017)
- GA92** Bridgette Pace (11 May 2017)
- GA93** Nola Ries, Elise Mansfield, Amy Waller and Jamie Bryant (11 May 2017)
- GA94** Prudentia Financial Planning (12 May 2017)
- GA95** NSW Council of Social Service (12 May 2017)
- GA96** Shopfront Youth Legal Centre (12 May 2017)
- GA97** Avant Mutual Group Limited (12 May 2017)
- GA98** Bill Kelly (12 May 2017)
- GA99** June Walker (12 May 2017)
- GA100** National Disability Services (12 May 2017)
- GA101** NSW Civil and Administrative Tribunal (12 May 2017)
- GA102** Multicultural NSW (12 May 2017)
- GA103** Peter Deane (15 May 2017)
- GA104** Michael Coppin, Lachlan O'Neill and Georgina Sebar (12 May 2017)
- GA105** NSW Institute of Trauma and Injury Management (18 May 2017)
- GA106** Australasian College for Emergency Medicine (17 May 2017)
- GA107** Royal College of Pathologists of Australasia (17 May 2017)
- GA108** NSW Public Guardian (17 May 2017)
- GA109** Legal Aid NSW (17 May 2017)
- GA110** NSW Civil and Administrative Tribunal (19 May 2017)
- GA111** Carers NSW (19 May 2017)
- GA112** Cognitive Decline Partnership Centre (22 May 2017)
- GA113** NSW Council for Intellectual Disability (23 May 2017)
- GA114** Sexual Assault Services within Nepean Blue Mountains and Western Sydney Local Health Districts (25 May 2017)
- GA115** Medical Insurance Group Australia (25 May 2017)
- GA116** Mental Health Commission of NSW (29 May 2017)
- GA117** NSW Trustee and Guardian (29 May 2017)
- GA118** Law Society of NSW (2 June 2017)
- GA119** Being (1 June 2017)
- GA120** Professor John Carter
- GA121** Mental Health Carers NSW Inc (5 June 2017)
- GA122** NSW Young Lawyers Civil Litigation Committee (8 June 2017)
- GA123** Law Society of NSW (8 June 2017)
- GA124** Office of the NSW Privacy Commissioner (12 May 2017)
- GA125** Department of Family and Community Services (14 June 2017)

- GA126** NSW Disability Network Forum (12 May 2017)
- GA127** NSW Disability Network Forum (12 May 2017)
- GA128** NSW Disability Network Forum (12 May 2017)
- GA129** Rodney Lewis (26 June 2017)
- GA130** NSW Ministry of Health (27 June 2017)
- GA131** Angie Trehella (21 July 2017)
- GA132** Cameron Way (12 June 2017)
- GA133** Peter Wood (27 November 2017)
- GA134** Michelle Tait (19 January 2018)
- GA135** Royal Australian College of GPs (10 January 2018)
- GA136** NSW Ombudsman (5 February 2018)
- GA137** NSW Council of Social Service (5 February 2018)
- GA138** Mental Health Coordinating Council (5 February 2018)
- GA139** Living with Disability Research Centre (7 February 2018)
- GA140** NSW Trustee and Guardian (8 February 2018)
- GA141** Dementia Australia (8 February 2018)
- GA142** National Mental Health Commission (8 February 2018)
- GA143** Physical Disability Council of New South Wales (8 February 2018)
- GA144** NSW Council for Intellectual Disability (8 February 2018)
- GA145** Family Advocacy (9 February 2018)
- GA146** Australian Association of Gerontology (9 February 2018)
- GA147** NSW Council for Civil Liberties (9 February 2018)
- GA148** Mental Health Commission of NSW (9 February 2018)
- GA149** Associate Professor Nola Ries and Dr Elise Mansfield (9 February 2018)
- GA150** Combined Pensioners and Superannuants Association of NSW Inc (9 February 2018)
- GA151** Multicultural Disability Advocacy Association (9 February 2018)
- GA152** NSW, South Eastern Sydney Local Health District, Clinical Ethics Committee (9 February 2018)
- GA153** Medical Insurance Group Australia (9 February 2018)
- GA154** People with Disability Australia Inc (9 February 2018)
- GA155** National Disability Services (9 February 2018)
- GA156** Cognitive Decline Partnership Centre (10 February 2018)
- GA157** Royal Australian and New Zealand College of Psychiatrists (14 February 2018)
- GA158** Seniors Rights Service (15 February 2018)
- GA159** Justice Connect (16 February 2018)
- GA160** NSW Bar Association (15 February 2018)
- GA161** Carers NSW (16 February 2018)
- GA162** Benevolent Society (21 February 2018)
- GA163** Legal Aid NSW (26 February 2018)
- GA164** Law Society of NSW (27 February 2018)
- GA165** Hamish McRae (28 February 2018)
- GA166** John Carter (4 March 2018)

