12 May 2017

Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
DX 1227 SYDNEY
nsw-lrc@justice.nsw.gov.au

Dear Mr Cameron,

We are a group of law students enrolled in 6000LAW Law Reform course at Griffith Law School, Griffith University. We welcome the opportunity to participate in reviewing the *Guardianship Act* of New South Wales.

Please see the attached submissions in response to Question Paper 6.

This submission was prepared under guidance of Associate Professor Kieran Tranter.

Kind regards,

Michael Coppin, Lachlan O'Neill and Georgina Sebar

Address for correspondence

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INTRODUCTION

We are students enrolled in 6000LAW Law Reform at Griffith Law School, Griffith University, Queensland. This submission is part of our assessment in that course. For any questions about the course please contact Associate Professor Kieran Tranter (07 5552 8161, k.tranter@griffith.edu.au).

This submission is based upon an analysis of recent decisions made under the current *Guardianship Act 1987* (NSW) ('The Act'). From this analysis, we argue that there are discrepancies between the wording of the Act and decisions of the Tribunal. We suggest that the Tribunal's approach is preferable as it more reflective of modern understandings of disabilities, and this should be replicated in the Act.

We have identified three discrepancies:

- The weight allocated to the general principles under section 4.
- The absence in the Act of an avenue for the recovery of persons subject to orders made under the Act
- The use of the term 'disabled' in the Act.

1.0 WEIGHT ALLOCATED TO GENERAL PRINCIPLES

1.1 Current Law

Section 4 of the Act currently sets out the general principles which the Tribunal is to be guided by when making any decision under the Act. [1]

> s(4) It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:
>
> > (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.

The principles are intended to guide and structure the Tribunal's decision making.[2] This section clearly states that the greatest weight must be afforded by the Tribunals to the welfare and interests of the person in question. Reviewing recent decisions made under the Guardianship Division of the

1 *Guardianship Act 1987* (NSW) s 4.
2 *IF v IG* [2004] NSWADTAP 3 [34].

NSW Civil and Administration Tribunal (the 'Tribunal') reveals that, in practice, equal weight is being afforded to the relevant considerations.

It is clear that the welfare and interest of the person must be balanced against the person's right to freedom of decision and freedom of action, as well as other social considerations. The existing legislation has attempted to achieve this by directing the Tribunal to restrict the freedom of decision and freedom of action of the person as little as possible while giving the paramount consideration to the welfare and interests of the person in question.[3]

These general principles are meant to guide the Tribunal's decision making process by ensuring that all relevant considerations are made. While there is no requirement that decisions specifically state each relevant consideration, it is critical that such principles are at the forefront of the decision maker's mind.[4]

1.2 Current Interpretation by the Tribunal

The overall guiding principle of the Act is always the protection of the welfare and interests of the person in question. However, in practice, due to the complex nature of the decisions before the Tribunal and the number of considerations which need to be made,[5] recent decisions show that the Tribunal does not place this in a paramount position. Equal or more consideration has been afforded to ensuring decisions do not restrict the freedoms of the person in question, as well the preservation of family relationships and the protection of the person from neglect, abuse and exploitation.

The rise in the use of the consideration to protect from neglect, abuse and exploitation can be linked to the consideration of these factors as part of the process of granting financial management orders.[6] Decisions such as *P v New South Wales Public Guardian*[7] show that if the person who is the subject of the application is 'unduly open to the risk of neglect, abuse and exploitation'[8] then an order cannot be granted. With regards to the granting of guardianship orders some decisions such as *FQM*[9] find the obligation to protect from neglect and exploitation intertwined with the obligation to protect the welfare of the person. As such, the same level of consideration is often given to both considerations.[10]

Another consideration granted equal weight is that of preserving family relationships. Where significant family conflict is present, it is often the Tribunal's decision to make an order that aims to preserve family relationships.[11] These decisions, such as *NXH*,[12] require delicate handling, and the Tribunal has found that preserving existing family relationships is often in the person's best interest. In this way, equal weight is again granted to both considerations.

