THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref:ELCS:MTks1270050

5 June 2017

Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
DX 1227 SYDNEY

By email: nsw_lrc@agd.nsw.gov.au

Dear Mr Cameron,

Review of the *Guardianship Act 1987* – Question Paper 4: Safeguards and procedures

The Law Society of NSW appreciates the opportunity to comment on *Question Paper 4: Safeguards and procedures*. The Law Society's Elder Law, Capacity and Succession, Human Rights and Criminal Law Committees contributed to this submission.

As a general principle, the Law Society considers it imperative that any measure which increases the functions or workload of organisations operating within the guardianship scheme, including the creation of any new bodies or organisations, must be sufficiently funded. It is also important to ensure that any changes to the scheme do not detract from those parts of the scheme which currently operate effectively.

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

The Law Society is of the view that the current witnessing requirements under the *Guardianship Act 1987* ("Act") are appropriate with one exception. It is recommended that the eligibility requirements for witnesses be amended to remove the eligibility of a Registrar of the Local Court. It is observed anecdotally that Registrars of the Local Court have demonstrated a reluctance to witness enduring guardianship documents in any event.

The witness to an enduring guardianship document should be a lawyer. A lawyer is appropriately qualified to explain the nature and effect of the document and to take adequate instructions from the person entering into the guardianship document.

(b) the number of witnesses required, and

The Law Society is concerned that the increased focus on witnessing requirements may be misplaced. It is more important to ensure that the principal and the proposed enduring guardian understand the nature and extent of their obligations under the appointment document.

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The Law Society is of the view that one witness to the execution of an enduring guardian document is sufficient. Requiring more than one witness is impractical and introduces an unnecessary barrier. Requiring more than one witness in and of itself does not necessarily result in a protection against abuse where a person is being pressured into appointing a particular person as their enduring guardian. Additional witness requirements may also result in delay in entering into enduring guardianship arrangements, or agreements not coming into effect where only one witness has witnessed the document prior to the appointor losing capacity.

(c) the role of a witness?

We consider that the witness ought to certify that they explained the effect of the document to the appointor as is required, for example, under the *Powers of Attorney Act 2003* (NSW). The witness should also be required to certify that they have seen appropriate identification documents when witnessing an appointor's signature.

The Law Society is of the view that it is not necessary for a standard guardianship appointment form to include a list indicating what an appointor must understand before signing the document. The requirement that the legal practitioner has explained the operation of the enduring guardianship appointment is sufficient.

Question 2.2: 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?

An enduring guardianship appointment should come into effect when the appointor becomes a person in need of a guardian.[1]

The Law Society does not support a registration system for enduring guardianship documents as recommended, for example, by the Victorian Law Reform Commission.[2] A system of registration prior to an appointment coming into effect would cause uncertainty, particularly in circumstances involving delay between the execution and registration of the document.

The Law Society suggests that creating specific procedures to be followed before an enduring guardianship appointment comes into effect would be impractical. The current safeguards within the Act provide sufficient protection. Enduring guardianship appointments differ from power of attorney documents in this respect. Power of attorney documents are more susceptible to abuse and such abuse is likely to have more serious ramifications than appointments of enduring guardians, which deal with issues such as where that person is to live and the treatment to be received, rather than access to financial assets.

Question 2.3: Are the powers of the NSW Civil and Administrative Tribunal to review an enduring guardian appointment sufficient? If not, what should change?

The powers of the Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT") to review, revoke, replace and vary functions of an enduring guardianship appointment are narrower than NCAT's powers to review an enduring power of attorney. We agree with the following comments as noted in the submission in response to this question paper dated 12 May 2017 sent on behalf of NCAT:

> Having consistent powers across the two types of review would be beneficial as the powers currently available when receiving an enduring guardianship

[1] *Guardianship Act 1987* (NSW) s 6A (1)(a).
[2] Victorian Law Reform Commission, Guardianship, Final Report 24 (2012) rec 264, 271-272.

appointment could be seen as cumbersome and potentially adds to the cost of a review hearing.

Question 2.4: Ending an enduring arrangement

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

(a) the resignation of an enduring guardian, and

(b) the revocation of an enduring guardianship arrangement?

The Law Society considers that there is no need to change the Act with respect to the resignation of an enduring guardian or the revocation of an enduring guardianship arrangement.

Question 2.5: Would you like to raise any other issues about enduring guardianship procedures?

We do not wish to raise any other issues about enduring guardianship procedures.

Question 3.1: What are your views on the process for applying for a guardianship or a financial management order?

The Law Society considers that the current process is appropriate.

Question 3.2: Time limits for orders

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

We consider that NCAT ought to have the power to make temporary orders with a time limit of longer than 30 days where circumstances warrant such an order and medical evidence is available to indicate further time is required. Having regard to NCAT's workload, longer time limits for temporary orders may also be more suitable as it unnecessarily adds to the workload of NCAT to require NCAT to extend temporary orders with 30 day limits.

NCAT ought to have the power to make or renew a temporary order for up to 6 months in duration where medical evidence is available to indicate necessity.

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

We observe anecdotally that time limited financial management orders may cause financial managers to make decisions driven by the impending expiration of a financial management order rather than allowing a long term approach to financial management of the estate. It is the view of some members that as s 25N of the Act empowers NCAT to make financial management orders reviewable after a specified time, the current procedure for the protected person or an interested person to apply for a financial management order to be reviewed is appropriate.

