NCAT
NSW Civil &
Administrative Tribunal

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Mr Alan Cameron AO
Chairperson
New South Wales Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

12 May 2017

Dear Mr Cameron,

The NSW Civil and Administrative Tribunal ('the Tribunal') welcomes the opportunity to provide a response to the fourth question paper issued by the New South Wales Law Reform Commission in its review of the *Guardianship Act 1987* (NSW).

Question Paper 4 addresses the issue of 'Safeguards and procedures'. As the Tribunal is an independent body which exercises a range of judicial or quasi-judicial functions under the *Civil and Administrative Tribunal Act 2013* (NSW) (the CAT Act) and the *Guardianship Act*, we do not propose to comment on matters of policy. Accordingly, we have limited our comments, where relevant, to the operation of the current legislative scheme and potential implications for the functioning and resourcing of the Tribunal in relation to certain proposals for legislative reform.

In relation to Question Paper 4 (the Question Paper), NCAT (the Tribunal) will restrict its comments to:

- safeguards for enduring guardianship appointments including witnessing appointments (Questions 2.1, 2.2, 2.3 at [2.1]-[2.38]);
- safeguards for guardianship orders and financial management orders including time limits, reviews and grounds for revoking financial management orders (Questions 3.2, 3.3, 3.4, 3.6 at [3.5]-[3.36] and [3.41]-[3.47]);
- safeguards for supported decision-making (Question 6.1 at [6.1]-[6.23]);
- procedures of the Guardianship Division of NCAT including composition of Tribunals, requirements to hold a hearing and privacy and confidentiality (Questions 8.1, 8.3, 8.10 at [8.1]-[8.16], [8.21]-[8.28] and [8.58]-[8.63]).

Question 2.1: Witnessing an enduring guardianship appointment

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

(a) the eligibility requirements for witnesses

(b) the number of witnesses required, and

(c) the role of a witness?

The *Guardianship Act* requires that an enduring guardianship appointment be witnessed by at least one "eligible witness": s 6C(1)(d).

We note the proposals canvassed in the Question Paper to: (i) increase the number of persons required to witness an enduring guardianship appointment; (ii) expand the class of persons eligible to witness such appointments, and (iii) require any witness to an enduring guardianship appointment, to certify that they have explained to the appointer and the proposed enduring guardian, the powers and responsibilities of an enduring guardian.

Requiring an enduring guardianship appointment to be witnessed by two people, arguably provides an additional safeguard, and, would not involve any adverse implications for the Tribunal. We note that a number of other jurisdictions require enduring appointments to be witnessed by at least two people.[1]

Australian legal practitioners and employees of the NSW Trustee and Guardian who meet certain criteria are eligible to witness the making of an enduring guardianship appointment: s 5 of the *Guardianship Act* and cl 4 of the Guardianship Regulation 2016 (NSW). In contrast, the class of persons eligible to witness an enduring power of attorney is much wider and includes judges, magistrates, medical practitioners and ministers of religion: s 44(1)(a)(i) of the *Powers of Attorney Act 2003* (NSW); Schedule 1 to the Powers of Attorney Regulation 2016). The policy rationale for this apparent inconsistency is unclear.

The *Guardianship Act* directs that a witness to an enduring guardianship appointment must certify that the appointor and the proposed enduring guardian "appear to understand the effect of the instrument": s 6C(1)(e). A witness to an enduring power of attorney is subject to a corresponding requirement (but only in relation to the principal) and, in addition, must certify that they have explained the effect of the appointment to the principal: s 19(1) of the *Powers of Attorney Act*. The proposal to amend the *Guardianship Act* to include a requirement that a witness to an enduring guardianship appointment certify they have explained the effect of the appointment to the appointor and the proposed enduring guardian would promote consistency.

We understand the Question Paper (at [2.20]) to raise for consideration, whether, if the *Guardianship Act* were amended to require a witness to an enduring guardianship appointment to certify that they have explained to the appointor and the proposed enduring guardian the effect of the appointment (the explanation

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[1] *Guardianship and Administration Act 1995* (TAS) s 32(2)(c), *Powers of Attorney Act 2014* (VIC) s 33.

requirement), the Act should also prescribe the type of information to be included in that explanation. Our experience in the Tribunal is that the effect of an enduring guardianship appointment is often misunderstood and that such an explanation requirement, provided it covers all necessary information, would be a useful addition. Legislative guidance on the effect of an enduring guardianship appointment is also likely to assist a person taking on the role of witness to an enduring guardianship appointment to meet the explanation requirement.