Recent decisions also show the Tribunal balancing the welfare of the person in question with the promotion of their rights and freedoms. Such decisions consider it their directive to consider whether the person's life circumstances and protection of their rights necessitate the appointment of

[3] *Guardianship Act 1987* (NSW) s 4 (a-b).
[4] *GS v Protective Commissioner and Guardianship Tribunal* [2003] NSWADTAP 52 [44].
[5] *BDO v Public Guardian* [2015] NSWCATAD 152 [443].
[6] *CJ V AKI* [2015] NSWSC 498, [38]; *EB v Guardianship Tribunal* [2011] NSWSC 767 [134].
[7] *P v New South Wales Public Guardian* [2015] NSWSC 579.
[8] *P v New South Wales Public Guardian* [2015] NSWSC 579 [352].
[9] *FQM* [2016] NSWCATGD 19[32]; *NES* [2015] NSWCATGD 10 [27]; *NIQ* [2014] NSWCATGD 28 [51].
[10] *NES* [2015] NSWCATGD 10 [47].
[11] *HNI* [2016] NSWCATGD 12 [24]; *MKT* [2016] NSWCATGD 37 [12]; *NSD* [2016] NSWCATGD 20 [14].
[12] *NXH* [2015] NSWCATGD 20 [36].

a guardian.[13] This is shown in decisions such as *ROV*[14] where the Tribunal explicitly stated that it seeks to:

> Reflect the protective nature of the Guardianship jurisdiction but seeks to strike equal balance between providing necessary protection and promoting empowerment of the subject person with disabilities, including by intruding no more than necessary on their rights and liberties.[15]

The recent decisions show the Tribunal adopting an approach that treats as equal the person's overall welfare and respect for the person's rights and freedoms. As such, while the welfare and interests is still a guiding principle of the guardianship legislation, in practice it no longer receives the paramount consideration that the Act calls it to be.

1.3 Recommendations

By reforming section 4 to allow for equal weight to be granted to each of the relevant principles, the Act would more accurately fit the current practices of the Tribunal. This would also more closely reflect the current Act and practices in Queensland,[16] Western Australia[17] and New Zealand.[18]

2.0 RECOVERY INTEGRAL TO DEFINITION OF MENTAL ILLNESS

2.1 Current Law

The current definition of a person with a disability in the Act includes a person who, because of a number of reasons, is not able to participate in one or more major life activity. Those reasons are defined as 'intellectual, physical, psychological or sensory disability', 'advanced age', a 'mental illness under the *Mental Health Act*', or being otherwise disabled.[19] A 'person in need of a guardian' is defined as 'a person who because of a disability, is totally or partially incapable of managing his or her person'.[20]

There is no mention in the current definition of the possibility of recovery, either as a relevant consideration or otherwise. This has allowed the Tribunal to interpret the definition openly; however, without a definitive approach for dealing with recovery in the legislation, the Tribunal is reluctant to give it adequate weight in guardianship and financial management orders.

2.2 Current Interpretation

A review of recent decisions depict a precarious balancing act between accepting recovery as the basis of revoking or denying the renewal of a guardianship order and the need to protect the person from harm.[21] The decisions show an acknowledgment that recovery is a factor in determining whether a guardianship or financial management order should be made. However, the Tribunal can be seen to be reluctant in accepting recovery as evidence of capacity.

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[13] *EQK* [2016] NSWCATGD 29 [14]; *NXH* [2015] NSWCATGD 20 [22]; *BME* [2016] NSWCATGD 33 [30].
[14] *ROV* [2016] NSWCATGD 34.
[15] *ROV* [2016] NSWCATGD 34 [13].
[16] *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1.
[17] *Guardianship and Administration Act 1990* (WA) s 4.
[18] *Protection of Personal and Property Rights Act 1998* (New Zealand) s 12.
[19] *Guardianship Act 1987* (NSW) s 3(2)(a)-(d).
[20] *Guardianship Act 1987* (NSW) s 3(1).
[21] See *UMT* [2016] NSWCATGD 7; *UIO* [2016] NSWCATGD 5; *IUO* [2015] NSWCATGD 4; *SAQ* [2016] NSWCATGD 47.

An example of the Tribunal showing this acknowledgement can be seen in *EBI,*[22] in which a financial management order was awarded for a period of only nine months because the Tribunal determined that it was likely that the person would recover capability after settling into new accommodation.[23] At the time of the hearing the person was found to not adequately understand his own affairs.[24] A similar decision and reasoning was given in *EQK.*[25] Also, in *UIO,*[26] a guardianship order was not renewed because of evidence which:

> … supported a finding that Mrs UIO is able to make the important lifestyle decisions, and that her disability has now been treated to the extent that she is not a person for whom the Tribunal could make an order.[27]

On the other hand, the Tribunal often relies on evidence of the past as predictors of the future. In *DQC*[28]a sixty-six year old man with a history of schizophrenia and a major depressive order was able to show, at the time of trial, that he was capable of understanding and managing his own affairs, and have this affirmed by his case manager.[29] The Tribunal, on this evidence, was not convinced that they could consider DQC a person for whom an order should be made;[30] however, they relied upon evidence of past behaviour in recommending that DQC request that the NSW Public Guardian and Trustee become his enduring attorney in case of a relapse.[31]

These decisions demonstrate the need for a clear, definitive way to deal with recovery. *EBI* shows the Tribunal is willing to accept recovery as a genuine reason of the revoking or non-renewal of a guardianship order, while the *DQC* demonstrates reluctance to discount the possibility of relapse after a person has recovered. Without clear definitions, and with the ability to consider the past as a relevant consideration, the Tribunal is required to consider recovery as only part of the issue, rather than the most important consideration.