However we consider that, on balance, the need to give effect to Article 12 of the *UN Convention on the Rights of Persons with Disabilities* by imposing time limits on financial management orders should be given greater weight. This would be consistent with the principle of least restriction.[3]

[3] See also s 4(b) of the Act.

Question 3.3: 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?

The Act already allows for NCAT to consider which parts of a person's estate should be managed and we consider these provisions should not be altered.

We note that NCAT will often exclude a person's pension from the part of a person's estate which is under a financial management order. This is consistent with the need to ensure a person under financial management enjoys the greatest extent of autonomy that is suitable in their circumstances.

Question 3.4: When orders can be reviewed

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

We recommend against any change to the process for reviewing guardianship orders.

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

The requirement that financial managers provide accounts affords some degree of oversight as a safeguard against misuse and abuse. However, as indicated in answer to question 3.2 above, regular reviews may more effectively check whether a person still requires a financial management order and whether there are any less restrictive options available.

(3) What other changes, if any, should be made to the process for reviewing financial management orders?

The Law Society supports the comments made in the Law Society of NSW's Young Lawyers Civil Litigation Committee submission that 'any requirement for review in the new statutory framework be curbed with a limited ability for the Tribunal to avoid review obligations where it is satisfied, beyond doubt, that the protected person has no reasonable prospect of recovery'.

Question 3.5: Reviewing a guardianship order

(1) What factors should the NSW Civil and Administrative Tribunal consider when reviewing a guardianship order?

The Law Society takes the view that specifying factors for NCAT to consider when reviewing a guardianship order is unlikely to provide any safeguard against abuse.

(2) Should these factors be set out in the *Guardianship Act 1987* (NSW)?

Section 4 of the Act already sets out the general principles which NCAT will have regard to when reviewing a guardianship order.

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?

We note that the Act already allows NCAT to revoke a financial management order in circumstances where the person no longer needs someone to manage their financial

affairs as it is a relevant factor when considering whether the order is in the person's best interests.

Another option would be to include a specific ground for revoking a financial order in circumstances where a person no longer needs someone to manage their affairs.

Question 3.7: What procedures should apply if a guardian or a financial manager dies?

When making an order, NCAT ought to include a substitute guardian or manager who can be appointed in the event of the death or incapacity of the first guardian or manager.

When a guardian dies, where no substitute is appointed or available, then by default the role vests temporarily in the Public Guardian until such time as an alternative can be appointed. We suggest consideration be given to allowing the NSW Trustee and Guardian to be temporarily vested with the role of a financial manager, if a financial manager dies. Having regard to the recent significant reorganisation of the powers and structure of the NSW Trustee and Guardian, we are concerned that the necessary organisational capacity to perform this role may still be developing.

Information regarding enduring guardianship and financial management emphasising the importance of substitute guardians and managers should be emphasised in educational materials.

Question 4.1: Benefits and disadvantages of a registration system

(1) What are the potential benefits and disadvantages of a registration system? Do the benefits outweigh the disadvantages?

The Law Society sees little benefit in implementing a registration system. Potential disadvantages include uncertainty as to when and whether documents are valid as well as additional costs. We do not consider that registration would provide any additional protection against the abuse of people under guardianship or financial management.

(2) Should NSW introduce a registration system?

For the reasons outlined above, we consider that NSW should not introduce a registration system.

(3) Should NSW support a national registration system?

As stated above, we do not consider that any potential advantages of a registration system outweigh the potential disadvantages.

Question 4.2: If NSW was to implement a registration system, what should be the key features of this system?

The Law Society does not support any registration system except as is necessary for the registration of powers of attorney or financial management orders to permit dealings with land.

Question 5.1: A statement of duties and responsibilities

(1) Should the *Guardianship Act 1987* (NSW) and/or the *NSW Trustee and Guardian Act 2009* (NSW) include a statement of the duties and responsibilities of guardians and financial managers?

The Law Society is concerned that prescribing the duties and responsibilities of guardians and financial managers in a specific list may unnecessarily restrict the generality of the overall principles guiding guardians and financial managers under s 4 of the Act. The requirement, for example, that a guardian and financial manager act in the

best interests of the subject person should be the over-arching or guiding principle, and may be less effective if it is complicated with a list of things a guardian or financial manager ought or ought not to do in furtherance of their duties.

(2) If so:

(a) what duties and responsibilities should be listed in this statement?

(b) should guardians and financial managers be required to sign an undertaking to comply with these duties and responsibilities?

(c) what should happen if guardians and financial managers fail to observe these duties and responsibilities?

We do not support a requirement that guardians and financial managers must sign an undertaking to comply with these duties and responsibilities. In the event a statement of duties or responsibilities is incorporated, the Act and the *NSW Trustee and Guardian Act 2009* should include a broad statement recommending that a financial manager should obtain legal advice regarding their duties and responsibilities before exercising their powers.

Question 5.2: What, if anything, should change about the NSW Trustee and Guardian's supervisory role under the *NSW Trustee and Guardian Act 2009* (NSW)?

The Law Society does not consider that the supervisory role of the NSW Trustee and Guardian should change. The current supervisory role is cost effective and we are aware of only limited and less beneficial alternatives. The NSW Trustee and Guardian reviews annual accounts which is a sufficient exercise of its supervisory role. In default of the NSW Trustee and Guardian being available to exercise its supervisory role, the annual accounts could be filed with NCAT. NCAT is not currently adequately resourced to perform this role so it would be necessary for NCAT to receive additional appropriate resources if this function is added to its role.

