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

19 May 2017

Dear Mr Cameron,

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

Question Paper 6 addresses "Remaining issues" not otherwise addressed in the previous five question papers issued by the Commission. 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) ('CAT Act') and the *Guardianship Act*, we do not propose to comment on matters of policy. Accordingly, we have sought to limit 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.

The Tribunal has focused its comments on the discussion concerning:

- the statutory objects in the *Guardianship Act* and the language of guardianship (Questions 2.1, 2.2 and 2.6 at [2.1]-[2.16] and [2.43]-[2.46]);
- the relationship between NSW and Commonwealth laws (Question 3.1 at [3.1]-[3.27]);
- adoption information directions (Question 4.1 at [4.1]-[4.5]);
- the appointment of parents as guardians (Question 5.5 at [5.31]-[5.49]);
- whether guardianship and financial management orders should be combined and the effect of Tribunal orders on enduring appointments (Questions 7.1 and 7.2 at [7.1]-[7.17]);
- search and removal powers (Question 8.1 at [8.1]-[8.13]).

Questions 2.1: Statutory objects

What, if anything, should be included in a list of statutory objects to guide the interpretation of guardianship law?

As noted in the Question Paper (at [2.4]), the *Guardianship Act* currently only provides an objects clause in relation to the operation of Part 5 which deals with medical and dental treatment.

Any proposal that general statutory objects be included to guide the interpretation of the *Guardianship Act* is a matter of policy and the Tribunal provides no comment. However, in terms of the Tribunal's functions under the *Guardianship Act*, consideration would need to be given as to the interrelationship between any newly introduced objects in that Act, and the objects contained within s 3 of the CAT Act.

Questions 2.2: General principles

(1) What should be included in a list of general principles to guide those who do anything under guardianship law?

(2) Should there be multiple statements of principles that are tailored to particular decision-making situations? What are those situiations and what principles should be included?

Again, the inclusion and content of general principles in the *Guardianship Act* is a matter of policy.

The only comment the Tribunal would make is to note the importance of ensuring that any amendment or addition to the current principles included in the legislation must use concepts and phraseology which not only reflects contemporary understanding of disability, but are also capable of being readily understood by the community at large. Substitute decision-makers, and, if a formal regime is introduced, supporters, for people with disabilities are derived from all sections of our community. It is important that those appointed to formal roles are guided by principles which are universally capable of being understood and implemented. We note that the importance of this issue has been highlighted in a previous submission to the Commission provided by the NSW Council for Intellectual Disability.[1]

Questions 2.6: Language of guardianship

What terms should be used to describe particpants in substitute and supported decision-making schemes?

It is important that proposals relating to the terminology to be applied to substitute and supported decision-making schemes take into consideration the need for unambiguous terms that do not cause confusion, and where possible, enhance

[1] NSW Council for Intellectual Disability, *Preliminary Submission PGA018 to the NSW Law Reform Commission – Review of the Guardianship Act 1987 (NSW)*, 2017. Available at: http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Preliminary-submissions/PGA18.pdf

harmonisation of terminology across Australian jurisdictions.

By way of example, as a result of amendments to the *Children and Young Persons (Care and Protections) Act 1998,*[2] the Children's Court now has authority to make a guardianship order to allocate parental responsibility to either a relative or kin of a minor. This shift in language effectively promulgated the application of two different notions of a guardian in NSW, one relating to minors and one relating to people with disabilities.

Any reform of the language used would need to include consideration of such use, as well as the wider community's general use and understanding of "guardianship" terms.

Question 3.1: Relationship between Commonwealth and NSW laws

What should be done to ensure an effective interrelationship between Commonwealth nominee or representative provisions and state-based arrangements for managing a person's financial and personal affairs?

