

Review of the Guardianship Act 1987

Legal Aid NSW submission to the
NSW Law Reform Commission
Draft Proposals Paper

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NEW SOUTH WALES 

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The specialist Mental Health Advocacy Service of Legal Aid NSW provides representation to clients in the Guardianship Division of the NSW Civil and Administrative Decisions Tribunal (**the Tribunal**) on a direct representation basis and when the Tribunal orders that the client be separately represented. Solicitors in Legal Aid NSW regional

offices also provide representation in guardianship matters.

The Legal Aid NSW Children's Civil Law Service (**CCLS**), established in 2013, provides a targeted and holistic legal service to young people identified as having complex needs. The CCLS also facilitates representation of its clients in matters before the Tribunal, either through liaising with the young person's separate representative to ensure the young person's views are heard, or directly representing the young person in the proceedings.

Legal Aid NSW provided 530 advice and minor assistance services relating to guardianship to clients in 2016–2017. We also provided 257 representation services in guardianship matters, through both in-house and private practitioners.

Legal Aid NSW welcomes the opportunity to make a submission to the NSW Law Reform Commission in relation to its draft proposals. Should you require any further information, please contact

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Introduction

Legal Aid NSW welcomes the opportunity to comment on the *Draft Proposals* in the NSW Law Reform Commission's Review of the *Guardianship Act 1987*.

We consider that the guardianship legislation could usefully be updated and include reference to supportive decision-making arrangements. Supportive decision-making arrangements are currently very widespread in the community, and among clients of Legal Aid NSW. We have not seen a need for close regulation of these arrangements, which might deter people from formalising support agreements.

We have concerns about the proposed will and preferences model of decision making, which are detailed below. Our preferred approach is simpler and is based on the promotion of the person's personal and social wellbeing. We consider that this model is consistent with the United Nations *Convention on the Rights of Persons with Disabilities (the Convention)* in that it respects the rights, will and preferences of the person.¹

Chapter 1: a new framework

Proposal 1.1 A new act

Legal Aid NSW would be open to a new Act, if the reforms ultimately proposed warrant that approach. We accept that 'the *Assisted Decision-Making Act*' may be a more appropriate and plain English title for the legislation.

Proposal 1.3 Key terms

Legal Aid NSW generally supports the development of new terms for representatives and the instruments appointing them. The term 'guardian' could be seen as paternalistic, and it would be useful to update this term to reflect contemporary language and policy around disability. Also, the terms 'power of attorney' and 'enduring guardian' are not always easily understood by lay people. We would support them being replaced with more plain English terms.

Proposal 1.8 statutory objects

Proposal 1.8 is that the objects of the Act are to 'implement the principles of the UN Convention'. We suggest that it should be clarified whether the object of the Act is to implement article 3 of the Convention, which sets out the 'general principles' of the Convention, or to give expression to other obligations in the Convention, such as those in article 12.

¹ United Nations *Convention on the Rights of Persons with Disabilities* article 12(4).

Proposals 1.9–1.11 decision-making framework

Legal Aid NSW considers that the proposed framework for assisted decision-making is complex, would create some difficulties for representatives performing functions under the Act, and may not sufficiently protect the rights and interests of represented people.

Complex

The current Act includes eight general principles, with one simply expressed overriding principle: the welfare and interests of such persons should be given paramount consideration. In contrast, Proposal 1.9 is for representatives to be required to act in accordance with 13 general principles. There are a further five general principles to be observed when the represented person is an Aboriginal person or Torres Strait Islander.

It appears that principle (a), ‘their will and preferences should be given effect where possible, in accordance with Proposal 1.11’, is the overriding principle, but this is not clearly expressed. Principle (a) is qualified twice, by ‘where possible’, and by ‘in accordance with proposal 1.11’. Proposal 1.11 sets out a four-step approach to decision making, culminating in a requirement that if giving effect to a person’s will and preferences creates ‘an unacceptable risk to the person’, then decisions should promote the person’s personal and social wellbeing. The qualifications ‘where possible’ and ‘unacceptable risk’ are undefined and may create difficulties (discussed below).

Legal Aid NSW considers that non-specialist members of the community would find this decision-making structure to be complex and somewhat opaque. A more manageable structure would identify the overriding purpose or goal of substitute decision making, and set out a short list of principles to assist the decision maker to achieve that purpose.