Surety bonds

The unilateral introduction and blanket imposition of surety bonds by the NSW Trustee and Guardian in exercising its supervisory role is problematic. The Law Society is not aware of the evidentiary basis for the introduction of the surety bond scheme or of any evidence that shows that the current safeguards against maladministration or fraud are inadequate for Tribunal appointed financial managers. We consider that the mandatory imposition of a surety bond for all privately managed estates has led to unfair and unnecessary expense in a number of cases.

The Law Society notes that, in cases where the imposition of a surety bond is unnecessary, the cost of the bond reduces the funds available to care and provide for the living expenses of managed persons. Where there is no immediate or long-term benefit to the managed person, it cannot be argued that the imposition of this cost is in the best interests of the managed person.

In some circumstances, surety bonds may provide some recompense to a person affected by wrong-doing; however in most instances the bonds are unnecessary and expensive.

Question 5.3: Should the *NSW Trustee and Guardian Act 2009* (NSW) be amended to allow the NSW Trustee and Guardian to decide how often private managers should lodge accounts?

The *NSW Trustee and Guardian Act 2009* should not be amended to allow the NSW Trustee and Guardian to decide how often private managers should lodge accounts.

Accounts should be lodged annually to ensure adequate supervision of private financial managers. The requirement for annual reporting is a requirement for many types of businesses.

Question 5.4: Removing private financial managers from their role

(1) When should a private financial manager be removed from their role?

Sections 25N to 25U of the Act which allow NCAT to revoke or confirm the appointment of a financial manager are appropriate. In addition, the Act should provide that NCAT may remove an appointed financial manager where the financial manager becomes insolvent; bankrupt; a paid carer for the person who is being managed; has committed an offence against the person or has been the recipient of a domestic violence order sought by or on behalf of the person the subject of the order; is serving a term of imprisonment; is struck off the roll of solicitors or barristers; or otherwise has an incapacity to fulfil the requirements of the role.

(2) Should the *Guardianship Act 1987* (NSW) set out the circumstances in which a private financial manager can or must be removed from their role more clearly?

The matters outlined in our response to Question 5.4(1) above should be set out in the Act as matters NCAT should consider when exercising its discretion to remove a private financial manager.

Question 5.5: Should private guardians be required to submit regular reports on their activities? If so, to whom should they be required to report?

We do not consider that any additional reporting requirements should be imposed upon private guardians.

Question 5.6: Who should be able to apply to the NSW Civil and Administrative Tribunal for directions on the exercise of a guardian's functions?

We suggest that it is appropriate that guardians continue to be able to apply to NCAT for directions on the exercise of the guardian's functions. To extend the class of persons capable of seeking directions may give rise to attempts to re-litigate matters which had previously been addressed.

Question 5.7: Removing private guardians from their role

(1) When should a private guardian be removed from their role?

(2) Should the *Guardianship Act 1987* (NSW) set out these circumstances?

The Law Society suggests that NCAT should consider similar factors to those outlined in response to Question 5.4(1) when deciding whether a private guardian should be removed from their role.

Question 5.8: What, if anything, should change about the mechanisms for reviewing the decisions and conduct of the NSW Trustee and Guardian and the Public Guardian?

The Law Society is of the view that the mechanisms for reviewing the decisions and the conduct of the NSW Trustee and Guardian and the Public Guardian need not change as they appear to function adequately.

Question 5.9: Should NSW introduce new criminal offences to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager?

We do not consider that new criminal offences should be introduced to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager.

We suggest that when used in the abstract, the words 'abuse' and 'exploitation' amount to a value judgment which is very difficult to translate into the statutory language of an offence. The word 'abuse' is not defined in the question paper. By contrast, the Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016)[4] defined 'financial abuse' in a way which is essentially synonymous with fraud. Psychological, emotional, physical and sexual abuse were all defined in ways that are clearly directly regulated by the criminal law as serious forms of assault.

'Exploitation' in this context is a synonym for self-enrichment by misuse of a fiduciary relationship and, as the Question Paper notes,[5] s 192E and s 249E of the *Crimes Act 1900* (NSW) also already regulate that kind of conduct.

It follows that, unless there is further clarification regarding conduct which is unregulated, the only area that appears not to be currently covered by the *Crimes Act 1900 (NSW)* is 'neglect'. Sections 43A and 44 of the *Crimes Act 1900* (NSW) provide that it is an offence to fail to provide the necessities of life to a child or other person respectively where that conduct leads to a danger of death or serious injury to the person to whom the duty is owed. Neither section appears to cover the scenario where a person is appointed a guardian or financial manager and is simply negligent in their duties, such that the victim is left destitute but not in danger of death or injury.

The introduction of a broader form of offence in relation to neglect may be worthwhile such as 'without reasonable excuse, failing to provide for a person to whom a duty is owed under a guardianship or financial management arrangement'. However, we note again that the behaviour being regulated is not defined in the Question Paper and there is a need to be clear about what conduct is to be the subject of a criminal offence.

Additional offences may duplicate offences which already exist under the *Crimes Act 1900* (NSW). The NSW Legislative Council recommended creating an indictable offence of 'dishonestly obtaining or using an enduring power of attorney'.[6] We agree with the Australian Law Reform Commission's ("ALRC") view that this would be a substantial duplication of existing offences, and would not be likely to result in an increase in the number of prosecutions.[7]

The ALRC indicates there are evidentiary reasons why there are few prosecutions in this area under the current offence provisions,[8] including perhaps that the person who has had a guardian or financial manager appointed may be unable to provide cogent evidence.