The Question Paper raises a number of issues about the interaction between certain federal legislative schemes and the *Guardianship Act.* A number of comments are made in relation, in particular, to the nominee scheme under the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act). In a paper that examines recent cases decided by the Guardianship Division of NCAT in relation to applications prompted by a person's participation in the National Disability Insurance Scheme,[3] the author notes in relation to the nominee scheme that evidence provided on behalf of the NDIA in two cases (*KCG* [2014] NSWCATGD 7 and *LBL* [2016] NSWCATGD 22) indicates:

> that the NDIA is reluctant to utilise the nominee scheme and, instead, relies on the participant's informal support network, such as family or close friends, to assist in the development of a person's plan of supports. Someone who has this degree of support around them does not, in the NDIA's view, need a guardian or a nominee to be appointed. In *KTT*, therefore, it may be that the application for guardianship, if decided now, would be dismissed not on the basis of the Tribunal's caution against appointing a guardian as a way of making more likely the appointment of that person as a nominee under the NDIS Act (given that it seems that nominees are rarely appointed), but on the basis that Mr KTT's mother can be involved in the discussions and development of her son's plan without needing to be appointed as his guardian. It would be the NDIA that would be identified as managing the plan under s 42(2)(c) of the NDIS Act.[4]

The paper also notes the difficulty in finding any publicly available information concerning the extent to which nominees are being formally appointed under the

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[2] *Child Protection Amendment Act 2014* (NSW).

[3] NCAT, C Fougere, *Guardianship, financial management and the NDIS: NCA T's experience* (18 May 2017) Available at: http://www.ncat.nsw.gov.au/Documents/speeches_and_presentations/20170323_paper_fougere_agac_hobart.pdf

[4] NCAT, C Fougere, *Guardianship, financial management and the NDIS: NCA T's experience* (18 May 2017) [83]. Available at: http://www.ncat.nsw.gov.au/Documents/speeches_and_presentations/20170323_paper_fougere_agac_hobart.pdf

NDIS Act.[5]

The practical outcomes of the nominee scheme under the NDIS Act may be relevant to any recommendations that may be made in relation to this particular interaction between a federal nominee scheme and the *Guardianship Act*.

More broadly, as the Tribunal also noted in its response to Question 7 of Question Paper 5, the outcomes of a number of federal reforms are still uncertain, for example, the content of the legislation that will bring into effect important aspects of the NDIS Quality and Safeguarding Framework[6] and the response at a federal level, if any, to the Australian Law Reform Commission's (ALRC) Inquiry on 'Protecting the Rights of Older Australians from Abuse'. However, to the extent that it is possible to do so given this uncertainty, any proposed legislative reform of the *Guardianship Act* should have careful regard to these proposed reforms to ensure consistency, particularly in relation to the regulation of restrictive practices in NSW.

Question 4.1: Adoption information directions

What changes, if any, should be made to the part of the Guardianship Act 1987 (NSW) that relates to adoption information directions?

As noted in the Question Paper, Part 4A of the *Guardianship Act* provides for applications to be made to the Tribunal by a person seeking directions as to adoption information available under the *Adoption Act 2000* (NSW). The provisions provide a mechanism for a person to act on behalf of a person with a disability who has entitlements to information under the *Adoption Act* but is unable to exercise those rights due to their disability.

Whilst any change to the current operation of Part 4A is a matter of policy, the Tribunal notes that it has been unable to identify any record of having received an application requesting the Tribunal to exercise the powers provided in this part of the *Guardianship Act* since the part was introduced into the Act in 2000.

Question 5.5: Process for appointing parents as guardians

(1) Should NSW introduce a streamlined method for parents of adult children with profound intellectual disability to become their guardian when they turn 18 without the need for a NSW Civil and Administrative Tribunal hearing?

(2) What other mechanisms could be made available for parents to make decisions for an adult with profound decision-making incapacity?

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[5] NCAT, C Fougere, *Guardianship, financial management and the NDIS: NCA T's experience* (18 May 2017) [85], [108]. Available at: http://www.ncat.nsw.gov.au/Documents/speeches_and_presentations/20170323_paper_fougere_agac_hobart.pdf

[6] Department of Social Services, *NDIS Quality and Safeguarding Framework*, 2016. Available at: https://www.dss.gov.au/sites/default/files/documents/04_2017/ndis_quality_and_safeguarding_framework_final.pdf.