Difficulties for representatives

Requiring a representative to ‘give effect to’ a represented person’s will and preferences will sometimes pose significant difficulties. As the Council for Intellectual Disability said in its submission to this Review, people with intellectual disability:

- often have impaired cognition and communication, making it difficult to ascertain their will and preferences or likely will and preferences
- are commonly highly influenced by those around them, who may favour a status quo or risk averse approach
- sometimes have very changeable views, and
- are not able to assess the advantages and disadvantages of the available options, particularly where their life experience has been limited.²

At the heart of the dilemma is that representatives are being asked to give effect to the will and preferences of a person who has been determined by the Tribunal to be unable to understand relevant information or the nature of the decision and its consequences, to retain the information necessary to make the decision, to weigh the information as part of

² Council for Intellectual Disability submission to Question Paper 3.

the decision-making process, or to communicate the decision.³ Representation orders are not to be made if there is a less restrictive way of meeting the person's needs.⁴

Legal Aid NSW considers that there is a contradiction between the requirement to give effect to the represented person's will and preferences and the Tribunal's determination that the person lacks decision-making ability and needs a representative. In our view, the role of a representative is not merely to carry out the wishes of the represented person, but to make decisions that promote positive outcomes for the person.⁵ We also note that the Convention requires measures relating to the exercise of legal capacity to 'respect the rights, will and preferences of the person'—it does not require the decision maker to 'give effect to' the will and preferences of the person. The alternative proposal outlined below respects the will and preferences of the person by making it clear that promoting the person's personal and social wellbeing requires close attention to the person's will and preferences.

Insufficient protection for rights and interests of represented people

Legal Aid NSW is concerned that the requirement to give effect to the represented person's will and preferences, where possible, unless doing so would create an 'unacceptable risk to the person', may not sufficiently protect the person's rights and interests.

Alternative proposal

We note that a range of stakeholders supported an overriding duty to promote the person's personal and social wellbeing.⁶ We also support this approach, and consider that it should be accompanied by principles similar to those proposed by the Victorian Law Reform Commission in its 2012 report, *Guardianship*. These principles indicate that the person's personal and social wellbeing is promoted when the representatives:

- a) have paramount regard to making the judgments and decisions that the person would make themselves after due consideration if able to do so
- b) act in consultation with the person, giving effect to their wishes
- c) support the person to make or participate in decisions
- d) act as an advocate for the person, and promote and protect their rights and dignity
- e) encourage the person to be independent and self-reliant
- f) encourage the person to participate in the life of the community
- g) respect the person's supportive relationships, friendships and connections with others
- h) recognise and take into account the person's cultural and linguistic circumstances, and

³ Proposal 1.12.

⁴ Proposal 5.2.

⁵ See further Department of Family and Community Services submission to Question Paper 3, GA77.

⁶ See submissions to QP 3 from the Council for Intellectual Disability GA59, the Mental Health Commission NSW GA69, Intellectual Disability Rights Service GA71, NSW Law Society GA75, NSW Public Guardian GA73, Family and Community Services GA77, NSW Council of Social Service GA46.

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- i) protect the person from abuse, neglect and exploitation.⁷

Proposal 1.9 right to respect

Proposal 1.9 is that the 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:

...

(b) They have an inherent right to respect for their worth and dignity as individuals.

...

(f) They have the right to respect for their age, gender, sexual orientation, cultural and linguistic circumstances, and religious beliefs.

We support inclusion of these principles and suggest they would be further strengthened by including reference to the right to equality before the law and non-discrimination.

Proposals 1.10, 1.15, 1.16 - Aboriginal people and Torres Strait Islanders

Legal Aid NSW general supports the approach taken in Proposals 1.10, 1.15 and 1.16, but considers that some of the wording could be clarified.

Proposal 1.10(a) calls for everyone exercising functions under this Act to act 'in accordance with that person's culture, values and beliefs'. We do not consider it is appropriate to require a person to act in accordance with another person's culture, values and beliefs. This proposal might be better framed as a requirement for everyone exercising functions to 'ensure that the person's culture, values and beliefs are respected, to the extent practicable and appropriate'.

Proposal 1.10(b) says that everyone exercising functions must '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'. This could be clarified and strengthened by providing that everyone exercising functions must 'acknowledge that Aboriginal people and Torres Strait Islanders are the first peoples of Australia and have unique history, culture and kinship relationships and connection to their traditional land and waters'.