Protection against abuse, exploitation and neglect would be better achieved though the allocation of resources for law enforcement and the prosecution of offenders utilising the offences which already exist.

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[4] At pages 5 and 6.
[5] At [5.49].
[6] NSW, Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016), [6.101].
[7] Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [4.20], [4.35] - [4.40].
[8] Ibid, [4.13].

Question 5.10: Should NSW introduce new civil penalties for abuse, exploitation or neglect committed by a guardian or financial manager?

There might be conduct of the guardian or financial manager which falls short of the standards expected of a person in that position, but not so far short that it amounts to neglect, exploitation or abuse. In those instances, a civil penalty, including a ban on the person being a guardian or financial manager in the future, would be appropriate. There may be some instances where civil penalties result in some money being recovered as a result of a wrong being perpetrated or have some deterrent effect. We note, however, that a direct approach to educating people about abuse, neglect or exploitation should also be implemented.

Question 5.11: Should NSW legislation empower the NSW Civil and Administrative Tribunal to issue compensation orders against guardians and financial managers?

We consider that a person who is the subject of a guardianship or financial management order should be compensated and returned to the position they would have been in but for a wrong perpetrated against them.

In the event NCAT is vested with power to impose civil penalties and compensation orders, consideration ought to be given to how those additional powers will interact with other legislation allowing for compensation orders following a criminal prosecution. There is a need to ensure a person is not able to claim compensation twice, or be prevented from claiming any compensation, by virtue of the way the two schemes interact. There may also be reasons for a compensation order to be made prior to a criminal prosecution being finalised, for example in circumstances where the victim needs money to continue to receive care, food or shelter. However there would also need to be protections to ensure that any NCAT proceedings do not prejudice the guardian or financial manager in the parallel criminal proceedings.

Consideration should also be given as to who will have standing to bring the action on behalf of the person subject to the guardianship or financial management order; what representation is available to that person; and who is likely to benefit from punitive damages, for example, being ordered against a guardian or a financial manager.

Question 5.12: Would you like to raise any other issues about how guardians and financial managers can be held responsible for their actions?

We do not wish to raise any other issues about how guardians and financial managers can be held responsible for their actions.

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

We consider that it is not useful to precisely codify the safeguards which should be incorporated into a formal supported decision-making model, as it is necessary to ensure that each decision is made taking into account the particular circumstances at the time.

One of the key features of the NSW guardianship regime, contributing to its success and effective function, is its simplicity when compared with other more prescriptive regimes. This feature should be maintained if formal supported decision-making is implemented.

However we note that one example of a safeguard in a supported decision-making model would be an obligation on supporters and co-decision makers, depending on the model introduced, to notify NCAT if the supported person no longer has the capacity to make decisions with support.

Question 7.1: Should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship?

In other states, a Public Guardian or public advocate may assist in circumstances where a person would benefit from advocacy prior to an order being made. We consider that this model should be adopted in NSW as it might have the effect of resolving some disputes prior to an application being made to NCAT.

Question 7.2: What, if any, forms of systemic advocacy should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to undertake?

The Law Society is of the view that a public advocate could play a useful role in investigating allegations of systemic abuse or neglect in aged care facilities and group homes. Although these might already be matters for police, they appear to rarely be the subject of police investigations.

Question 7.3: Should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to investigate the need for a guardian?

A public advocate should be empowered to investigate the need for a guardian. However, we note that in order for a public advocate to investigate the need for a guardian, the advocate would presumably need to be notified. If there is someone in close contact with the person who can make such a notification, that person may be a suitable person to apply for a guardianship order, without the need to involve a public advocate.

Question 7.4: Should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to investigate suspected cases of abuse, exploitation or neglect?

In circumstances where the Public Guardian becomes involved, their role as the guardian of last resort for the person is at least to some extent inconsistent with the powers of investigation they might have. The Public Guardian has an over-riding duty to the victim, which is inconsistent with the objectivity ordinarily required of an investigating agency. However the Act should empower the Public Guardian or public advocate to investigate suspected cases of abuse, exploitation or neglect. Please refer to our response to Question 5.9 with respect to 'abuse, exploitation or neglect'.

Question 7.5: If the Public Guardian or a public advocate is empowered to conduct investigations, should they be able to investigate on their own motion or only if they receive a complaint?

The Public Guardian or a public advocate ought to be empowered to conduct investigations by their own motion or after a complaint.

Question 7.6: What powers, if any, should the Public Guardian or a public advocate have to compel someone to provide information during an investigation?

The Public Guardian or a public advocate should have powers to compel someone to provide information during an investigation. If such powers are to be conferred then protections should be implemented so that any information provided will not be admissible as evidence against that individual in civil or criminal proceedings, other than proceedings arising out of the false or misleading nature of the information.[10]

[10] See for example s 61 of the *Coroners Act 2009* (NSW).

Consideration should also be given to ways to reduce confusion where the powers of NSW Police and the public advocate overlap.

Question 7.7: What powers of search and entry, if any, should the Public Guardian or a public advocate have when conducting an investigation?

The Law Society shares the views of the ALRC that only police agencies should have powers to enter and inspect premises without consent.[11]

In the event the Public Guardian or a public advocate is vested with search and entry powers, they should be provided with appropriate funding and training to develop an expertise in these skills to ensure that any new powers are appropriately exercised. For example, any search and entry powers must be exercised in accordance with the law and should consistently demonstrate good investigative techniques to ensure that any evidence duly obtained can be used.

Question 7.8: Should NSW establish a separate office of the "Public Advocate"? If so, what functions should be given to this office-holder?