Question 2.2: When enduring guardianship takes effect

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

The appointment of an enduring guardian comes into effect when the appointor becomes a "person in need of a guardian", namely a person who, because of a disability, is totally or partially incapable of managing his or her person: ss 3 and 6A(1) of the *Guardianship Act*. As the Question Paper notes (at [2.27]), this is an automatic process. While, on the application of a person appointed as an enduring guardian, the Tribunal may declare that the appointment "is in effect", such declaration is not a prerequisite to the appointment coming into effect: ss 6M(2) and 6A of the *Guardianship Act*.

We note that the registering and recording of enduring guardianship appointments does not fall within the functions assigned to the Tribunal. Nor is it otherwise catered for in the practices and procedures established in the CAT Act or the Tribunal's procedural rules. If it were to be proposed that the Tribunal was to be the applicable registration body, then this would require appropriate legislative support and would be likely to have significant resource implications for the Tribunal.

Question 2.3: Reviewing an enduring guardian appointment

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

As the Question Paper notes (at [2.32]), the powers conferred on the Tribunal to review an enduring guardianship appointment are narrower in scope than those conferred in respect of an enduring power of attorney. While the Tribunal has power to review the "making, revocation or the operation or effect of a reviewable power of attorney", it can only review the appointment or the purported appointment of an enduring guardian: s 36(1) of the *Powers of Attorney Act*, s 6J of the *Guardianship Act*. The policy rationale for this apparent inconsistency is unclear. Extending the Tribunal's powers to enable it to review the revocation and operation of an enduring guardianship appointment would provide appointors with additional protection. To the extent that this leads to more or lengthier proceedings, it could have resource implications for the Tribunal which should be taken into account in making any recommendation for reform.

Likewise, as the Question Paper notes at ([2.26], [2.37]), the orders that are available to the Tribunal on review of an enduring guardianship appointment are narrower than those available on review of an enduring power of attorney. The

Tribunal does not have the power to amend an enduring guardianship appointment by, for example, removing or replacing an enduring guardian (unless the enduring guardian has died, resigned or become incapacitated), or alter the powers conferred on the enduring guardian. As noted in *WBN* [2015] NSWCATGD 9 at [30], if, for example the Tribunal concludes, having conducted a review, that it is appropriate that a substitute enduring guardian be appointed, the only way this can be achieved would be to revoke the appointment and make a guardianship order under s 14 of the *Guardianship Act*. Having consistent powers across the two types of review would be beneficial as the powers currently available when reviewing an enduring guardianship appointment could be seen as cumbersome and potentially adds to the cost of a review hearing.

Question 3.2: Time limits for orders

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

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

A guardianship order may be either temporary or continuing: s 16(1)(b) of the *Guardianship Act*. The term of a guardianship order is determined by the Tribunal: s 18(1). The term of a temporary guardianship order cannot exceed 30 days: s 18(2). Generally, the term of an initial continuing guardianship order cannot exceed 12 months; the term of a renewed continuing guardianship order cannot exceed three years: s 18(1). Where the Tribunal is satisfied that the subject person has permanent disabilities, it is unlikely that they will become capable of managing their person, and, it is likely that there is a need for a guardianship order of longer duration, the Tribunal may make an initial guardianship order for a period not exceeding three years and a renewed order for a period of up to five years: s 18(1A) of the *Guardianship Act*.

In contrast, as the Question Paper notes (at [3.11] – (3.13)), the *Guardianship Act* does not impose any restrictions on the term of a financial management order, apart from interim financial management orders, which can be made for a maximum term of six months: s 25H. The Tribunal may order that a financial management order be reviewed within a specified time, however, it is not required to do so: s 25N of the *Guardianship Act*. As a consequence, the order will continue indefinitely, unless the order is reviewed, on the Tribunal's own motion or on the application of a person entitled to apply for an order to revoke or vary the order.

As the Table below reveals, NSW is the only jurisdiction in Australia that does not require financial management orders to be reviewed, or impose a restriction on their term.