Appendix C

Preliminary consultations

NSW Trustee and Guardian (PCGA1)

8 February 2016

Ms Imelda Dodds, Chief Executive Officer

Ms Ruth Pollard, Director Legal

Ms Lidia Zin, Acting Principal Legal Officer

Public Guardian of NSW (PCGA2)

9 February 2016

Mr Graeme Smith, Public Guardian

Ms Justine O'Neill, Assistant Public Guardian, Advocacy and Policy

Mr Rodney Lewis (PCGA3)

16 February 2016

Mr Rodney Lewis

NSW Civil and Administrative Tribunal (PCGA4)

19 February 2016

The Hon Justice Robertson Wright, President

Mr Malcolm Schyvens, Deputy President, Division Head, Guardianship Division

Ms Cathy Szczygielksi, Principal Registrar

Ms Kelly Roberts, Justice Strategy and Policy, Department of Justice

Law Society of NSW – Elder Law and Succession Committee (PCGA5)

8 March 2016

Mr Michael Tidball, Chair, Elder Law and Succession Committee

Ms Pam Suttor, Member, Elder Law and Succession Committee

Ms Emma Liddle, Policy Lawyer, Law Society of NSW

Mr Daryl Browne, Deputy Chair, Elder Law and Succession Committee

Australian Law Reform Commission (PCGA6)

21 March 2016

Ms Rosalind Croucher, President

Mr Bruce Alston, Principal Legal Officer
Ms Sabina Wynn, Executive Director

Mr Nick O'Neill (PCGA7)

5 April 2016

Mr Nick O'Neill, President, NSW Guardianship Tribunal, 1994-2004

Mr Roger West (PCGA8)

11 April 2016

Roger West, President, NSW Guardianship Tribunal, 1989-1994

Carers Advisory Council (PCGA9)

6 June 2016

Carers Advisory Council

NSW Civil and Administrative Tribunal, Guardianship Division Consultative Forum (PCGA10)

17 June 2016

Mr Malcolm Schyvens, Deputy President, Division Head, Guardianship Division

Ms Anne Britton, Principal Member, Guardianship Division

Ms Pauline Green, Acting Divisional Registrar, Guardianship Division

Ms Nicole D'Souza, Acting Legal Officer, Guardianship Division

Mr Graeme Smith, Public Guardian

Mr Viet Hoang Nguyen, Acting Manager Administrative Law and General Claims,
General Litigation and Dispute Resolution, Department of Family and
Community Services, Legal

Mr Stein Boddington, Disability Council

Ms Annabelle Bains, Department of Health, Whole of Health Program

Ms Rosanne Walters, Social Work Team Leader, Geriatric Medicine Department,
Westmead Hospital

Ms Maria Bisogni, Deputy President, Mental Health Review Tribunal

Ms Nihal Danis, Mental Health Advocacy Service, Legal Aid NSW

Ms Melissa Chaperlin, Solicitor, Seniors Rights Service

Mr Dennis Bryant, NSW Council for Intellectual Disability

Ms Margot Morris, Principal Solicitor, Intellectual Disability Rights Service

Ms Ngila Bevan, Manager for Individual Advocacy, People with Disability Australia
Inc

Mr Michael Hampton, Community Voice Manager, Brain Injury Association of NSW

NCOSS – NSW Disability Network Forum (PCGA11)

2 August 2016

Disability Advisory Council, NSW Department of Justice (PCGA12)

9 August 2016

Appendix D

Consultations

NSW Civil and Administrative Tribunal, Guardianship Division, Consultative Forum (GAC01)