We note the possible benefits of establishing a separate office of the Public Advocate outlined in paragraph 7.49 of the Question Paper. However we are also mindful that the creation of an office of a Public Advocate to operate in addition to the Public Guardian such as is the case in Queensland,[12] is likely to be less cost effective than conferring advocacy and investigative functions on a single office holder such as is the case in Victoria.[13]

We suggest that NSW adopt a framework in which the public advocate or Public Guardian undertakes systemic advocacy, has guardianship functions for adults and has powers to investigate complaints and allegations against a guardian and administrator.

Question 7.9: Would you like to raise any other issues about the potential advocacy and investigative functions of the Public Guardian or a new public advocate?

We acknowledge that an Office of the Public Advocate may be created as a result of this consultation. We note, however, that the adequate resourcing of any such position without reducing the resourcing available to the Public Guardian is paramount to its success. Specific training in relation to assisting and protecting people lacking capacity, including the elderly, ought to be provided both to the new Public Advocate and also to the NSW Police.

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?

The Law Society considers that it is important that those matters currently identified in Schedule 6(4) of the *Civil and Administrative Tribunal Act 2013* (NSW) as requiring a three member panel comprising a legal member, a professional member and a community member, should be retained. This composition appears to work appropriately in the interests of the just, quick and cheap resolution of the real issues having regard to the principles set out in s 4 of the Act.

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[11] Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [3.42].
[12] See *Guardianship and Administration Act 2000* (Qld) s 209(2) and *Public Guardian Act 2014* (Qld) s 12.
[13] *Guardianship and Administration Act 1986* (Vic).

Question 8.2: Parties to guardianship and financial management cases

(1) Are the rules on who can be a party to guardianship and financial management cases appropriate?

We consider that the rules about who can be a party to a guardianship or financial management case are appropriate. Other than in extraordinary circumstances, children under the age of 18 years should not be a party.

(2) If not, who should be a party to these cases?

Please see our response in answer to Question 8.2(1) above.

Question 8.3: When, if ever, would it be appropriate for the Guardianship Division to make a decision without holding a hearing?

The Law Society considers that a decision should only be made without a hearing in circumstances involving ancillary or interlocutory orders.

Question 8.4: Notice requirements

(1) Are the current rules around who should receive notice of guardianship and financial management applications and reviews adequate? If not, what should change?

The Law Society considers that the current rules are adequate and result in the appropriate people receiving notice of a guardianship or financial management application.

(2) If people who are not parties become entitled to notice, who should be responsible for notifying them?

We do not consider it is necessary to provide notice to persons who are not parties.

Question 8.5: When should a person be allowed to be represented by a lawyer or a non-lawyer?

In any application before the Guardianship Division, a person who is the subject of an application should always be permitted to be represented by a lawyer without requiring leave of NCAT or the Court.

Some examples include financial management applications involving large and complex arrangements where there are interrelated family businesses, or where the subject person is the trustee of a trust. It remains appropriate that other persons may be permitted legal representation with leave of the Tribunal.

Question 8.6: How should separate representation be funded?

We consider that the general principle that parties each bear their own legal costs, other than when the Tribunal exercises its discretion to order otherwise, ought to remain. It is appropriate that when the Tribunal appoints a separate legal representative, Legal Aid NSW ought to bear the cost of such representation.

Question 8.7: Should the *Guardianship Act 1987* (NSW) or the *Civil and Administrative Tribunal Act 2013* (NSW) allow a person to be represented by a lawyer in Guardianship Division cases when the person's capacity is in question?

A person should be allowed to be represented by a lawyer where their capacity is in question. The framework should operate in a similar fashion to legal representation being available to a person under the *Mental Health Act 2007*.

Any cost associated with engaging legal representation in such a case should be paid from the estate of the person and not funded through Legal Aid NSW.

Where a person has residual capacity to instruct a legal representative, although their capacity is otherwise in question, the person may instruct a legal representative. If the person clearly lacks capacity, then a separate representative should be appointed. The appropriate person to assess whether the person has capacity to provide adequate instructions is the legal representative proposed to be retained by the person whose capacity is in question.

We consider that costs ought to be borne by the person who is seeking the appointment of the legal representative.

Question 8.8: What, if any, changes to the legislation are required to support the timely finalisation of Guardianship Division cases?

The timely finalisation of NCAT cases is unlikely to be improved by the introduction of additional regulatory and other hurdles. The speedy, just and cheap resolution of matters ought to remain NCAT's goal.

Question 8.9: Appealing a Guardianship Division decision

(1) Is the current process for appealing a Guardianship Division case appropriate and effective?

(2) If not, what could be done to improve this process?

The Law Society considers the current process is appropriate and effective.

Question 8.10: What, if anything, should be changed in the law to protect the privacy of people involved in Guardianship Division cases?

The Law Society considers the current privacy protections for people involved in Guardianship Division cases are sufficient.

Question 8.11: Access to documents

(1) Who should be allowed to access documents from Guardianship Division cases?

(2) At what stage of a case should access be allowed?

We note that the findings and evidence in NCAT proceedings are often of significant relevance in later Supreme Court capacity proceedings and other estate litigation. For this reason, a guardian or financial manager ought to be able to access those documents for the purposes of related proceedings. At present, the procedure for accessing such documents is unnecessarily cumbersome and expensive.

Question 8.12: Other issues

Would you like to raise any other issues about the procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal?

We do not wish to raise any other issues about NCAT procedures.