State/Territory	Legislation	Duration
NSW	*Guardianship Act 1987* (NSW) s25N	Review included in order, on own motion, or on an application under s 25R
QLD	*Guardianship and Administration Act 2000* (QLD) s 28	Review within 5 years
VIC	*Guardianship and Administration Act 1986* (VIC) s 61	Review within 12 months or at least once within each 3 year period
SA	*Guardianship and Administration Act 1993* (SA) s 57	Review at intervals of not more than 3 years
ACT	*Guardianship and Management of Property Act 1991 (ACT)* s 19	Review within 3 years
TAS	*Guardianship and Administration Act 1995 (TAS)* s 52	Lapses on the expiration of 3 years after the date on which it is made unless continued under s 68
WA	*Guardianship and Administration Act 1990* (WA) s 84	Review within 5 years
NT	*Guardianship of Adults Act 2016* (NT) s 19, s 36, s 40	No limit, but order must include a review date

As the Question Paper points out (at [3.33)], there is a significant body of opinion that the absence of any legislative restriction on the term of a financial management order is inconsistent with the UN Convention on the Rights of Persons with Disabilities which provides in Article 12 in effect that:

- all appropriate and effective measures are taken to ensure the equal right of persons with disabilities to control their own financial affairs, and
- safeguards shall ensure that measures relating to the exercise of legal capacity 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.

If the *Guardianship Act* were amended to introduce time-limited orders resulting in mandatory reviews, this would have very significant resources implications. In the financial year 2015/16, the Tribunal received 10,384 applications.[2] As approximately 43% of the applications received relate to financial management, the resource implications would be very significant if, in those matters which result in an order, a review is mandated.

Question 3.3: Limits to the scope of financial management orders

[2] NCAT, NCAT Annual Report 2015-2016 at p 41. Available at: http://www.ncat.nsw.gov.au/Documents/ncat_annual_report_2015_2016.pdf.

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

While the *Guardianship Act* gives the Tribunal the power to exclude a specified part of a person's estate from the scope of a financial management order, it does not direct the Tribunal to consider whether part of the person's estate should be excluded from any order made: see ss 25E(1) and 25E(2).

The Division not infrequently exercises the power to exclude a specified part of a person's estate from the scope of a financial management order. In most, the excluded part of the estate, relates to regular income or social security entitlements, see for example:

- *XNO* [2015] NSWCATGD 46: All but lump sum compensation payment excluded from financial management order.
- *NES* [2015] NSWCATGD 10: Employment Income excluded from financial management order.
- *KDH* [2016] NSWCATGD 17: Centrelink payments and bank account excluded from financial management order.
- *NVQ* [2016] NSWCATGD 38: Centrelink payments excluded from financial management order.

As noted in the Question Paper, the NSW Legislative Council Standing Committee on Social Issues (Report 43 – 2010) concluded:

> 7.40 The Committee notes the subtle but significant difference in the decision-making process the different provisions engender in the mind of the person making the financial management order. Section 40 of the *NSW Trustee and Guardian Act 2009* – which provides for an order to made for part of an estate – requires the person to take as their starting point that none of the estate is under management, and then proceed to consider which parts of the estate should be committed to management. Section 25E (2) of the *Guardianship Act 1987* – which provides for an order to made which excludes part of an estate – requires the person to take as their starting point that the entire estate is under management, and then proceed to consider which parts of the estate should be excluded from management.
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> 7.41 The Committee considers that the latter approach is more liable to result in parts of an estate being placed under management unnecessarily. The Committee agrees with those inquiry participants who argued that the former approach, under section 40 of the *NSW Trustee and Guardian Act 2009*, is more consistent with the principle of the presumption of capacity and more likely to result in orders according with the principle of least restriction.

Question 3.4: When orders can be reviewed

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

The *Guardianship Act* does not expressly stipulate the matters the Tribunal is to take into account when exercising its power to review a guardianship order under s 25 of the Act.

In contrast, when deciding whether to make a guardianship order, the *Guardianship Act* states that the Tribunal must first be satisfied that the person, in respect of whom an application is made, is a "person in need of a guardian": s 14(1). If so satisfied, the Tribunal must take into account the matters listed in s 14(2) of the *Guardianship Act*, before exercising its power to make, or decline to make, a guardianship order.

