MHCN mental health carers nsw

NSW Law Reform Commission
Level 3, Henry Deane Building
20 Lee Street
Sydney NSW 2000 Australia

31st January 2016

Attention: nsw_lrc@justice.nsw.gov.au

Re: Question Paper 1 Preconditions for alternative decision-making arrangements

Dear Sir/Madam

Mental Health Carers NSW is the peak body in NSW representing the interests of the carers of people with a mental illness. Our vision is for an inclusive community and connected carers; and our mission is to empower carers for mental health. We undertake systemic advocacy on behalf of mental health carers to improve their recognition and support in mental health and related social services.

Thank you for providing the opportunity to us to comment on the review of the Guardianship Act 1987 (NSW) in April 2016 and for this opportunity to comment on question paper 2, Decision making Models and 3 The Role of Guardians and Financial Managers. We have noted the format of the questions detailed in this 'question papers' and have structured this paper to respond to the questions raised.

Our overall Observations and Recommendations

Substitute decision making and supported decision making

We have noted the discussion and arguments in the discussion paper on the different principles to guide decision making. We are fully supportive of the idea that policies, legislation, systems and procedures, should preserve as far as possible the opportunity for individual's to make their own decisions. Where they need assistance informal mechanism such as that provided by families and friends may well be sufficient. However, when formal assistance is required we are supportive, in principle, of the idea of formal mechanisms for supported and co-decision making models.

Our focus and experience is in the area of mental health. People with mental illnesses may, over time, have wide fluctuation in both their expressed preferences and in their capacity to make responsible decisions concerning their life. This distinguishes them from other groups with disabilities who also need to use the provisions of the Guardianship Act in areas of decision-making but whose lack of capacity may remain relatively stable. For these reasons we are of the view that for many people with mental illness mechanisms, formal supportive or co-decision making may not be sufficient; and at some stages in their lives and illnesses they may need to rely on substitute decision-makers. We believe that formal substitute decision making should be retained alongside any new models of formal substitute decision making and co-decision making which may be introduced in NSW.

Mechanisms for review of decisions

We are strongly of the view that whatever models are adopted in a revised Guardianship Act there should be automatic, responsive and easily accessible mechanisms for reviewing and if necessary amending any decisions. These decisions include the appointment of enduring guardians or more formal mechanisms by the Guardianship Tribunal, such as the appointment of guardians and financial managers. All too often we are aware of circumstances where decisions have been made under the provisions of the Guardianship Act that are not the appropriate model for decision-making when circumstances change. The overwhelming feedback we receive from our members is that the current mechanisms available to family members and carers to instigate and participate in a review of the original decision remain obscure, overly legalistic, bureaucratic, lengthy, cumbersome and expensive often resulting in substantial difficulty for both consumers and their families. Any new legislation must contain the provision of regularly and timely reviews of all decision by an appropriate independent authority. The role of the Mental Health Tribunal articulated in the Mental Health Act 2007 may provide a useful model for the establishment of a review process.

'Will and preferences' and 'welfare and best interest' texts

We are, in principle, strongly of the view that any new legislation be based on the principle of 'structured will and preference' as discussed on pages 47-50 of Question Paper 3. For the same reasons as outlined above we are aware that there are often circumstances where the adoption of an unqualified 'will and preference' model may lead to harm. In addition, the nature of mental illness means that a person's will and preference may vary over time and, at times, quite rapidly. This can mean that decisions based on the preferences at one point in time may not reflect the person's preference for the majority of their lives. Consequently, we are firmly of the view that any new Guardianship Act should allow substitute and supportive decisions to be based on a 'structured will and preference' model that allows decision makers to consider the potential for harm. We are also of the view that the Act should include guidelines on how to use this principle.

The roles of guardians and financial managers

We are supportive of the ideas suggesting a greater role for community organizations and corporations in taking on the role of guardians and financial decision makers and that these roles be treated equally under the Act. However, we note that the discussion paper is heavily weighted on questions of 'who' and 'what' but not 'how'. Carers inform us that it is the 'how' questions that most concern them. How can families and carers can influence the decisions of substitute decision makers, how can previous decisions of the Tribunal be amended when circumstances change, how can family members and carers receive timely responses from substitute and or supportive or co-decision makers?

Listed below are our responses to your specific questions.