16 December 2016

Mr Malcolm Schyvens, Deputy President, Division Head, Guardianship Division
Ms Anne Britton, Principal Member, Guardianship Division
Ms Pauline Green, Divisional Registrar, Guardianship Division
Ms Rebecca Clifton, Deputy Divisional Registrar, Guardianship Division
Ms Jasmine McHenry, Legal Officer, Guardianship Division
Mr Graeme Smith, Public Guardian
Mr Viet Hoang Nguyen for Ms Jacqueline Townsend, Acting Manager
Administrative Law and General Claims, General Litigation and Dispute
Resolution, Department of Family and Community Services, Legal
Ms Catherine Posniak, People With Disability Australia Inc
Mr Stein Boddington, Disability Council NSW
Ms Jessica Lobo, National Disability Services NSW
Ms Melissa Chaperlin, Solicitor, Seniors Rights Service
Ms Margot Morris, Principal Solicitor, Intellectual Disability Rights Service
Ms Emma Liddle for Ms Pam Suttor, Law Society of NSW
Ms Corinne Henderson, Chief Executive Officer, Mental Health Coordinating
Council
Ms Sara Imanian, Multicultural Disability Advocacy Association of NSW, Network of
Women With Disability
Ms Gael Prophet, National Disability Insurance Agency
Ms Mary Hawkins, National Disability Insurance Agency

Supreme Court of NSW (GAC02)

23 January 2017

The Hon Justice Geoff Lindsay

NSW Civil and Administrative Tribunal, Guardianship Division (GAC03)

30 January 2017

The Hon Justice Robertson Wright, President
Mr Malcolm Schyvens, Deputy President, Division Head, Guardianship Division
Ms Anne Britton, Principal Member, Guardianship Division
Ms Cathy Szczygielski, Principal Registrar and Executive Director

National Disability Insurance Agency (GAC04)

7 February 2017

Mr Andrew Ford, Corporate Counsel
Mr Lee Davids, Director, Technical Advisory Team
Ms Karlie Dickinson, Principal Lawyer

Ms Kathleen Cunningham (GAC05)

21 March 2017

Ms Kathleen Cunningham, Executive Director, British Columbia Law Institute

NSW Ombudsman (GAC06)

27 March 2017

Professor John McMillan, Acting NSW Ombudsman
Mr Steve Kinmond, Deputy NSW Ombudsman, NSW Community and Disability Services Commissioner
Ms Kathryn McKenzie, Director, Disability, Community Services Division

NSW Trustee and Guardian (GAC07)

27 March 2017

Ms Ruth Pollard, Director, Legal
Ms Catherine Phang, Principal Legal Officer
Ms Lidia Zin, Acting Principal Legal Officer

Public Guardian Staff Workshop (GAC08)

26 April 2017

Public Guardian Staff

Public Agencies Consultative Forum (GAC09)

27 April 2017

Mr Malcolm Schyvens, Deputy President NSW Civil and Administrative Tribunal, Division Head, Guardianship Division
Ms Christine Fougere, Principle Member NSW Civil and Administrative Tribunal, Guardianship Division
Mr Robert Wheeler, Solicitor in Charge, Mental Health Advocacy Service, Legal Aid NSW
Mr Andrew Taylor, Senior Solicitor, Civil Law Outreach, Legal Aid NSW
Ms Louise Pounder, Senior Legal Project Manager, Legal Aid NSW
Mr Graeme Smith, Public Guardian

Ms Justine O'Neill, Assistant Director, Advocacy and Policy, NSW Public Guardian
Ms Jacqueline Connelly, Director, Quality and Safeguards, Ageing, Disability and Home Care Services, Department of Family and Community Services
Ms Jemi Jeng, Department of Family and Community Services
Ms Catherine Phang, Principal Legal Officer, Operations, NSW Trustee and Guardian
Ms Necta Minas, NSW Trustee and Guardian
Ms Elizabeth Hewitt, Mental Health Commission NSW
Ms Kathryn McKenzie, Director

Family and Carers Roundtable (GAC10)