NCAT and its predecessor Tribunals, have consistently adopted the approach that by implication the *Guardianship Act* requires the Tribunal, in the exercise of its review function, to have regard to the matters that must be considered in making a guardianship order: *IF v IG & Ors* [2004] NSWADTAP 3 at [30]; *DL v Public Guardian and Ors* [2008] NSWADTAP 6 at [6]; *ZCY v ZCZ & Ors* [2017] NSWCATAP 49 at [29]. The Supreme Court has approved this approach: *Application of SJ* [2011] NSWSC 372 at [31]; *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [112].

In the interests of certainty and consistency in decision making, an appropriate amendment to the *Guardianship Act* could put beyond doubt the factors required to be taken into account in reviewing a guardianship order.

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

This is addressed above in response to Question 3.2.

Question 3.6: Grounds for revoking a financial management order

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

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

To make a financial management order the Tribunal must be satisfied that the subject person is not capable of managing their affairs, there is a need for another person to manage their affairs, and it is in the person's best interests that the order be made: s 25G of the *Guardianship Act*. To revoke a financial management order, the Tribunal must either be satisfied that the protected person is capable of managing their affairs, or even if they have not regained capacity consider that it is in the best interests of the protected person that the order be revoked: s 25P(2) of the *Guardianship Act*. The absence of a need for a financial management order is not an express ground for revocation.

In *P v NSW Trustee and Guardian* [2015] NSWSC 579, at [319], Lindsay J gave an example of where it may be appropriate to revoke a financial management order on "best interests" grounds, despite a finding that the subject person lacked capacity to manage their affairs:

> [W]here there is no practical utility in burdening a person or his or her estate with the administrative infrastructure necessarily involved in protected estate management: *Re W and L* (Parameters of protected estate management orders) [2014] NSWSC 1106 at [87]-[89] and [95]).

See also *KDP* [2016] NSWCATGD 24 [40]-[41], in which the Tribunal considered the practical utility of retaining a financial management order in circumstances where there was no apparent need for such an order, and, as a consequence of the estate remaining under management, it would become liable for the costs of complying with a direction issued to the estate manager by the NSW Trustee & Guardian, to obtain a "surety bond", in respect of the estate.

We note that if the reasoning of Lindsay J in *P v NSW Trustee and Guardian* is applied, it may be strictly unnecessary to amend the *Guardianship Act* to include as a separate ground of revocation, the absence of a need for a financial management order, as this is a relevant consideration in determining whether the best interests ground is established. However, we also note that an amendment providing for such an express ground for revocation might provide clarity and be helpful to those directly involved in proceedings before the Tribunal.

The Division's experience is that a large number of applications made to the Tribunal for financial management orders are made in respect of individuals who:

a) have minimal or no assets,
b) whose only source of income is some form of social security entitlement and for whom arrangements have been made for recurrent expenses to be automatically paid by direct debit, and
c) are unlikely to incur any additional expenses in the foreseeable future.

The determination of this issue is made difficult because of the divergent practices among and within financial institutions, about whether direct debit arrangements can continue to operate, once the subject person loses capacity to manage their affairs. Suitable amendments could also assist in resolving these matters more efficiently.

Question 6.1: Safeguards for a supported decision-making model
If NSW introduces a formal supported decision-making model, what safeguards should this model include?

Question Paper 4 raises for discussion (at [6.6]-[6.23]) what safeguards should be included if NSW introduces a formal supported decisions-making model.

Whether or not NSW introduces a formal supported decision-making model is a matter of policy and the Tribunal does not express a view about this. Should, however, a formal supported decision-making model be introduced, it should operate as simply as possible and in a manner that provides appropriate safeguards for the supported person. Any reforms must ensure that supported decision-making does

not become substituted decision-making by default.

Any legislative scheme would need to make clear the circumstances in which the appointment of a supporter or co-decision maker could be reviewed and, in appropriate circumstances, be removed from that role.

Similarly, clear guidance would be required as to the appropriate legislative pathway should a supported person's cognition decline such that the person can no longer be truly supported in their decision-making. Particular reference should be made to the obligations of appointed supporters in these circumstances to ensure that supported decision-making does not become substituted decision-making without the formal appointment of a substitute decision-maker and without further consideration or review whether that is necessary.