Question 5 A formal supported decision –making framework for NSW

Q No.	Question	Suggested MHCN Position
Question 5.1: Formal supported decision-making		
5.1 (1)	Should NSW have a formal supported decision-making model?	Perhaps. If it is necessary to comply with the UN convention then we should have one. However, the discussion paper does not make a strong case that we have a problem that needs to be solved and that this is the solution to it. In addition, the there is a dearth of detail on how their models work in practice and early trials in Australia appear to have resulted in equivocal findings.
5.1 (2)	If there were to be a formal supported decision-making model, how could we ensure there was an appropriate balance between formal and informal arrangements?	Formal support decision makers arrangement should be time limited to avoid the potential for support decision makers to slip into substitute decision makers over time. Formal support decision makers could be appointed to a limited number of areas of decision making (accommodation, medical, financial etc.). Formal support decision making arrangements must not explicitly exclude informal support decision making by others where appropriate. There should be timely and compulsory reviews of all formal decision making arrangements under the Guardianship Act which provide opportunities for family members and carers to challenge the continuing operation of the formal arrangements. There should be easily accessible mechanisms for family members and carers to ask for a review of the formal arrangements at any time, independent of routine scheduled reviews.
5.1 (3)	If there were not to be a formal supported decision-making model, are there any ways we could better recognise or promote informal supported decision-making arrangements in NSW law?	More information on who can be an informal support decision maker and their right of access to information should be available to family members and consumers.

Question 5.2 Key features of a formal supported decision-making model

5.2 (1)	Should NSW have formal supporters?	Yes, but not so as to compromise the use of informal support decision makers and the potential use of substitute decision makers should be retained as a mechanisms of last resort.
5.2 (2)	If so, should NSW permit personal or tribunal appointments, or both?	Both. Any person should be able to appoint their own support person or the tribunal could also appoint one. There should be no difference between the appointed and selected support person in their access to

		information and ability to communicate with institutions and corporations.
5.2 (3)	Should NSW have formal co-decision-makers?	Yes, but the model adopted would need to be clearly structured to be different from 'support decision makers' and easy for lay people to understand. The discussion paper does not clearly distinguish the practical differences between a 'support decision maker' and a 'co-decision maker'. There needs to be strong and appropriate mechanisms in any new Act to ensure continuing regular reviews (at least annually) of any decisions to appoint supportive decision-makers in place. This mechanism may help to avoid the 'co-decision maker' morphing into a substitute decision maker. Informal arrangement should need to be ratified and registered at least at a state level along the lines that have been proposed for the register of enduring powers of attorney. The same frequency of reviews should apply to any decisions of the Guardianship Tribunal to appoint continuing substitute decision makers.
5.2 (4)	If so, should NSW permit personal or tribunal appointments, or both?	Yes and both should be treated equally in relation to registration and review.
5.2 (5)	What arrangements should be made for the registration of appointments?	Informal arrangements need to be ratified by the same authority as would appoint a support or co-decision maker, or a substitute decision maker. The details of these arrangements should be available to those with a genuine interest such as financial organizations, local authorities, government departments and professional service providers in the areas of health, care, welfare, law and accommodation.

Question 5.3 Retaining substitute decision-making as an option

5.3 (1)	If a formal supported decision-making framework is adopted, should substitute decision-making still be available as an option?	Yes it will be necessary in some cases and should not be an either-or model. Mechanism should be available for family and carers to easily request a review of any formal decisions. It should be compulsory for family and carers to be consulted in relation to the appointment of a supportive or a substitute decision maker and a requirement that both supportive and substitute decision makers take the family and carers view into consideration in influencing and making decision.

5.3 (2)	If so, in what situations should substitute decision-making be available?	1. Where it is not possible to determine a person's wishes and preferences 2. Where the nature of their mental illness is such that their 'will and preferences' *at that time* are considered to deviate from a 'welfare and best interest' test to such a large extent that they should be protected from making their own decisions. 3. The nature of their mental illness, *at that time*, means that they cannot understand the context or nature of the decision or communicate their will and preferences in a manner that is understandable to others.
5.3 (3)	Should the legislation specify what factors the court or tribunal should consider before appointing a substitute decision-maker and, if so, what should those factors be?	Yes the legislation should specify the factors that the court or tribunal should take into consideration before appointing a substitute decision maker. It would need to clearly be a decision of last resort and where a support or co-decision maker was not appropriate. All such decisions should be subject to regular review and family members and carers should have access to those reviews. In addition, Family members and carers should be able to apply for a review of a decision to appoint a substitute decision maker and their views must be taken into consideration during that review.