2 May 2017

Ms Bridgette Pace
Mr Maxwell Watts
Ms Mareea Watts
Mr Michael Cochran
Ms Hilda Cochran
Ms Kellie Jefferson
Ms Mary Lou Carter
Ms Marie Buckwalter
Ms Nell Brown
Ms Sarah Judd-Lam, Carers NSW
Mr Tom Hinton, Carers NSW
Mr Jonathan Harms, Mental Health Carers NSW

Peak Bodies Consultation (GAC11)

8 May 2017

Ms Kirsten Gibbs, BEING
Ms Melissa Chaperlin, Seniors Rights Service
Mr Jim Simpson, NSW Council for Intellectual Disability
Ms Kylie Miskovski, Alzheimer's Australia
Dr Ellen Marks, One Door Mental Health
Mr Rob Ramjan, One Door Mental Health
Mr Tom Hinton, Carers NSW

Peak Bodies Consultation (GAC12)

11 May 2017

Ms Ya'el Frisch, NSW Disability Network Forum, NSW Council of Social Service, Policy Officer, Disability and Ageing
Ms Julie Bajic Smith, Cognitive Decline Partnership Centre
Ms Sue Field, Cognitive Decline Partnership Centre
Ms Margot Morris, Intellectual Disability Rights Service

Ms Janene Cootes, Intellectual Disability Rights Service
Ms Kate Finch, People with Disability Australia Inc
Ms Leonie Hazelton, People with Disability Australia Inc
Mr Stein Boddington, Disability Council NSW
Ms Mary Lou Carter, Our Voice Australia
Ms Lyn Anderson, Mental Health Carers NSW

Ms Nicholle Nobel Consultation (GAC13)

17 May 2017

Ms Nicholle Nobel

Consultation with Service Providers (GAC14)

18 May 2017

Ms Colleen Rivers, Aged and Community Services Australia
Ms Jessica Lobo, National Disability Services
Ms Elleker Cohen, National Disability Services

Confidential Consultation (GAC15)

18 May 2017

Public Consultation (GAC16)

30 May 2017

Ms Catherine Gerloff
Ms Sarah McCarthy
Ms Nola Starmans
Ms Katrina Clark
Ms Lorraine Blackett
Ms Karine Shellshear
Ms Lisa Ip
Mr Peter Dwyer
Dr John Carter
Ms Merren Carter
Ms Di Cook

Mr Craig Sinclair Consultation (GAC17)

30 May 2017

Mr Craig Sinclair

Public Consultation (Parramatta) (GAC18)

1 June 2017

Ms Judith Blake
Ms Karen Brown
Ms Rajni Chandran
Mr William (Bill) Kinnaird
Ms Sofie Korac
Mr Kevin Morgan
Ms Helen O'Mullane

Alzheimer's Australia NSW (GAC19)

5 June 2017

Ms Kylie Miskovski, Alzheimer's Australia NSW representative and constituents

People with Disability Australia Inc (GAC20)

6 June 2017

Mr Stephin Hargreave
Ms Kate Finch
Ms Leonie Hazelton
Ms Paulina Gutierrez
Ms Meredith Lea

Legal Roundtable (GAC21)

19 July 2017

Ms Amelia Jenner, Law Society of NSW
Ms Jennifer McMillan, Law Society of NSW
Ms Emily Ryan, Law Society of NSW Young Lawyers
Mr Lewis Hamilton, Law Society of NSW Young Lawyers
Mr Joshua Dale, Australian Lawyers Alliance
Ms Jackie Maxton, Shopfront Legal Centre
Mr Rodney Lewis
Mr Ben Fogarty
Ms Ros Curnow (teleconference)

NCOSS Conference – Orange (GAC22)

25 July 2017

NCOSS conference participants

Dementia Friendly Kiama (GAC23)

31 July 2017

Mr Dennis Frost
Mr Graham Fairbairn
Ms Lynda Henderson
Ms June Hass
Mr Ray Hass

NCOSS Conference – Kiama (GAC24)

31 July 2017

NCOSS conference participants

Medical Roundtable (GAC25)