Question Paper 6 raises for discussion (at [5.31] to [5.47), whether there should be a more streamlined way for parents of people with profound intellectual disabilities to become their child's guardian, or otherwise make decisions on their behalf, once they turn 18.

This discussion clearly raises significant matters of policy on which the Tribunal makes no comment. The only comment we wish to make relates to any proposal that the Tribunal be provided with authority to make orders for people in the cohort discussed without conducting an oral hearing.

Currently, the Tribunal is required to conduct an oral hearing in determining an application to appoint a substitute decision-maker for a person with a disability. This is the case irrespective of the age of the person, the extent of their disability, or their relationship to the individual seeking appointment.[7] Any amendment which would permit the Tribunal to proceed to make orders without conducting an oral hearing for a particular group within the community raises several issues that require consideration.

First, there would need to be consideration as to how this regime complies with Article 12 of the UN Convention on the Rights of Persons with Disabilities given that it provides, in effect, that any authority provided to a substitute decision maker must be regularly reviewed by an independent authority or judicial body, is proportional, and provided for the shortest time possible.

Second, there would need to be clear legislative guidance to permit the Tribunal to identify those who were eligible to have an application treated in a different manner from others. Following the discussion in the Question Paper, this would require legislative amendment to provide a definition for the meaning of "profound intellectual disability", or some like term, as well as "parent".

Third, consideration would need to be given to the appropriateness and consistency of bringing into existence different regimes for the appointment of a substitute decision-maker, depending only on whether a person has a "profound intellectual disability" or not, and whether they are in the care of their "parents" or not.

Fourth, any recommendation would need to address the disadvantages associated with dispensing with an oral hearing, including the potential denial of procedural fairness, the possibility of delays in finalisation of "on the papers" matters compared to matters dealt with by way of an oral hearing and the very substantial prejudice to people who lack the ability to express themselves clearly and cogently in writing, including most importantly, but not only, the person the subject of the application in many cases. We refer the Commission to our previous submissions as to the possible disadvantages of dispensing with oral hearings in relation to applications under the *Guardianship Act.* [8]

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[7] *Civil and Administrative Act 2013* (NSW), Cl 6(1) of Sch 6.

[8] NSW Civil & Administrative Tribunal, *Submission GA101 to the NSW Law Reform Commission – Review of the Guardianship Act 1987 (NSW)*, 2017. Available at: http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Submissions/GA101.pdf

Question 7.1: A single order for guardianship and financial management

(1) Should there continue to be separate orders for guardianship and financial management?

(2) What arrangements would be required if a single order were to cover both personal and financial decisions?

Question Paper 6 raises for discussion (at [7.1]-[7.7]), whether current orders for guardianship and financial management should be merged into one order.

The ability to make distinct and separate orders for financial management and guardianship is a necessary separation to the extent that a person with a decision-making impairment does not require both types of orders or the same person is not appropriate for both roles. While occasions arise whereby the same person is appointed as both guardian and financial manager, there are many instances where separate appointments are required.

As noted in the Question Paper (at [7.5]), the Victorian Law Reform Commission recommended the retention of the legislative distinction on the basis that "substitute decision making about financial and personal matters often requires significantly different skills".[9] Indeed, a move towards removing such a distinction would be a significant shift in policy and arguably contrary to the principles espoused by Article 12 of the UN Convention on the Rights of Persons with Disabilities.

Further, a single order in circumstances where someone is appointed both as a financial manager and a guardian with extensive powers would necessitate the appointee providing the order, in its entirety, to third parties in order to exercise the authority conferred by any part of the order. This would likely compromise the privacy of the person the subject of the appointment. For example, to operate a bank account a financial manager would need to provide to the financial institution their order of appointment which might also provide them with authority to authorise the use of restrictive practices on the person to control or restrict certain behaviours. There is obviously no reason for the financial institution to be privy to this information.