Thank you once again, for the opportunity to provide comments to this inquiry. If you have any queries about this submission, please do not hesitate to contact Katrina Stouppos, Policy Lawyer, on (02) 9926 0212 or at katrina.stouppos@lawsociety.com.au.

Yours sincerely,

Michael Tidball
Chief Executive Officer

THE LAW SOCIETY
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Our Ref:ELCS:MTks1270054

1 June 2017

Mr Alan Cameron AO
Chairperson
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Dear Mr Cameron,

Review of the *Guardianship Act 1987* – Question Paper 6: Remaining issues

The Law Society of NSW appreciates the opportunity to comment on *Question Paper 6: Remaining issues.* The Law Society's Elder Law, Capacity and Succession and Human Rights Committees have contributed to this submission.

Question 1.1: Are there any issues you would like to raise that we have not covered in Question Papers 1–6?

The Law Society does not wish to raise any additional issues at this time.

Question 2.1: What, if anything, should be included in a list of statutory objects to guide the interpretation of guardianship law?

The Law Society is of the preliminary view that the *Guardianship Act 1987* ("Act") should include both statutory objects and general principles. The objects should be complementary with the principles and should avoid being overly prescriptive in order to ensure the individual circumstances of each particular matter may be accommodated.

Question 2.2: General principles

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

The Law Society generally supports amendments to the Act which would give effect to the principles articulated in Article 3 of the *UN Convention of the Rights of Persons with Disabilities* (CRPD).[1]

We made several suggestions as to matters to be included in a list of general principles in our submission dated 7 November 2016 in answer to Question Paper 1. In particular,

[1] This would be cognate with other legislation in NSW such as the *Boarding Houses Act 2012* (NSW) which contains objects specific to the operation of "Assisted Boarding Houses": s 34(1)(b) and the *Disability Inclusion Act 2014* (NSW).

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we suggested that the general principles set out in the NSW Capacity Toolkit[2] are a good basis on which to develop principles to be included in the Act.

> The inclusion of general principles about what it means to have decision-making capacity would assist the Supreme Court and the Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT") when applying the legislation. The Supreme Court and NCAT would continue to set an objective standard by which decision-making capacity is measured and applied on a case-by-case basis.
>
> The Law Society supports the inclusion of such an acknowledgment in the general principles section of the Act using positive language that is the least prescriptive:
>
> A person's decision-making capacity is specific to the decision to be made.
>
> A person's decision-making capacity is not static and may fluctuate over time.
>
> When assessing a person's capacity, every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed and maximised.[3]

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

The Law Society suggests that the general principles should be general in application rather than tailored to particular decision-making situations. Incorporating multiple statements of principles tailored to particular decision-making situations is likely to cause confusion. It might cause a potential guardian to be uncertain as to their responsibilities and unwilling to undertake the role of guardian.

The Law Society submits that the language contained in the general principles, in particular items (c) and (f) ought to be revisited to be more relevant in a contemporary sense.

Question 2.3: How should multicultural communities be accommodated in guardianship law?

The Law Society suggests the principles in the *Disability Inclusion Act 2014* be adopted. This will have the effect of ensuring people within the guardianship scheme have the right to respect for their cultural or linguistic diversity, age, gender, sexual orientation and religious beliefs acknowledged.

The Law Society recommends that information about aged care facilities for specific cultural backgrounds should be more widely circulated. Anecdotally, it has been observed that a person suffering from dementia may revert to their first language, and the availability of aged care facilities catering to people from that cultural and linguistic background can be comforting.

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[2] Capacity Toolkit, NSW Department of Justice, Section 2 *What is capacity?* At http://www.justive.nsw.gov.au/diversityservices/pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx.
[3] Law Society of NSW, *Review of the Guardianship Act 1987 – Question Paper 1: Preconditions for alternative decision-making arrangements*, 4.

Question 2.4: How should Aboriginal people and Torres Strait Islanders be accommodated in guardianship law?

There is precedent for introducing statutory provisions in NSW which protect and recognise the special needs of indigenous people. For example, when considering a family provision claim on an estate, s 60(2)(o) of the *Succession Act 2006* (NSW) permits the court to consider "any relevant Aboriginal or Torres Strait Islander customary law." We recommend amending the Act to empower the Tribunal to consider relevant customary law, kinship structures or indigenous cultural knowledge that may be relevant to a decision which affects a person in this jurisdiction.

Question 2.5: Language of disability

(1) Is the language of disability the appropriate conceptual language for the guardianship and financial management system?
(2) What conceptual language should replace it?

In our submission dated 7 November 2016 in response to Question Paper 1, the Law Society submitted that

> ... terms such as "disability" or "mental disorder" may be considered out dated. We note that the paradigm shift taking place is moving society away from thinking in terms of a person's disability, and instead focusing on their ability and capacity. This is reflected in human rights legislation and international conventions.
>
> The Law Society does not support linking a person's disability to the question of their decision-making capacity. The Law Society considers that the terms "cognitive impairment", "impairment" or "mental health impairment" could be included in the legislation as one of a number of factors to be considered when determining a person's decision-making capacity.[4]

Question 2.6: What terms should be used to describe participants in substitute and supported decision-making schemes?

The Law Society is broadly supportive of a shift towards supported decision-making and there being a consequent shift in the language used to describe participants. In accordance with the paradigm shift away from thinking in terms of a person's disability, and instead focusing on a person's ability and capacity, we suggest the language of representative and represented person and supporter or supported person rather than guardian and person under guardianship. The language will necessarily depend upon whether a shift to supported decision-making is implemented and the specific functions relevant to each role.