Question 5.4 Other issues

	Are there any other issues about alternative decision making models you would like to raise?	To guide the determinations of a court or tribunal considerations should be given to the development of a decision tree to articulate the personal circumstances and attributes that assesses a person's capacity and in around which • a person can make their own decisions • a person can appoint a support decision maker • a person can appoint a co-decision maker • a tribunal can appoint a support decision maker • a tribunal can appoint a co-decision maker • a tribunal can appoint a substitute decision maker. In addition, a decision tree should be developed describing those situation where • an informal arrangement is preferred over a formal arrangement • the actions of a support decision maker differ from a co-decision maker

		• the limits of a support and/or co-decision maker • when the informal and formal arrangements for a support and/or co-decision maker cease and it is necessary to appoint a substitute decision maker

Question 6 Supporters and co-decision makers

Q No.	Question	Suggested MHCN Position
Question 6.1: When supporters and co-decision-makers can be appointed		
6.1 (1)	What requirements should be met before a person needing support can appoint a supporter or co-decision-maker?	We believe the requirements should be: • the person is over 18 years old • understands and, therefore, is not incapable of entering into such a relationship • considers their capacity to be in question, or shortly to be lacking, in making other decisions • has a disability or mental illness • is making the decision voluntarily and without undue influence or coercion
6.1 (2)	What requirements should be met before a court or tribunal can appoint a supporter or co-decision-maker?	We support the suggested requirements, namely: • an application must be made • the principal's capacity to make decisions is impaired to the extent that there in concern over their capacity to make decisions on their own • the principal could make a decision if supported • less formal, intrusive and restrictive measures have been considered and found unsuitable • it is in the persons 'best interest' • the proposed formal support or co-decision maker agrees to the appointment • the principal consents to the appointment
Question 6.2 Eligibility criteria for supporters and co-decision makers		
	What, if any, eligibility criteria should potential supports and co-decision makers be required to meet?	We support the suggested possible criterial for the selection of a support or co-decision maker: • must be over 18 years • voluntarily agrees to take on the role • understand the nature and effect of the arrangement to act to both assist the person to achieve their 'will and preferences' while also taking into consideration the principal's 'best interest' • must be suitable

		○ understands the principal's wishes and preferences ○ the importance of preserving family and other relationships ○ can meet and communicate with the principal ○ will act honestly and in good faith ○ can manage conflict of interests

Question 6.3 Characteristics that should exclude potential appointees

	What, if any, characteristics should exclude a person from being a support or co-decision maker	We support the suggested possible exclusions to a support or co-decision maker: • no convictions or bankruptcy • does not work where the principal lives • not themselves receiving decision support • has not been previously dismissed as a support decision maker • is not a former spouse or partner and/or does not have an adversarial relationship

Question 6.4 Number of supporters and co-decision makers

	What limits should be placed on the number of supporters or co-decision makers that can be appointed?	• It should be possible to appoint more than one support or co-decision makers • Where more than one support or co-decision maker is appointed it must be clear whether they are to act jointly or in what area of decision making each can be involved. • No more than three would seem desirable

Question 6.5 public agencies as supporters and co-decision makers

6.5 (1)	Advantage and disadvantages of allowing public agencies to be appointed as support and co-decision makers	We identify the following disadvantages for the appointment of a public agency as a support person • Staff of an agency are unlikely to know the person's preferences • Frequent staff changes are likely • Agency staff are likely to be restricted in the persons access and timely responses • This is likely to be a cumbersome and expensive model as experience suggest this is a time consuming process that relies on relationship building and trust development over time
6.5 (2)	In which circumstances should public agencies be appointed as supporters or co-decision makers	As a appointment of 'last resort' where there are no family or other support decision makers available

Question 6.6 Paid workers and organisations as supporters and co-decision -makers

