

Our reference: 2018/015835

Mr Alan Cameron AO
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NSW Law Reform Commission
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Dear Mr Cameron

NSW Law Reform Commission review of the Guardianship Act 1987 – draft proposals

Thank you for the opportunity to comment on the NSW Law Reform Commission's (NSWLRC) draft proposals from its review of the *Guardianship Act 1987*. We appreciate that many of the proposals are consistent with information we provided in our March 2016 preliminary submission to the review.

Overall, we support the proposals of the NSWLRC, noting that they include:

- important changes to align with the UN Convention on the Rights of Persons with Disabilities (UNCRPD) – including a shift to a model that is focused on the rights, will and preferences of the person rather than their 'best interests', and the introduction of reviews of financial management orders
- an increased focus on assisted decision-making, including the use of support agreements and support orders
- welcome guidance on assessing decision-making ability, and
- the introduction of necessary safeguards to address the alleged abuse, neglect and exploitation of vulnerable adults.

Advocacy and investigative functions (9.1)

In particular, we welcome the proposed functions of a NSW Public Advocate, with the critical ability to investigate allegations of abuse, neglect and exploitation and to take timely and collaborative action to safeguard individuals at risk. Among other things, we welcome the proposed inclusion of powers to enable the Public Advocate (or other body) to gain direct access to the person at risk; require the provision of information from individuals and agencies; have access to the COPS and KiDS databases; and to exchange information with other relevant agencies, including interstate and Commonwealth agencies.

We support the agency playing an important leadership and educative role in relation to decision-making support, including setting standards and guidelines for supporters. However, there is a risk that the use of the term 'Advocate' will result in the agency's role being seen as equivalent to, or a replacement for, the work that is currently undertaken by community and disability advocacy organisations. The role of the Public Advocate would complement, but not duplicate, the role of community advocacy. There is a vital continuing role for community

advocates who work with and support people with disability and other individuals who require decision-making and advocacy assistance, and who advocate for them in relation to broader, systemic issues across a range of life domains. In our view, community advocates will be an important stakeholder for the Public Advocate, including playing a key role in raising concerns about suspected abuse, neglect and/or exploitation of individuals for the agency's investigation and action; and providing critical decision-making support. On balance, there would be merit in considering an alternative title for the Public Advocate.

Exchange of information

We welcome the inclusion of information exchange provisions to enable the Public Advocate to refer matters to Public Advocates (or equivalent) in other jurisdictions, and to exchange information with relevant state/territory and national bodies on matters affecting the safety of a person with disability. Given the intended shift in the legislation away from 'disability', there may be merit in amending 'safety of a person with disability' to 'safety of a person in need of decision-making assistance' or similar.

In our current work in receiving and responding to allegations of abuse, neglect and exploitation of adults with disability in community settings, we regularly liaise and exchange information with non-government disability providers, in addition to government agencies.¹ For example, we convene roundtable meetings with key providers and agencies that are involved with the person with disability – to identify and clarify the identified risks and the actions taken to date, and to discuss potential options for mitigating the risks and improving the person's safety. It will be important to ensure that the Public Advocate is able to exchange information with non-government bodies in relation to the safety of people with impaired decision-making ability.

Eligibility for appointment as a supporter (2.3)

We agree with providing as much scope as possible for the supported person to obtain decision-making assistance from people that they know and trust, including from service staff. We note that the proposed safeguards in relation to support agreements include having clear information in the agreement about the type of decisions the supporter may assist with, and any conditions and limitations on their role; requiring supporters to sign an acknowledgement that they have read and understood the outlined responsibilities; and enabling review by the NSW Civil and Administrative Tribunal ('the Tribunal') of support agreements in response to a request from any person with a genuine interest in the personal or social wellbeing of the supported person.

However, we have concerns that the proposal provides for supporters who 'have been bankrupt or been found guilty of an offence involving dishonesty' to assist with financial decision-making, provided that they have 'recorded this in the support agreement'. It is not clear to us how the recording of this history in the support agreement would sufficiently mitigate the risk to the supported person. While we appreciate that the role of the supporter does not include making decisions on the supported person's behalf, they would have access to the person's financial information and would be in a position of trust and influence, presenting risks to the individual. The supporter may be appropriate to assist with decisions about other matters (personal, healthcare, restrictive practices); however, allowing them to assist with financial decision-making appears to present unnecessary risk to the supported person.

¹ As part of our standing inquiry into the abuse, neglect and exploitation of people with disability in community settings, being conducted under section 11(1)(e) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

Tribunal review of support agreements (2.12) and support orders (3.14)

Under proposals 2.12 and 3.14, the Tribunal must review a support agreement or a support order if requested to do so by the supported person, the supporter, or a person with a genuine interest in the personal or social wellbeing of the supported person, unless the request does not disclose grounds that warrant a review or the Tribunal has previously reviewed the agreement/order. While the Public Representative, Public Advocate and NSW Trustee would be 'a person with genuine interest...', there may be benefit in specifying that an application may be made by those parties.

Application for a tribunal support order (3.1) and for a representation order (5.1)

On a separate but related note, proposals 3.1 and 5.1 specify that an application for a tribunal support order or representation order may be made by the Public Representative or the NSW Trustee. There may be merit in also specifying the Public Advocate as a party that can make an application (noting that the Commission has distinguished the Public Representative from the Public Advocate in its proposals).²

Eligibility for appointment as a supporter (3.4)

Similarly, proposal 3.4 indicates that the Tribunal may appoint the Public Representative or the NSW Trustee to facilitate the development of a support agreement between parties. However, this role would appear to be consistent with the proposed functions of the Public Advocate.