Question 2.7: How could relationships be defined in the *Guardianship Act 1987* (NSW) to take into account Aboriginal and Torres Strait Islander concepts of family?

The Law Society recommends that s 3E of the Act be amended so that the definition of relative reflects the definition of 'relative' in s 71(2) of the *Mental Health Act 2007* (NSW). That is, a relative of a person who is an Aboriginal person or a Torres Strait Islander includes a person who is part of the extended family or kin of the person according to the indigenous kinship system of the patient's culture.

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[4] Law Society of NSW, *Review of the Guardianship Act 1987 – Question Paper 1: Preconditions for alternative decision-making arrangements*, 3.

Question 3.1: 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 Law Society is of the view that, generally, a guardian ought not to be automatically involved with the affairs of the person under other Commonwealth legislation.[5] A guardian should not necessarily, for example, become a person's National Disability Insurance Scheme ("NDIS") nominee, and conversely, an NDIS nominee does not necessarily need to become a person's guardian or financial manager.

Question 4.1: What changes, if any, should be made to the part of the *Guardianship Act 1987* (NSW) that relates to adoption information directions?

The Law Society does not consider that this part of the Act should be changed.

Question 5.1: What should the age threshold for guardianship orders in the *Guardianship Act 1987* (NSW) be?

The Law Society considers that the current age threshold of 16 for a guardianship order should be maintained and that it is appropriate that there is no age threshold for a financial management order.

Question 5.2: Should the NSW Civil and Administrative Tribunal have the power to make financial management orders for children and young people?

We consider that the current power of the Guardianship Division of the New South Wales Civil and Administrative Tribunal ("NCAT") to make financial management orders for children and young people ought to remain.

Question 5.3: Under what circumstances, if any, should the NSW Civil and Administrative Tribunal be able to appoint 16- and 17-year-olds as guardians?

As the Question Paper suggests at [5.22], 'allowing young carers to become guardians would oblige medical practitioners to consult with them and take their views more seriously.' There seems to be a significant number of young carers aged between 15 and 25. Lowering the age at which a young carer can be appointed as a guardian to 16 would recognise the role that these young people are already performing as primary carers. We consider that guardianship orders should be tailored so that the young person's decision-making powers are consistent with the young person's decision-making ability.

Question 5.4: Young people in NSW Civil and Administrative Tribunal proceedings

(1) Should young people have standing in the NSW Civil and Administrative Tribunal?

The Law Society does not support the Act being amended to allow children to have standing. The Law Society is of the view that the current requirement that NCAT seek to preserve the person's existing family relationships and to consider the view of a child who is a primary carer, are appropriate ways to involve children and should be maintained.

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[5] There may be circumstances where this is appropriate, for example in the case of persons with profound intellectual disability.

(2) In what circumstances should the Tribunal be required to take the views of a young person into account?

When NCAT makes an order regarding a child, the views of the child should be taken into account wherever possible. When a child has the care of another person who is their parent, the child's views should be taken into account. The weight to be given to those views is within the discretion of NCAT to decide depending upon the child's maturity and understanding.[6]

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?

The Law Society is of the view that parents of a child with a profound intellectual disability should not automatically become the child's guardians when the child turns 18. There is a general need to avoid guardianship orders being made in unnecessary circumstances and where informal arrangements may be suitable. There is important protection provided by having a hearing, even for those people for whom it is necessary for a parent to become a guardian when a child reaches the age of 18 years.

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

In circumstances where third parties require a formal authority before engaging with parents, consideration could be given to adopting the model proposed by the Victorian Government in 2014 as set out in paragraphs 5.41 to 5.45 of the Question Paper.

Question 6.1: Interstate court or tribunal appointments

(1) Are the arrangements in relation to interstate appointments in the *Guardianship Act 1987* (NSW) operating well?

In broad terms, the Law Society considers that the current scheme, in which interstate court or tribunal appointments are recognised upon an application by a guardian, operates well. The common law principles which have developed with respect to the effect of recognition also operate appropriately.

Some aspects of the arrangements should be reviewed to address difficulties with respect to transactions dealing with real property.

We note that an interstate financial management or administration order is not sufficient to allow a manager or administrator to sign a transfer of land which is located in NSW. The manager or administrator is required to apply for recognition of the order appointing them in NSW. There should instead be mutual recognition of valid instruments entered into in other states so that a manager or administrator appointed by a valid interstate instrument can be recognised in NSW without the need to obtain a separate NSW order. These ought not to be wholesale changes as the arrangements otherwise operate well.

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[6] See *Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.*

(2) Should the legislation clarify what the effect of registration of interstate appointments is and when it is required?

The Law Society is of the preliminary view that, while there should be mutual recognition of valid interstate instruments, a scheme of registration should not be implemented. In the event a registration system is implemented, the Act should clarify the effect of registering an interstate appointment and when the registration is required.

(3) Should the NSW Civil and Administrative Tribunal have the discretion not to recognise an appointment in certain circumstances?

We consider that NCAT should have discretion to refuse to recognise an interstate appointment in certain circumstances, including when the person who is the subject of the order is not ordinarily resident in NSW or their estate is not located in NSW.

(4) What, if any, other changes should be made?

The NSW Trustee and Guardian should have the ability to seek a review of the recognition of an interstate appointment if the person and the assets are in NSW.

Question 6.2: Should the *Guardianship Act 1987* (NSW) clarify the powers of the NSW Civil and Administrative Tribunal to vary an interstate recognition order?