6.6 (1)	What are the advantages and disadvantages of allowing paid care workers to be appointed as either supporters or co-decision-makers? (2) In what circumstances should paid care workers be appointed as supporters or co-decision-makers?	• Volunteers or paid care workers may be useful where there are no other persons willing to take on this role • Volunteers or paid care workers may be preferable to paid government agency staff as a 'last resort' for support decision-makers
	(3) What are the advantages and disadvantages of allowing professional organisations to be appointed as either supporters or co-decision-makers?	• The major disadvantage to this model may be the cost of a professional's time for this role which may be time-consuming. • Payment should by the Public Guardian and not be a cost imposed on the consumer
	(4) In what circumstances should professional organisations be appointed as supporters or decision-makers?	• Only as a circumstance of last resort in those locations where alternative arrangements are not possible. • Payment should come by the Public Guardian and not be a cost imposed on the consumer

Question 6.7: Volunteers as supporters and co-decision-makers

	(1) What could be the advantages and disadvantages of appointing community volunteers as supporters?	• We support the suggestion in the paper that a trial of suitably trained volunteers supported by the Public Guardian could be undertaken similar to the role of volunteers in similar schemes in Victorian and Western Australia. • Reasonable costs should be covered by the Public Guardian for this service and not be a cost imposed on the consumer.
	(2) What could be the advantages and disadvantages of appointing community volunteers as co-decision-makers?	• Will cover those circumstances where family members and carers are not available, willing or precluded due to conflict of interest • Community volunteers may have the time to assist and bring a 'reasonable person' approach to support decision making.
	(3) In what circumstances do you think community volunteers should be appointed as supporters or co-decision-makers?	• Where other individuals or informal supporters are not available of have a working relationship with the person.

Question 6.8: Powers and functions of supporters

	(1) What powers and functions should the law specify for formal supporters?	• The power and function of a formal support decision-maker should be specified in their appointment • These powers and functions should be reviewed regularly from time to time • Support decision makers should be given the power to access information they need to support the person make decisions
	(2) What powers or functions should the law specifically exclude for formal supporters?	• They should not be permitted to make decisions on behalf of the person they are supporting

Question 6.9: Powers and functions of co-decision-makers

	(1) What powers and functions should the law specify for formal co-decision-makers?	• Power to access information • Power to co-sign documents • Power to require certain agencies and organisations to recognise the co-decision-making appointment and role
	(2) What powers and functions should the law specifically exclude for formal co-decision-makers?	• Consideration could be given to the types of decisions in which a co-decision maker can be involved personal and/or financial • It is noted that personal and financial decisions may not be mutually exclusive as the list of personal decisions provided in the discussion document (p.46) include health care, accommodation, education and employment, all of which may have financial implications.

Question 6.10: Duties and responsibilities of supporters and co-decision-makers

6.10 (1)	What duties and responsibilities should the law specify for formal supporters?	We support the principles about individual decision making outlined in the discussion document (p. 50) namely • The wishes and preferences of people with impaired decision-making ability should inform decisions • People with impaired decision-making ability are entitled to take reasonable risks and make choices with which other people might disagree However, we stress that safeguards need to be in place to ensure that people with mental illness do not make decisions at a point in time that they may later regret and that are significantly not in their overall best interest

6.10 (2)	What duties and responsibilities should the law specify for formal co-decision-makers?	• They should have the required skills and attributes to assist the person to make reasonable decisions • They have the capacity to advise the person on reasonable decisions
6.10 (3)	What duties and responsibilities should the law specifically exclude for formal supporters and formal co-decision-makers?	• They cannot act alone in making decisions • They should not have a conflict of interest in relation to the areas of decision making in which they are involved.

Question Paper 3: The role of guardians and financial managers

2. Who can be a guardian or a financial manager?

Question 2.1: Who can be an enduring guardian?

(1)	Who should be eligible to be appointed as an enduring guardian?	• Persons without a conflict of interest in relation to their professional role • People who have met minimum criteria for managing the resources of another
(2)	Who should be ineligible to be appointed as an enduring guardian?	• Persons with conflicts of interest in being in the role of an enduring guardian such as people providing medical services, personal care, accommodation etc., or their relatives. • A person on a 'banned list' maintained by the relevant state authority following the passage of legislation requiring the registration of enduring powers of attorney.

Question 2.2: Who can be a tribunal-appointed guardian?