We also consider that it will be necessary to provide concrete guidance to people exercising functions in relation to Aboriginal people and Torres Strait Islanders as to what it means in practice to respect Aboriginal culture. This guidance could be in the statute or in policy or administrative documents, and should include the requirement to consult with an Aboriginal person's family and community (if the decision-maker is not from that family or community).

⁷ Victorian Law Reform Commission *Guardianship* (2012) Final Report 24, 399.

It may not be realistic to expect ‘everyone exercising functions under this Act’ to address the multiple disadvantage experienced by some Aboriginal and Torres Strait Islander people, as suggested in Proposal 1.10(d). Some people who are simply assisting a friend, family member or neighbour under a personal support agreement should not be burdened with this responsibility.

It is unclear what ‘other relevant considerations’ could be encompassed by Proposal 1.15(b), and this part may be redundant.

We also find Proposal 1.16(a) unclear. We would support a provision that required the Tribunal to have regard to ‘the likely impact of the order on the person’s ability to participate in their culture and act according to their values and beliefs’.

Proposals 1.12, 1.13, 1.14

Legal Aid NSW supports the following:

- the functional approach to decision-making ability in Proposal 1.12
- the rebuttable presumption that a person has decision-making ability in Proposal 1.13, and
- the approach to the assessment of decision-making ability in Proposal 1.14.

Chapter 2: Personal support agreements

As noted above, supportive decision-making arrangements are common among Legal Aid NSW clients. We have not observed a pressing need to tightly regulate these arrangements. While our clients are sometimes exploited by people close to them, we do not consider that close regulation of supportive decision-making arrangements would address those problems. In our view, the most pressing need is for more support, both formal and informal, to be provided to those of our clients who have decision-making ability, and need support to exercise that ability, but are socially isolated.

We consider that Proposal 2.4 would create unnecessary formality, in its requirement for a signed and witnessed agreement in a prescribed form. We consider this is excessive for the appointment of a person who is not invested with any legal powers. There are advantages in making supportive decision-making arrangements more widely available, and potential supporters should not be discouraged by requirements for paperwork. A paper or online form, signed by both the supporter and the supported person, should be sufficient.

Similarly, we consider that the following proposals create unnecessary formality and could discourage supporters from entering into or formalising a supportive arrangement:

- The requirement for a person who assists with financial decision making to keep accurate records and accounts (Proposal 2.9(1)(f)).

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- The requirement for a supporter to be required to notify the Public Representative or NSW Trustee if the supported person no longer has decision-making ability (Proposal 2.9(1)(h)), as this is a difficult judgment for a layperson to make and could be perceived by the supported person as a betrayal of trust.
 - The requirement for a supporter to gain the approval of the Tribunal to resign (Proposal 2.10).
 - The requirement for a supported person to revoke an appointment via a prescribed form, signed and witnessed (Proposal 2.11). Revocation in writing would be sufficient.

We are concerned about Proposal 2.8(4), that ‘unless otherwise specified in the agreement, 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.’ On its face, this provision seems to confer powers similar to those under a power of attorney. This Proposal would benefit from more explanation as to the extent of the powers proposed, and why such extensive powers are needed.

We do not consider that a mechanism for Tribunal or Supreme Court review of a personally appointed supporter is necessary (Proposals 2.12 and 2.14). If either the supporter or the supported person is dissatisfied with the arrangement, they can revoke the agreement. If a third party is concerned about the wellbeing of the supported person, they can apply to the Tribunal for a guardianship (representation) order or report concerns to the proposed Public Advocate or the NSW Police.

We do not support Proposal 2.13(2)(b), which permits the Tribunal to vary a support agreement by appointing a replacement supporter. We consider that if the supported person has decision-making ability, then they should be able to choose their own supporter without interference from the Tribunal.

Chapter 3: Tribunal support orders

Legal Aid NSW supports Proposals 3.1–3.8, which set out the circumstances in which the Tribunal may appoint a supporter. In particular, we agree that the Tribunal should only appoint a supporter where the person consents to the appointment. However, as with the proposals in Chapter 2, we have concerns that Proposals 3.9-3.16 impose an unnecessary degree of formality on the arrangement, impose significant responsibilities on supporters, and may deter some people from assuming the role of supporter.

Chapter 4: Enduring representation agreements

Legal Aid NSW generally supports Proposals 4.1–4.16, but considers that it would be useful to maintain separate roles for personal and financial decision makers. We support consistent approaches to appointment and review of these roles, and consider that a personal representative and a financial representative could be appointed by the same

document. However, many people will find that these roles are best allocated to different people. The skills and personal qualities required to manage money are not the same as those required to assist with medical treatment and other personal decisions. For example, a person may wish to appoint their spouse for lifestyle decisions but their accountant regarding financial decisions.