While the power is likely to be exercised rarely, the Act should clarify the powers of NCAT to vary an interstate recognition order for limited purposes and without departing from the substance of the original document. This includes the recognition of an interstate order for the purpose of effecting a sale of real property.

Question 6.3: Interstate enduring appointments

(1) Should interstate enduring appointments be reviewable in NSW?

The Law Society is of the view that interstate enduring appointments should be reviewable in NSW in circumstances where the person under the guardianship order is habitually resident in NSW or their estate is located in NSW.

(2) Should NSW introduce a system of registration for interstate appointments? If so, should there be a process for confirming the powers confirmed by the interstate instrument or order?

The Law Society does not support a registration system being introduced to register interstate appointments as it is likely to be confusing, time consuming and expensive for participants.

Question 7.1: A single order for guardianship and financial management

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

The Law Society prefers that there continue to be separate orders for guardianship and financial management because financial management decisions are usually of a different nature to personal decisions and may require different skills and knowledge.

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

We suggest that further consideration be given to the merits of and appropriate arrangements for a single order covering both personal and financial decisions.

Question 7.2: 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?

When NCAT or the Supreme Court of NSW appoints a guardian or financial manager, there should be careful consideration of the ongoing operation of enduring documents regarding financial management. The financial management powers contained in a document may need to be wholly suspended when any order is made by the Supreme Court or NCAT, as is currently the case with respect to guardianship.

The provisions of the Act could be amended to clarify that NCAT or the Supreme Court, when exercising power to make a guardianship order, suspends the entirety of any guardianship appointment under an enduring appointment document. If NCAT or the Court intends for certain orders from the instrument appointing an enduring guardian to remain in place, those orders continue not by virtue of having been in the guardianship document but as a result of the Court or NCAT's specific order.

Question 7.3: Resolving disputes between decision-makers

(1) How should disputes between decision-makers be resolved?
(2) Who should conduct or facilitate any dispute resolution process?
(3) What could justify preferring the decision of one substitute decision-maker over another?

The Law Society suggests that NSW should adopt the Northern Territory model as outlined in paragraph 7.22 of the Question Paper. We understand this would involve empowering NCAT to make orders to facilitate the resolution of differences which multiple substitute decision-makers cannot resolve by themselves. We consider this to be preferable and more flexible than the Act indicating which decision-maker's decision will take precedence.[7]

Question 10.1: In what circumstances should different decision-makers and supporters be able to access a person's personal, health or financial information?

The rules with respect to access to information vary in the different legislative provisions operating in NSW and between other states and territories. When organisations that hold personal information such as a bank, an insurance provider or a telecommunications company receive a notice that a guardian has been appointed, that entity should be able to rely on the appointment to know that the guardian is entitled to access the person's information. The different rules across jurisdictions cause difficulty for those deciding whether or not personal information ought to be released to a person who purports to be a guardian.

The Law Society recommends that the Act adopt a model based on that found in Alberta, Canada where the legislation specifies the types of information and conditions for

[7] As was recommended, for example, by the Victorian Law Reform Commission, *Guardianship, Final Report* 24 (2012) rec 196.

gaining access that must be met.[8] Some other associated legislation may also need to be amended to adopt this model.

Schedule 3 of the *Privacy Code of Practice (General) 2003*[9] concerns the collection and use of the personal information by a community care agency, including where a person lacks capacity. Where a person lacks capacity to make certain privacy decisions, there is a "personal information custodian" which includes a guardian or attorney under a power of attorney, and also others who can act for the person in making decisions about privacy on their behalf.

Question 10.2: Disclosure of personal information

(1) In what circumstances should various decision-makers and supporters be permitted to disclose a person's personal, health or financial information?
(2) In what circumstances should various decision-makers and supporters be prohibited from disclosing a person's personal, health or financial information?

The Law Society recommends that a model be adopted in similar terms to that found in Queensland where a guardian or administrator may not use confidential information gained other than in prescribed circumstances.[10] This framework will allow a guardian to disclose personal or health information and an administrator to disclose financial information in circumstances appropriately limited to allow the guardian or administrator to give effect to their role.

Question 11.1: What, if anything, should legislation say about the relationship between the Supreme Court of NSW's inherent protective jurisdiction and the operation of guardianship law?

The Law Society submits that no amendment is required to the Act with respect to the inherent protective jurisdiction of the Supreme Court of NSW.

Question 11.2: Interactions between the Supreme Court and the Tribunal

(1) Are the provisions that deal with the interaction between the Supreme Court of NSW and the NSW Civil and Administrative Tribunal adequate?

The Law Society submits that the provisions dealing with the interaction between the Supreme Court of NSW and NCAT are adequate and that no changes are required to these provisions.

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

There are advantages to the current framework in which there is an element of flexibility and discretion with respect to matters which may be brought to the Supreme Court that ought not to be restrained or disrupted.

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[8] See the *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 9, s 22, s 72.
[9] Privacy codes of practice are provided for by s.29 of the *Privacy and Personal Information Protection Act 1998.*
[10] *Guardianship and Administration Act 2000* (Qld) s 249, s 249A.

Question 11.3: Are there any issues that should be raised about the Supreme Court of NSW's supervisory, review and appellate jurisdictions?

The Law Society does not wish to raise any issues.

Thank you for considering this submission. If you have any questions, please do not hesitate to contact Katrina Stouppos, Policy Lawyer, on (02) 9926 0212 or by email at katrina.stouppos@lawsociety.com.au.

Yours sincerely

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