(1)	What should the Tribunal consider when deciding whether to appoint a particular person as a guardian?	We agree with the principles outlined in the current Guardianship Act namely: • the welfare and interests of the person should be paramount, • the freedom of decision and freedom of action of such persons should be restricted as little as possible, • the person's views of such persons in relation to the powers of the guardian should be taken into consideration, • the importance of preserving the family relationships and the cultural

		and linguistic environments of such persons should be recognised, • individuals should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs, • such persons should be protected from neglect, abuse and exploitation, • the community should be encouraged to apply and promote these principles. We would like to see the following added: • the views of the family and carer relation to the powers of the guardian should be taken into consideration • there should be regular and timely reviews of the appointment of a guardian • the family and carers should be able to apply for a review of the appointment of a guardian when circumstances change
(2)	Who should be ineligible to act as a guardian?	• Persons incompetent of carrying out the functions of a guardian • Persons with whom the principal has a conflict • Persons who do no demonstrate that they understand the responsibility and nature of the role • Individuals with a clear conflict of interest in undertaking that role

Question 2.3: When should the Public Guardian be appointed?

(1)	Should the Tribunal be able to appoint the Public Guardian as a guardian? If so, when should this occur?	The Public Guardian should be able to be appointed as a guardian where there is no suitable alternative.
(2)	Should there be any limits to the Tribunal's ability to appoint the Public Guardian? If so, what should these limits be?	The limits on the appointment of the Public Guardian are when: • The personality of the Public Guardian is not compatible with that of the person concerned • The Public Guardian does not have the capacity to take the persons will and preferences into account or the views of family and carers

		• There is not the capacity to have regular and meaningful contact between the Public Guardian and the person under guardianship

Question 2.4: Should community volunteers be able to act as guardians?

(1)	What could be the benefits and disadvantages of a community guardianship program?	A guardian appointed under a community guardianship program may have an advantage in personal contact with a person under guardianship which is superior to a Public Guardian.
(2)	Should NSW introduce a community guardianship program?	A trial of suitable appointed guardians properly trained and supervised by the Public Guardian should be completed before appointments are made.
(3)	If NSW does introduce a community guardianship program: (a) who should be able to be a community guardian? (b) how should community guardians be appointed? (c) who should recruit, train and supervise the community guardians?	There is insufficient material in the discussion paper on this model to allow a suitable response to these questions. We would be supportive of this concept only if suitable resources were provided with adequate oversight from a relevant body and had built-in access by relatives and carers to the appointed guardian.

Question 2.5: Who can be a private manager?

(1)	What should the Tribunal consider when deciding whether to appoint a particular person as a private manager?	Detailed and appropriate general and specific principles should be included in the Guardianship Act to cover the appointment of any financial managers. These general and specific principles should broaden the current provisions and fill the gaps in the current legislation for when a financial manager is appointed for a person who does not have a disability as the Act only applies the principles in the Act to persons with a disability.
(2)	Should the Guardianship Act include detailed eligibility criteria for private managers or is the current "suitable person" test sufficient?	• Yes the Act should include details of a 'suitable person' who can be appointed. This must include compatibility with the person under guardianship and the capacity to provide access to and take account of the views of family and carers, in addition to the person's will and preferences.

		• We support the inclusion of the range of factors listed on page 13 of the discussion document for the appointment of suitable persons as financial managers.
(3)	Should the same eligibility criteria apply to private guardians and private managers? If so, what should these common criteria be?	• Yes. We are comfortable with the criteria outlined in the discussion document. • In addition, we would like to see the capacity for regular review and the capacity to take into consideration the views of family and carers, and the persons will and preference. • A further criteria may be around the capacity of the financial manager to ascertain the 'risk preference' of the person under guardianship and their family when making financial decisions. • The Guardianship Act should emphasise that the will and preference of the person under guardianship should have preference in decision making but not so as to unreasonably disadvantage the welfare and best interests of the individual. • We agree with the recommendations of the standing committee which in 2010 recommended that the suitable person test for the appointment of a financial manager be the same as that for a guardian (p. 14)
(4)	What are the benefits and disadvantages of appointing private corporations to act as financial managers?	Private corporations could bring more up-to-date skills in financial management than the Public Trustee. On the other hand they may be unreasonably costly and have unsuitable preferences for risk.
(5)	Should the Tribunal be able to appoint a corporation to be a private manager? If so, under what circumstances should this occur?	• The appointment of private managers or corporations as financial managers should be no more costly than the appointment of the Public Trustee. • The appointment of a private or corporate financial manager should be subject to regular and timely review (at least annually) and the review should provide access to family and

		carers to share their views of the actions of the financial manager. • Family members and carers should have the capacity to request a review of the appointment of a financial manager where they have concerns or the person's circumstances have changed.