With respect to Proposal 4.5, we consider that the general rule should be that an enduring representation agreement comes into effect when the person has lost decision-making ability. However, it should be possible for a person to make an agreement to come into effect immediately, to 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 lost.

With regard to the resignation of an enduring representative (Proposal 4.10), we consider that the representative should be required to notify the Tribunal, but not obtain the approval of the Tribunal. If a representative is no longer willing or able to act, then it is onerous for the representative and unhelpful to the represented person to require them to continue to act until approval is obtained.

If the represented person understands the nature and consequences of the resignation, the enduring representative should be able to resign by giving written notice to the person, rather than by giving notice in a prescribed form, signed and witnessed, as in Proposal 4.10.

We have concerns about Proposal 4.14(2), which permits the Tribunal to appoint a replacement enduring representative. This power appears to be unnecessary, as the Tribunal may make a representation order, as provided for in Proposal 4.14(4). This is a better approach as it would ensure that the appointment is subject to regular reviews.

Chapter 5: Representation orders

Legal Aid NSW generally supports a closer alignment between the formal requirements for appointing substitute decision makers for financial decisions and other decisions. However, we consider that there should continue to be separate orders for guardianship and financial management, in order to promote the principle that persons with disabilities should have their freedom of decision and freedom of action restricted as little as possible. It is often the case that only a financial management order, or a guardianship order, is needed. The responsibilities, duties and qualifications for the representative are different (even if the same person is able to fulfil both roles). Requiring the Tribunal to consider the need for each order separately will increase the likelihood that the Tribunal will only make orders that are necessary.

Legal Aid NSW supports the proposed 'grounds for an order' in Proposal 5.2, in particular, that an order should only be made if less intrusive and restrictive measures are unavailable or not suitable, and there is a need for an order. It is not clear that it is necessary to include both (1)(b), 'there are one or more decisions to be made', and (1)(d),

‘there is a need for an order’. If there are no decisions to be made, there is no need for an order. It might be better to include ‘there are decisions to be made’ in the list of matters to be taken into account when considering whether there is a need for an order, that is, in Proposal 5.2(2).

The current requirement that an order be ‘in the best interests’ of the person subject to it has utility. The Tribunal currently relies upon it when it refuses to make an order on the basis that the order would not be effective, usually because the person subject to it would not cooperate with the guardian.

Case Study: Kevin

Legal Aid NSW acted for Kevin, a 21 year old Aboriginal man. At the twelve month review of his guardianship order, he told the court he was not interested in the order and did not have anything to do with the service providers or the appointed guardian. The Tribunal decided that it would not be in Kevin’s best interests to renew the order as it lacked utility.

As the ‘best interests’ terminology is associated with a paternalistic approach, we suggest that the grounds for an order should include that the order ‘would be of assistance to’ or ‘would promote the social wellbeing of’ the person.

We have concerns about Proposal 5.2(3), which places an onus on the applicant for an order to show that the person does not have decision-making ability. Proceedings in the Guardianship Tribunal are inquisitorial, rather than adversarial,⁸ and placing an onus on the applicant contradicts this approach. We agree that there should be a presumption of decision-making ability, which has been appropriately addressed in Proposal 1.13.

We support Proposal 5.3, in particular, the requirement to specify what decisions or types of decisions the representative may make. As we submitted in our response to Question Paper 4, we consider that the Act should require the Tribunal to consider which parts of a person’s estate should be managed. We are concerned about the frequency with which the Tribunal makes orders that a person’s social security income should be managed, when our observation is that there is only a need for their assets to be managed.

Legal Aid NSW queries Proposal 5.9(c), that the Act should ensure that the Public Representative and the Public Trustee are not appointed as joint representative with each other or with anyone else. Currently, the Public Guardian and the Public Trustee are often appointed jointly with a private person and each other, and we are not aware of any difficulties arising from this approach.

⁸ Deputy President Malcolm Schyvens, ‘The Australian Guardianship Tribunal System: Lessons to Share with Canada’ conference paper, Canadian Elder Law Conference, Vancouver, 2 November 2017, http://www.ncat.nsw.gov.au/Documents/speeches_and_presentations/20171011_paper_schyvens_canadian_elder_law_conference.pdf

Proposal 5.17 is that a representative may resign with the approval of the Tribunal. However, we consider that a representative should be able to resign by notifying the Tribunal. The requirement to continue to act as representative while waiting for the approval of the Tribunal seems unreasonable as resignation may have resulted from illness or incapacity on the part of the representative, or a breakdown of the relationship between the representative and the represented person.