Any additional jurisdiction provided to the Tribunal as part of providing the requisite safeguards to a supported decision-making regime, such as conducting regular reviews, or reviews upon application, of the appointment of supporters, would have significant resource implications for the Tribunal.

Question 8.1: Composition of the Guardianship Division and Appeal Panels

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

(2) If not, what would you change?

Composition of the Tribunal in proceedings in the Guardianship Division

As the Question Paper notes (at [8.12]), other than in relation to certain specified proceedings[3], when exercising its substantive Division functions, the Tribunal is to be constituted by three Division members. The three Division members must be: a member who is an Australian lawyer, a member with a "professional qualification" and a member with a "community based qualification".[4]

Although, as noted in the Question Paper (at [8.15]), none of the preliminary submissions question the need for three member panels, we note that the three member panel model has a number of advantages.

This model enables the Tribunal to draw on the collective skill and experience of its members. Members holding a professional qualification have expertise in a range of areas relevant to the guardianship jurisdiction, including medicine, psychiatry, psychology, social work and pharmacology. Those holding a community based qualification generally have direct personal or professional experience with people with disability. Given that in most proceedings, the parties are not legally represented and the quality of expert evidence is often uneven, the collective expertise of the Tribunal assists it in understanding the available evidence and discharging its fact finding role. In addition, this collective expertise assists the Tribunal to discharge its obligation to ensure that all relevant material is disclosed, by for example, enabling it to identify any gaps in the evidence: s 38(6) of the CAT Act.

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[3] Set out in cl 4(2) of sch 6 to the CAT Act.
[4] CAT Act, cl 4(1) of sch 6.

The Tribunal's ability to draw on its own expertise contributes significantly to the quality of its decisions. It can also be seen as reducing the time and expense involved in conducting hearings.

In circumstances where the parties and or other participants are in conflict and the subject matter of the application or review is contentious, the use of a three-member panel contributes to a more effective and fairer hearing.

The use of a three-member panel also reduces the likelihood that an aggrieved party will perceive that the Tribunal has been biased or has determined the application other than on its merits.

We note that the use of three member panels also appears to result in a very much reduced rate of appeals.

Composition of the Appeal Panel

The Appeal Panel when dealing with an appeal from the Guardianship Division is required to be constituted by three Tribunal members: two lawyers, including one who is an Australian lawyer of at least seven years standing, and either a senior or general member who is not an Australian lawyer: cl 13(1) of sch 6 to the CAT Act.

For similar reasons to those discussed above in relation to the composition of the Tribunal in proceedings in the Guardianship Division, in our experience there are advantages in having a three-member panel determine internal appeals for decisions made by the Division.

Question 8.3: The requirement for a hearing

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

As the Question Paper notes (at [8.22]), the Division is required to hold a "hearing" except where making an ancillary or interlocutory decision: cl 6 of the sch 6 to the CAT Act. The Question Paper raises for consideration when, if ever it would be appropriate to make a decision without holding a hearing.

In other Divisions of NCAT, the Tribunal may dispense with the requirement to hold a hearing: s 50 of the CAT Act. To exercise that power the Tribunal must be satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material lodged with or provided to the Tribunal: s 50(2) of the CAT Act. In addition, the Tribunal must afford the parties an opportunity to make submissions about the proposal to dispense with an oral hearing and take any such submissions into account: 50(3) of the CAT Act. Where that power is exercised the Tribunal is required to determine the matter based on the written submissions or any other documents or material that have been lodged with, or provided to, the Tribunal: s 50(4) of the CAT Act.

The experience is that dispensing with an oral hearing is most effective where parties are legally represented, there is no contested evidence and all issues can be

adequately addressed in writing. Where this is not the case, the time taken for the Tribunal to decide an application and prepare written reasons is usually greater than if an oral hearing were conducted. This is because the Tribunal does not have the ability to ask questions of parties, which is often necessary because the written material provided to the Tribunal is not comprehensive. In addition, if the Tribunal invites the parties to make written submissions on a particular issue, procedural fairness demands that the parties be given the opportunity to comment on each other's responses. This almost inevitably delays finalisation of the application.

In addition to these practical matters, dealing with applications "on the papers" also raises concerns about fairness and justice. Determining matters on the papers is not infrequently viewed with suspicion by unrepresented parties because they did not have the opportunity to participate in a hearing and observe the hearing and decision-making process.