Question 2.6: Should the NSW Trustee be appointed only as a last resort?

(1)	Should the Guardianship Act state explicitly that the Tribunal can only appoint the NSW Trustee as a last resort?	Yes
(2)	If so, how should this principle be expressed in the Act?	The Guardianship Act should apply the same criteria to the appointment of a financial manager to that of a guardian. There should be built into the Act mechanisms for family and friends to have the appointment of the NSW Trustee reviewed when they have concerns of when circumstances change. Such a review should always include the family and carers of the person under guardianship.

Question 2.7: Should the Act include a succession planning mechanism?

(1)	Should the Guardianship Act allow relatives, friends and others to express their views on who should be a person's guardian or financial manager in the future?	Strongly supported.
(2)	What could be the benefits and disadvantages of such a succession planning mechanism?	Succession planning should commence at the beginning of a guardianship order and be reviewed at our recommended regular and timely reviews.
(3)	When deciding who to appoint, should the Tribunal be required to give effect to the wishes expressed in a succession planning statement?	Yes

3. What powers and functions should guardians and financial managers have?

Question 3.1: What powers and functions should enduring guardians have?

(1)	Should the Guardianship Act contain a more detailed list of the powers and functions that an adult can grant to an enduring guardian?	We are broadly in agreement with the recommendations of the Victorian Law Reform Commission's recommendations on the scope of decisions of an enduring

	If so, what should be included on this list?	guardian and the limitations of their decision-making power. However this list should not be read as exhaustive in the new Guardianship Act.
(2)	Should the Guardianship Act contain a list of the powers and functions that an adult cannot grant to an enduring guardian? If so, what should be included on this list?	We are broadly in agreement with the recommendation of the Victorian Law Reform Commission's recommendations on the powers and functions that an adult cannot grant to an enduring guardian.

Question 3.2: Should the Tribunal be able to make plenary orders?

(1)	What are the benefits and disadvantages of allowing the Tribunal to make plenary orders?	There appear to be few advantages.
(2)	Should the Guardianship Act: (a) continue to enable the Tribunal to make plenary orders (b) require the Tribunal to specify a guardian's powers and functions in each guardianship order, or (c) include some other arrangement for granting powers?	The 'plenary' powers of the Guardianship Act, which provides the guardian with "custody of the person to the exclusion of any other person", should either be deleted or retained with severe limitations and definitions as to those circumstances when it can be applied. The Tribunal should be required to specify the guardian's powers and functions in all cases. These powers and function should be able to be challenged by family members or carers and be subject to regular and timely review.

Question 3.3: What powers and functions should tribunal-appointed guardians have?

(1)	Should the Guardianship Act list the powers and functions that the Tribunal can grant to a guardian? If so, what should be included in this list?	Yes. While we recognise the challenge that this will pose for its construction any revised Act should list the powers and functions that can be granted to a guardian.
(2)	Should such a list: (a) set out all the powers that a guardian can exercise, or (b) should it simply contain examples?	It should set out the powers a guardian can exercise.

Question 3.4: Are there any powers and functions that guardians should not be able to have?

(1)	Should the Guardianship Act contain a list of powers and functions that the Tribunal cannot grant to a guardian?	Yes
(2)	If so, what should be included in this list?	• make or revoke a will

		• make or revoke a power of attorney, enduring power of attorney or advanced health care directive • vote • consent to an adoption • enter into or terminate a civil partnership • enter into a surrogacy arrangement, or • consent to the making or discharge of a parentage order. • exercising the rights of an accused person in a criminal investigation or criminal proceedings, and • chastising or punishing the person under guardianship. • enter into surrogacy arrangements • consent to making or discharging a substitute parentage order, or • manage the estate of the represented person when they die.

Question 3.5: What powers and functions should financial managers have?