Chapter 6: Healthcare decisions

Legal Aid NSW generally supports the approach taken to healthcare decisions, including the explicit statutory recognition of advance care directives, in Chapter 6. We support the prohibition on giving health care when it is against the patient's will and preference as expressed in an advance care directive: Proposal 6.5. However, regarding Proposals 6.9 (representative's consent to continuing or further special healthcare), 6.14 (consent to withdrawing or withholding life-sustaining measures), 6.22 (Consent of person responsible) and 6.24 (Tribunal consent to healthcare) we again note our view that decision-makers, regarding healthcare and other matters, should not be required to 'give effect to' the person's will and preferences' but to promote the person's personal and social wellbeing (which will include taking into account their will and preferences).

Offence of giving healthcare without consent

Proposal 6.27 is for a new offence of giving healthcare without consent. At common law, the usual remedy for giving healthcare without consent is a civil claim for trespass.⁹ There is the potential for a person to be charged with an assault for the act of giving healthcare without consent,¹⁰ but we have not been able to identify any reports of such a prosecution in NSW. The proposal could have the effect of placing a healthcare provider at higher risk of criminal prosecution when treating a person without decision-making ability than they are when treating a person with decision-making ability. If this proposal is contained in the final report, we would ask that the report provide an explanation of the need for this offence.

Chapter 7: Medical research procedures

Legal Aid NSW generally supports the proposals in Chapter 7.

⁹ *Halsbury's Laws of Australia* 280 *Medicine* 'Consent' [280-3000]

¹⁰ *The Laws of Australia* 20 *Health and Guardianship* 'Consent: Assault and battery' [20.6.210]

Chapter 8: Restrictive practices

Legal Aid NSW generally supports Proposal 8.1(2) regarding education for families, carers and community groups about restrictive practices. We have no comment on Proposal 8.2(1).

Chapter 9: Advocacy and investigative functions

Legal Aid NSW supports the introduction of a Public Advocate with advocacy and investigative functions. We are aware of significant gaps in the current system. Firstly, there is an absence of any state power to investigate behaviour that is not criminal, but may constitute abuse and neglect of a person who needs decision-making assistance. Secondly, we are concerned about the transition to the National Disability Insurance Scheme (NDIS) in New South Wales, and the privatisation of the provision of supported accommodation and the absence of a provider of last resort. In particular, we are concerned about the impact of the transition to the NDIS on people with cognitive impairments and complex needs in contact with the criminal justice system. A systemic failure of appropriate supports and advocacy for people with cognitive impairment in the criminal justice system is likely to be exacerbated by the withdrawal of disability services provided by the state government, including the Criminal Justice Program.

Legal Aid NSW is concerned about the actions of accommodation providers who, when their clients are arrested and charged with offences, refuse to provide accommodation for their clients. This leaves the court in the position of having to either refuse bail or release the person into homelessness. Legal Aid NSW is aware of cases where the accommodation provider has advocated for restrictive bail conditions as a condition of providing accommodation, or recommended that bail be refused.

Case Study: Geoffrey

Legal Aid NSW acted for Geoffrey, a 27 year old Aboriginal man person with an intellectual disability and mental illness who has been in long term residential care provided by AP. He had a lengthy history of assaulting a co-resident, his ex-girlfriend. His charges were usually dismissed under section 32 of the *Mental Health (Forensic Provisions) Act*. Despite this lengthy history, AP made no arrangements to rehouse Geoffrey or to make alternative arrangements for crisis accommodation in the event that he reoffended. When Geoffrey was again arrested by police and brought before the Local Court, AP refused, without notice, to continue to house him.

In the majority of the cases that Legal Aid NSW is aware of, these acutely vulnerable clients are under the care of the Public Guardian, whose role appears to be one of decision maker rather than advocate.

A Public Advocate may be able to assist by:

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- advocating for individuals with disabilities experiencing difficulties in negotiating the NDIS and the criminal justice system, and
 - identifying systemic problems and advocating for their resolution.

However, we would encourage further consideration of and consultation on the Victorian experience with a Public Advocate before implementing this reform in NSW. We note that the review of the Victorian combined model was carried out in 2012, prior to the roll out of the NDIS.