Further, the quality of a determination made on the papers is dependent on the quality of the written submissions and written evidence provided to the Tribunal. Many unrepresented parties lack the ability to address the relevant issues clearly, cogently and comprehensively. As a result they are at an enormous disadvantage compared to a represented party or a party who is articulate, well informed and well resourced.

In addition, in most cases, the person the subject of an application is not in a position to provide submissions or documentary evidence at all thus their views may be entirely overlooked. Furthermore, it is difficult for the Tribunal to assess in advance and without seeing the parties, the capacity of the parties to provide effective written submissions and other material. Consequently, the Tribunal, even if it complied with the requirements of s 50(3) of the CAT Act, would rarely be in a position to determine in guardianship proceedings whether there would be likely to be substantial prejudice to one or more parties if an oral hearing was dispensed with.

Question 8.10: Privacy and confidentiality

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

Open hearings

Hearings in the Guardianship Division are open to the public unless the Tribunal orders otherwise: s 49(1) of the CAT Act. The Act gives the Tribunal a discretionary power, which can be exercised of its own motion or on the application of a party, to order that a hearing be conducted wholly or partly in private if it is "satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason": s 49(2) of the CAT Act.

While s 49 of the CAT Act creates the norm of a public hearing, it nonetheless gives the Tribunal a broad power to conduct a hearing wholly or partly in private. That power must be exercised in accordance with the guiding principle of the CAT Act: to facilitate the just, quick and cheap resolution of the real issues in the proceedings: s 36(1). In practice the power is exercised sparingly.

Arguably, s 49 of the CAT Act coupled with the non-disclosure provisions contained in the *Guardianship Act* and the ability to make non-disclosure orders under s 64 of CAT Act strikes an appropriate balance between the public interest in open justice and the need to protect the personal information of the parties to proceedings.

Modification of the hearing rule

The Tribunal is required to accord procedural fairness to all parties and any person whose interests are affected by its decisions: s 38(2) of the CAT Act; *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [159]. As part of this requirement, the Tribunal must give any person whose interests might be affected by its decisions, the opportunity to respond to adverse information that is "credible, relevant and significant to the decision to be made", even where obtained in the course of a private hearing: *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [159]; *ZAA v NSW Trustee and Guardian* [2015] NSWCATAP 234 at [11]; *KV v Protective & Ors; KW & Ors v KV & Ors* (No.2) [2004] NSWADTAP 48 at [18] – [29] citing *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 584.

An issue raised by the Question Paper is whether the CAT Act should be modified, to permit the Tribunal not to disclose "certain evidence" even in circumstances where to do so, might constitute a denial of procedural fairness. As noted in the Question Paper, this issue was explored in 2010 by the NSW Legislative Council Standing Committee on Social Issues "Substitute decision-making for people lacking capacity", which recommended that amendments to the *Guardianship Act* be considered, to permit the Tribunal to order that certain evidence not be disclosed to the parties where it forms the view that to do so would not be in the best interests of the Subject Person: Recommendation 7. The NSW Government decided not to adopt that recommendation.

However, we note that the CAT Act permits the Tribunal of its own motion or on the application of a party, pursuant to s 64(1)(d) of the CAT Act, to make an order

> Prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings.[5]

The Tribunal may only make such an order if it is "satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason".[6]

The version of the *Guardianship Act* considered by the Standing Committee did not contain an equivalent provision.

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[5] CAT Act, s 64(1)(d).
[6] CAT Act, s 64(1).

Non-disclosure of information

We also note that the provisions contained in s 65 of the CAT Act prohibit the publication or broadcast of information that would identify persons involved in guardianship proceedings except with the consent of the Tribunal.

In response to the question 8.10 (at [8.58]-[8.63], namely, what, if anything, should be changed in the law to protect the privacy of people involved in Guardianship Division cases, it would seem that the protections offered by ss 49, 64, and 65 of the CAT Act provide adequate measures to protect the privacy of individuals. This is bolstered by the duty that the Tribunal has when exercising its discretion in relation to those provisions to observe the principles set out in s 4 of the *Guardianship Act*.

Yours sincerely

Malcolm Schyvens
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Division Head – Guardianship Division
NSW Civil and Administrative Tribunal