8 August 2017

Dr Elizabeth Hindmarsh, Royal Australian College of General Practitioners
Dr Linda Sheahan, Royal Australian College of Physicians (teleconference)
Ms Georgie Haysom, Avant Mutual Group
Mr Timothy Bowen, Medical Insurance Group Australia
Ms Melissa Chaperlin, Seniors Rights Service
Ms Susan Duffy, Law Society of NSW
Ms Katrina Stouppos, Law Society of NSW
Ms Sue Day, Department of Family and Community Services
Ms Candy Leung, Department of Family and Community Services
Ms Justine O'Neill, NSW Public Guardian
Ms Blaise Lyons, NSW Ministry of Health
Ms Lynn Mitchell, NSW Ministry of Health
Mr Michael Nicholl, NSW Ministry of Health
Ms Robyn Gilbert, Legal Aid NSW
Ms Helen Seares, Legal Aid NSW
Ms Christine Fougere, NSW Civil and Administrative Tribunal
Mr Malcolm Schyvens, NSW Civil and Administrative Tribunal

NCOSS Conference – Newcastle (GAC26)

15 August 2017

Mr Ben Hamilton, Disability Advocacy NSW
Mr Dan Toohey, University of Newcastle Legal Centre
Ms Jenny Samuels, Seniors Rights Service
Mr Ben Folins, NSW Council of Social Service
Ms Kylie Hopkins, Toukley Neighbourhood Centre

Synapse – Epping NSW (GAC27)

14 August 2017

Mr Michael Hampton, Community Voice Manager and Synapse advocate

Clinical Trials Roundtable (GAC28)

19 September 2017

Mr Matthew Miller, Institute of Trauma and Injury Management and NSW Agency for Clinical Innovation

Ms Sandra Ware, Institute of Trauma and Injury Management and NSW Agency for Clinical Innovation

Mr Michael Dinh, Institute of Trauma and Injury Management and NSW Agency for Clinical Innovation

Ms Nola Ries, University of Technology Sydney

Ms Katy Wilson, University of Sydney, Human Research Ethics Committees

Ms Deborah McKay, Neuroscience Research Australia (NeuRA)

Mr William Brooks, Neuroscience Research Australia (NeuRA)

Mr Malcolm Schyvens, NSW Civil and Administrative Tribunal

Dr Simon Finfer, Royal North Shore Hospital

Dr Hergen Buscher, St. Vincent's Hospital, Department of Intensive Care Medicine

Mr Andrew Bohlken, South Eastern Sydney Local Health District, Human Research Ethics Committee

Mr Dominic Villa, South Eastern Sydney Local Health District, Human Research Ethics Committee

Professor Yahya Shehabi, Chief Investigator, SPICE III Clinical Trial

Mr James Cokayne, NSW Ministry of Health

Ms Blaise Lyons, NSW Ministry of Health

Ms Sarah Charlton, St Vincent's Hospital, Sydney Human Research Ethics Committee

Dr Gina Watkins, Australasian College for Emergency Medicine

Mr Jeremy Kenner, National Health and Medical Research Council (teleconference)

NCOSS Conference – Wagga Wagga (GAC29)

22 August 2017

Ms Trudy Gunning, Forrest Community Services

Ms Tammy Cabban, Forrest Community Services

Mr Chris Heckenberg, Wagga Family Support Counselling

Mr Martin Butcher, Regional Disability Advocacy Service

Mr Ben Folino, NSW Council of Social Service

Ms Karen Addy, IDEAS

Ms Lauren Cobden, IDEAS

Ms Hannah Reid, Legal Aid NSW

Ms Molly Alexander, Yes Unlimited

Mr Graeme Newcombe, St Vincent de Paul, Edel Quinn, Wagga Wagga

Ms Susan Joyce, Centacare South West NSW
Ms Andrea Masceni, TAFE Wagga Wagga

Mental Health Review Tribunal (GAC30)

18 September 2017

Ms Anina Johnson, Deputy President, Mental Health Review Tribunal

NSW Office of the Public Guardian (GAC31)

16 January 2018

Ms Justine O'Neil, Acting Public Guardian
Ms Anna Gauchi



Justice
Law Reform
Commission

NSW Law Reform Commission

GPO Box 31
Sydney NSW 2001
Australia

Email: nsw-lrc@justice.nsw.gov.au
Internet: www.lawreform.justice.nsw.gov.au

ISSN 1030 0244
ISBN 978 1 922254 30 6

