THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref:ELCS:MTks1270054

1 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 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).

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

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 [redacted] or by email at [redacted].

Yours sincerely,

[redacted]

Michael Tidball
Chief Executive Officer