Question 7.2: Effect of orders on enduring appointments

What arrangements should be made for the operation of enduring appointments when the NSW Civil and Administrative Tribunal or Supreme Court of NSW has also appointed a guardian or financial manager?

Question Paper 6 raises for discussion (at [7.8]-[7.17]), the effect of guardianship or financial management orders on the operation of enduring appointments.

As noted in the Question Paper (at [7.11]), the *Guardianship Act* does not expressly state the effect of the appointment of a financial manager on a person holding an enduring power of attorney. However, the effect of a financial management order on

[9] Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [5.46].

an enduring appointment is provided for in s 50 of the *Powers of Attorney Act*.[10] Section 50(3) of the *Powers of Attorney Act* provides that "a power of attorney is suspended while the estate of the principal is a managed estate". In addition, if in making a financial management order the Tribunal has excluded part of the principal's estate under s 25E of the *Guardianship Act*, s 50(4) of the *Powers of Attorney Act* empowers the Tribunal to make orders that a power of attorney remains in place for so much of the principal's estate that has been excluded.

In contrast, as noted in the Question Paper (at [7.9]), the *Guardianship Act* expressly outlines the effect of the Tribunal's making of a guardianship order on an enduring guardian appointment. Section 6I of the *Guardianship Act* provides that a guardianship order automatically suspends "all authority of the enduring guardian to exercise a function under the appointment". However, unlike the Tribunal's authority to exclude part of an estate from a financial management order and make orders that it continue to be managed under an enduring power of attorney, the Tribunal currently has no corresponding jurisdiction under the *Guardianship Act* to allow any part of an enduring guardianship appointment to remain in force once a guardianship order is made. Consideration of amendments to the *Guardianship Act* that would allow the Tribunal to make orders that an enduring guardianship appointment is only suspended in relation to that authority provided to another guardian appointed with limited functions under a guardianship order would enable the Tribunal to make orders that were less intrusive upon the original intentions of the appointer.

Question 8.1: Search and removal powers

(1) Is there a need for provisions in the Guardianship Act 1987 (NSW) that empower police or NSW Civil and Administrative Tribunal employees to search premises and remove people deemed in need of protection?

(2) What changes, if any, should be made to these provisions?

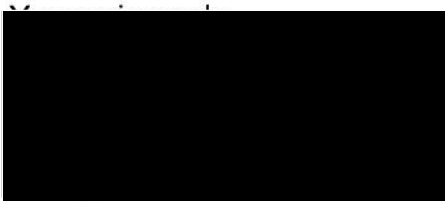
Question Paper 6 raises for discussion (at [8.5]-[8.13]) whether there is a need to retain or change the current legislative provisions that empower police or authorised officers to search premises and remove people in need of protection.

The Tribunal has rarely been called upon to exercise the authority provided in s 11 of the *Guardianship Act* to make orders empowering an authorised officer or a member of the police force. We are only aware of one matter where the former Guardianship Tribunal issued a removal order under s 11.[11]

In terms of the practical implementation of any orders for removal issued under s 11 of the *Guardianship Act*, the Tribunal is not aware of any matters in which an employee of the Tribunal registry has played an active role. There is currently no employee who is employed to enable the Tribunal to exercise its functions in the Guardianship Division of the Tribunal whose role includes playing an active part in the carrying out of removal orders as an "authorised officer". In addition to amendments contemplated to these provisions on a policy basis, consideration should at least be given to clarifying those persons who would be authorised to give effect to any removal orders made by the Tribunal. If the Tribunal was required to

[10] *Powers of Attorney Act 2003* (NSW) s 50 (3).
[11] *HZI* [2011] NSWGT 27 (10 August 2011).

employ person to fill such a role, this would have resource implications for the Tribunal and might require wide consultation as to whether this was consistent with the Tribunal's decision-making functions.



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