Tribunal action on review (3.15)

The proposals relating to the actions of the Tribunal on its review of a support agreement and a support order are the same – namely, that the Tribunal must 'determine whether the supported person had the decision-making ability to consent' to the agreement/order. While this may be a reasonable action in relation to support agreements, it is not clear why the Tribunal would need to determine as part of its review whether the person *had* the ability to consent to a support order, given that this is something the Tribunal already determined when it made the order. In this regard, we note that proposal 3.2 ('Making a support order') provides for the Tribunal to appoint a supporter to assist the person if 'the person would have decision-making ability in relation to the decision(s) covered by the order if assisted by the proposed supporter' (d), and 'the person consents to the appointment' (g).

Eligibility for appointment as an enduring representative (4.3)

Consistent with our views regarding the eligibility of individuals for appointment as a supporter (2.3), we also have concerns about the provisions in proposal 4.3 relating to the eligibility of a person for appointment as an enduring representative with a financial function. The proposal identifies that a person is not eligible to be appointed as an enduring representative if '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*' (our italics). We appreciate that the represented person should have as much choice as possible in selecting and appointing an enduring representative. However, in our view, the risks associated with enabling a person with a known history of bankruptcy and/or dishonesty offences to make financial decisions on behalf of another (vulnerable) party outweigh the potential benefits associated with freedom of choice. It is not evident to us how recording the person's problematic history on the agreement would serve to adequately mitigate the risks in all relevant circumstances. The person may be able to appropriately represent the person in relation

² We note that the need to separately list the Public Advocate and the Public Representative would not be needed in the event that the roles are combined in one entity.

to other decisions, but should not be eligible to act on the person's behalf in relation to financial decisions.

Tribunal review of enduring representation agreements (4.13)

Consistent with our views in relation to the review of support agreements and orders, there may be benefit in specifically identifying the Public Advocate, the Public Representative and the NSW Trustee as parties who may request a review of an enduring representation agreement.³

Tribunal consent to special healthcare (6.8)

Proposal 6.8 provides for the Tribunal to consent to special healthcare if it is satisfied that it is necessary to save the patient's life, or to prevent serious damage to the patient's health. In the case of healthcare 'intended or reasonably likely to render the patient permanently infertile', the proposal specifies that serious damage to the patient's health 'includes serious and persistent health problems associated with menstruation (for example, seizures or anaemia)'. It is not clear to us why specific reference is made to particular health problems associated with menstruation. In our view, the inclusion of this reference and the related examples give undue weight to the potential use of such extreme measures to manage health issues associated with menstruation. We note that seizures and anaemia are not necessarily 'serious and persistent' health problems.

Restrictive practices (8)

We note the Commission's in-principle support for consistent regulation of restrictive practices across NSW, and we agree that there is a need to gain a more consistent approach to regulating restrictive practices across a range of settings, including disability services, schools, aged care, and mental health. Our recent special report to Parliament on our *Inquiry into behaviour management in schools* included an examination of the use of restrictive practices, including seclusion and restraint, and highlighted the absence of a regulatory approach and the substantial differences that exist in restrictive practice requirements and guidance between disability services and schools.⁴

In the broader context of the significant changes in the disability sector, we appreciate why the Commission has opted to recommend that the NSW Government should closely monitor the implementation of the regulation of the use of restrictive practices under the NDIS Quality and Safeguarding Framework from 1 July 2018, to inform whether other regulation may be required in NSW – such as regulation of the use of restrictive practices in education and mental health settings.

However, we also note that:

- the behaviour support function in the NDIS Quality and Safeguarding Framework is limited to NDIS providers – it is not a comprehensive framework for the disability sector at large, and
- in relation to restrictive practices, the NDIS Quality and Safeguarding Framework relies on states and territories specifying the conditions that must be met for the use of a restrictive practice to be approved in a positive behaviour support plan. It is not evident from the Commission's draft proposals what the approval (authorisation and consent) process in NSW is intended to be.

³ We note that the need to separately list the Public Advocate and the Public Representative would not be needed in the event that the roles are combined in one entity.

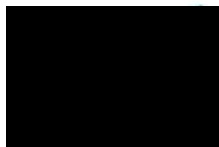
⁴ NSW Ombudsman (August 2017) *NSW Ombudsman Inquiry into behaviour management in schools*, pp26-34.

Search warrants (13.2)

We have concerns that the proposed provisions relating to seeking and issuing search warrants require the warrant to authorise 'a named employee' of the Public Advocate or 'named' police officer to enter specified premises, search the premises, and remove the person from the premises. We appreciate that these provisions are modelled on section 12 of the Guardianship Act, which also refers to search warrants 'authorising an employee or member of the police force named in the warrant'. However, it is not clear to us why there is a focus on specifying a particular individual(s). In our view, this presents unnecessary practical challenges in executing the search warrant in a timely way – for example, if the named employee and/or named officer become unavailable due to illness or other reason. There would be merit in amending this part to enable a search warrant to be issued authorising 'an employee of the Public Advocate or police officer' to execute the warrant. The Public Advocate and the Police Force would be best placed to make an informed decision about which employee(s)/officer(s) would be most appropriate to execute the warrant, taking into account the particular circumstances of the matter, the individual needs of the person at risk, and the knowledge, skills, expertise and availability of their staff.

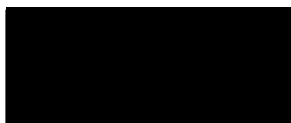
Thank you for the opportunity to comment on the draft proposals. Please do not hesitate to contact Kathryn McKenzie, Director Disability, [REDACTED] if you have any questions or require further information.

Yours sincerely



Michael Barnes
NSW Ombudsman

5/2/18



Steve Kinmond
NSW Community and Disability Services
Commissioner
Deputy Ombudsman

5/2/18