The Tribunal is willing to recognise the impact of recovery on the necessity of a guardianship order, but remain cautious about wholly accepting current wellness as evidence of the probability of continuing wellness. A recent study showed that a large percentage of those who access mental health services feel they struggle to be seen as a 'competent and equal person'.[32] Davidson *et al*[33] suggest that recovery should be given a greater weight when considering the capacity of those who suffer from a mental illness, stating:

> This does not mean that consideration, assessment, or discussion of risk should not be involved in mental health care but that it should not be used as the criterion on which compulsory intervention is based.[34]

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[22] *EBI* [2017] NSWCATGD 6
[23] *EBI* [2017] NSWCATGD 6 [69].
[24] *EBI* [2017] NSWCATGD 6 [53].
[25] *EQK* [2016] NSWCATGD 29 [26].
[26] *UIO* [2016] NSWCATGD 5.
[27] *UIO* [2016] NSWCATGD 5 [18]
[28] *DQC* [2016] NSWCATGD 10
[29] *DQC* [2016] NSWCATGD 10 [7].
[30] *DQC* [2016] NSWCATGD 10 [9].
[31] *DQC* [2016] NSWCATGD 10 [11].
[32] Patrik Dahlqvist Jönsson 'Service Users' Experiences of Participation in Decision Making in Mental Health Services' (2015) 22 *Journal of Psychiatric and Mental Health Nursing* 688, 692.
[33] Gavin Davidson, Lisa Brophy and Jim Campbell 'Risk, Recovery and Capacity: Competing or Complementary Approaches to Mental Health Social Work' (2016) 69 *Australian Social Work* 158, 165.
[34] Gavin Davidson, Lisa Brophy and Jim Campbell 'Risk, Recovery and Capacity: Competing or Complementary Approaches to Mental Health Social Work' (2016) 69 *Australian Social Work* 158, 165.

The decisions of the Tribunal demonstrate a modern understanding of disability caused by mental illness, but in making these decisions are restricted by the outdated language of the legislation.

2.2 Recommendation 2

We recommend that the definition of a disability should be reworded to more adequately address the possibility of recovery and contemporary understandings of mental illnesses. The Tribunal is interpreting the Act in such a way that a mental illness constituting a disability is considered not necessarily permanent. However, the existing legislative definition does nothing to prevent discrimination against those who have been mentally ill previously. The modern language of disability should be reflected in the Act, as it is already being reflected in the decisions being made.

3. CONTEMPORARY MEANING AND WORDING OF 'DISABLED', AND OTHER TERMS:

3.1 Terminology in Legislation:

It is clear that the Act intended to restrict the scope of those who would be considered as 'disabled'. In addition to the strict guidelines for determining whether a person is disabled under the Act, the person for who the application for a guardian is being made must meet the threshold that would make the board satisfied that a guardian is needed.[35] However, the use of the word 'disability' does not address 'decision making capacity', leaving those who may need a guardian, but whose disability falls outside of the scope of the legislation no avenue for obtaining legal guardianship.

The Australian Law Reform Commission's 2014 report on *Equality, Capacity and Disability in Commonwealth Laws* acknowledged the challenge of defining and clarifying terms with the intent to help, rather than to offend.[36] It gave examples of the wording from historical legislation, including 'lunatic' and '*non compos mentis*'[37] to show how quickly terms can come to be offensive. Similarly, Victoria, as part of the person first approach has recently recommended that the use of the word 'disability' should be replaced with 'decision making capacity'.[38]

3.2 Current Interpretation:

There are a number of recent decisions that show the failure of the current framework that determines entitlement to a guardian in New South Wales due to the term 'disability'. In *NVP,*[39] NVP, a sufferer of Huntington's disease, was denied a guardianship order despite being classified as a 'mentally disordered person'[40] within the hospital, as her illness did not come under the scope of a disability under the Act. A concluding comment was made by the Tribunal:

> The Tribunal was puzzled why the Huntington's unit is gazetted under the Mental Health Act. The cognitive impairment related to Huntington's disease is not a mental illness which means that a patient cannot be made an involuntary patient under the *Mental Health Act*. The *Mental Health Act* limits the powers that the Tribunal can give a guardian for a person in a gazetted unit. If the unit was not gazetted, if appropriate, the

[35] Explanatory Memorandum, Disability Services and Guardianship Bill 1987 (No 1) (NSW), Div. 3 (c).
[36] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, 2014.
[37] William Blackstone, *Commentaries on the Laws of England* (1765) vol 1, 292, 294.
[38] Victorian Law Reform Commission, *Guardianship*, report 24 (2012) at p 53: '*Public Policy Underpinning a New Act'*.
[39] *NVP* [2016] NSWCATGD 1 [5].
[40] *NVP* [2016] NSWCATGD 1 [5] – [6].

> Tribunal would have clear authority to give a guardian coercive powers in relation to accommodation and medical treatment decisions.[41]

From the excerpt above, it is clear that the Tribunal has been unduly limited by the definition and use of the term 'disability' with respect to s 3(2) of the Act,[42] and that NVO has therefore been prevented from being awarded a guardian.

Furthermore, the decision of *NXH*[43] demonstrates that an application for a guardianship order can be dismissed where the Tribunal is unsatisfied that the person's disability affects their decision making capacity enough to be classified under the Act. In this particular decision, a medical professional provided the view on NXH, stating:

> 'It should be noted that [Mr NXH]'s lack of insight into his cognitive impairments will, in all likelihood, have an adverse effect on his ability to make decisions pertaining to this specific aspect of his health care and resultant care needs. In view of the uncertain course of [Mr NXH]'s cognitive impairment (and it's at times fluctuant nature), it would be prudent to monitor his ability to continue to make decisions regarding his own health and lifestyle matters.'[44]

The Tribunal, however, were 'not satisfied that Mr NXH [had] a disability which prevents him making important decisions about his medical care and treatment.'[45] As a result of this, NXH's guardianship order was dismissed.

It is clear from analysing the above decisions and literature, that the limiting nature of the word 'disabled' has affected the meaning of specific terms within the Act. As a result of this, the Tribunal is frequently incapable of providing the invaluable support of guardianship needed by many members of the community.[46]

3.3 Recommendation 3

The terminology of 'disability' is inadequate for modern society. The idea of moving to a more progressive framework is welcomed, especially one which does not set a 'threshold of disability' for those in need of a guardian to help with important life decisions.

The suggestion is made that the use of objective tests to measure a minimum standard of disability is replaced with a test that is less restrictive and open to wider inclusion for the benefit of the community. Such an idea is encapsulated in the use of a 'decision making capacity' test, which will objectively include more people who need the assistance of a guardian.[47]

SUMMARY OF RECOMMENDATIONS

In summary, we argue that recent decisions of the Tribunal show inadequacies with some of the provisions and terms of the Act. In particular:

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[41] *SAQ* [2016] NSWCATGD 47.
[42] *Guardianship Act* 1987 (NSW) s 3 (2).
[43] *NXH* [2015] NSWCATGD 20.
[44] *NXH* [2015] NSWCATGD 20 [32].
[45] *NXH* [2015] NSWCATGD 20 [40].
[46] See above: *NXH* [2015] NSWCATGD 20, *UIO* [2016] NSWCATGD 5, *NVP* [2016] NSWCATGD 1.
[47] NMN [2015] NSWCATGD 52 [24]; DSD [2015] NSWCATGD 45 [38]; *AGI v Commission for Children and Young People* [2012] NSWADT 31 [32].

- The weight allocated to the general principles set out in section 4
- The absence in the Act of an avenue for the recovery of persons subject to orders made under the Act
- The use of the term 'disabled' in the Act

We suggest that the act be amended to address these inadequacies. In particular:

- Reform of section 4 of the Act to allow for equal weight with respect to the person's rights, freedoms, interests and overall welfare.
- Section 4(a) should be amended to allow for equal weight to be given to all relevant considerations. This may be achieved by removing the term 'paramount' and replacing it with the term 'adequate' or 'relevant'.
- We recommend that the definition of a disability should be reworded to more adequately address the possibility of recovery and contemporary understanding of mental illnesses.
- Removing the term 'disability' and 'disabled' to conform with contemporary societal standards, and superseding such terms with a framework around the 'decision making capacity' of a person.
- In the alternative, if the term 'disability' remains in the statute, the scope should be amended to further encapsulate any person that needs decision making support.