Consent

We generally support the model proposed by the NSW Law Reform Commission. However, we consider that Proposal 9.1(3), regarding the investigation of suspected abuse, neglect and exploitation, should include reference to the consent of the person. Regarding the investigation of elder abuse, the Australian Law Reform Commission (**ALRC**) said the following:

Securing consent before taking action that will affect someone is one way of respecting that person's autonomy. Respecting autonomy is a guiding principle in this inquiry, and its importance has been widely stressed by stakeholders. Many consider that help should not be forced upon adults.

Some fear that adult safeguarding laws will result in the state second-guessing or undermining people's choices, and that vulnerable people will be given less liberty and autonomy than other people. The ALRC therefore recommends that adult safeguarding legislation should provide that consent should be obtained before an adult safeguarding agency investigates or responds to suspected abuse, except in limited circumstances.¹¹

Legal Aid NSW considers that these comments are also relevant to the investigation of the abuse of people who need decision-making assistance. The ALRC made the following recommendation regarding the investigation of elder abuse, and we consider that this approach should be taken in any proposed laws regarding the investigation of suspected abuse of adults:

Adult safeguarding laws should provide that the consent of an at-risk adult must be secured before safeguarding agencies investigate, or take any other action, in relation to the abuse or neglect of the adult. However, consent should not be required:

- (a) *in serious cases of physical abuse, sexual abuse, or neglect; or*

¹¹ Australian Law Reform Commission *Elder abuse* (2017) Final Report 131 [14.80]-[14.81].

(b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or

(c) if the adult lacks the legal capacity to give consent, in the circumstances.¹²

Powers of investigation

Proposal 9.1(3)(f)(ii) is for extensive powers of investigation for the Public Advocate, including the power to 'require people, departments, authorities, service providers, institutions and organisations to provide documents, answer questions, and attend compulsory conferences'. Consideration should be given to the protection of the privilege against self-incrimination, and if necessary, the appropriate immunities.

We have concerns about Proposal 9.1(3)(f)(v), to give the Public Advocate read-only access to the police (COPS) and child protection (KIDS) databases. Without further information, we cannot understand the rationale for this access, particularly given the proposed power of the Public Advocate, noted above, to require the production of documents, answering of questions and attendance at conferences.

Chapter 10: Provisions of general application

With regard to Proposal 10-5, Legal Aid NSW does not support the creation of a new offence of disclosing information obtained in connection with the administration or execution of the Act. We acknowledge that people in need of decision-making assistance have a right to privacy. However, the usual legal response to a breach of privacy is civil rather than criminal. The *Guide to Framing Commonwealth Offences* notes that 'a criminal offence is the ultimate sanction for breaching the law and there can be far-reaching consequences for those convicted of criminal offences'.¹³ It suggests that 'criminal offences should be used where the relevant conduct involves, or has the potential to cause, considerable harm to society or individuals, the environment or Australia's national interests, including security interests'.¹⁴ We consider that this approach could usefully be taken to the creation of state offences, and we are not persuaded that a breach of privacy committed by a supporter or representative reaches a criminal standard of wrongdoing.

Chapter 11: Tribunal procedures and composition

Legal Aid NSW generally supports the proposals in Chapter 11, and particularly endorses Proposal 11.5, which would allow a legal representative of the person who is the subject of an application before the Tribunal to appear without seeking leave.

¹² Australian Law Reform Commission *Elder abuse* (2017) Final Report 131 Recommendation 14-4.

¹³ *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) [2.1.1].

¹⁴ *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) [2.1.1].

Chapter 12: Supreme Court

Chapter 13: Search and removal powers

Legal Aid NSW has no comment on the proposals in Chapters 12 and 13.

Chapter 14: Interaction with mental health legislation

Legal Aid NSW generally supports the proposals in Chapter 14. However, we have some concerns about completely removing the Mental Health Review Tribunal's power to order that the estate of the person be subject to management (Proposal 16.6(2)). Legal Aid NSW is aware of a number of matters where the Tribunal has made urgent interim financial management orders where a patient is at risk of dissipating funds. It would be useful for the Tribunal to retain the power to make a time-limited interim order to protect funds until the matter can be transferred to the Guardianship Tribunal.

Chapter 15: Adoption information directions

Chapter 16: Recognition of interstate appointments

Legal Aid NSW has no comment on the proposals in Chapters 15 and 16.