(1)	What powers and functions should be available to a private manager?	A broad range of powers should potentially be available to a private manager but the specific range of powers available to any private manager should be specified by selecting those powers from the list contained in the Act. They should have the power to make financial decisions to support the lifestyle decisions approved by Guardians, (including and especially those that go to preserve autonomy or respect the individual's preferences for the delivery of care and support in the least restrictive environment possible). Lifestyle and preferences should take precedence over the preservation of assets for any estate, so long as the expenditure of assets (in the quantum envisaged) is reasonably necessary to achieve the goal desired.
(2)	What powers and functions should the NSW Trustee have when acting as a financial manager?	The powers and functions granted to the NSW Trustee must have the same restrictions and qualifications specified by the Tribunal as those that apply to private managers.

(3)	Are the current arrangements for granting powers to private managers adequate? If not, how should powers be granted to private managers?	The Act should be strengthened to give greater weight to the view of Family and carers in both making the initial decisions on the powers and functions of a financial managers. In addition, once appointed the powers and functions of a private manager, it must be reviewed regularly and timely and in a manner that provides for family members and care to have input into the review and that requires the review to give weight to their views.
(4)	Should the legislation list the powers that a financial manager cannot exercise? If so, what should be on this list?	Yes and these should be similar to the Victorian Law Reform Commission's recommendations. A financial manager should not have the power to manage the assets for the benefit of any 3rd party (including the beneficiary of any estate or any trustee) except according to strict rules.

Question 3.6: Should the roles of guardians and financial managers remain separate?

	(1) What are the benefits and disadvantages of keeping the roles of guardians and financial managers separate? (2) What are the benefits and disadvantages of combining the roles of guardians and financial managers? (3) Should the roles of tribunal-appointed guardians and financial managers remain separate?	We are in agreement with the findings of the Victorian Law Reform Commission that "the reality of most people's lives is that lifestyle and financial decisions are seldom completely separate". And for this reason the roles and functions of guardians and financial managers should be combined unless there are overwhelming reasons not to do so. However, the primacy of supporting the rights and standard of living of the person being supported needs to be clearly articulated.

4. What decision-making principles should guardians and financial managers observe?

Question 4.1: What decision-making principles should guardians and financial managers observe?		
	What principles should guardians and financial managers observe when they make decisions on behalf of another person?	We recommend that the following principles should be observed by guardians and decision makers. In the list below text in bold and italics are in addition to the current text extracted from the current Act. ***(a)*** ***balance the*** welfare and interests ~~of such persons should be given paramount consideration~~ ***with the***

		will and preferences of the person taking into consideration ***i. the importance of promoting the person's happiness, enjoyment of life and wellbeing*** ***ii. the ability of the person to maintain their preferred living environment and lifestyle*** ***iii. the person's characteristics and needs*** (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible, ***with special consideration to*** ***i. the person's right to be treated with dignity and respect***[1] ***ii. the person's right to be a valued member of society and encourage them to undertake socially valued roles***[2] (c) such persons should be encouraged, as far as possible, to live a normal life in the community, with recognition, consideration and promotion of ***i. their basic human rights of all adults***[3] ***ii. their right to be treated with dignity and respect***[4] (d) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised, ***including*** ***i. the importance of maintaining (or creating) support networks and supportive relationships***

1. *Guardianship of Adults Act* (NT) s 4(5)(j); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 3.
2. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 4; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) rec 4-3.
3. See, eg, *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 2. See also Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) rec 4-3.
4. *Guardianship of Adults Act* (NT) s 4(5)(j); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 3.

		ii. the importance of maintaining the person's Aboriginal or Torres Strait Islander cultural and linguistic environment, values, traditions and customs (where relevant)[5] (e) the views of such persons, ***and their family and carers, and the persons other agents,*** in relation to the exercise of those functions should be taken into consideration ***at all times and particularly during regular and timely reviews of the guardianship orders***, (f) ~~such persons should be encouraged,~~ ***provide support to the person to be self-reliant,*** as far as possible, in matters relating to their personal, domestic and financial affairs, (g) such persons should be protected from neglect, abuse and exploitation, (h) ***consider the person's right to confidentiality***[6] ***and privacy***[7] ***(i) consider issues relating to the provision of appropriate care, including health care,***[8] ***and*** ***(j) the guardian and managers should act with honesty, care, skill and diligence.***[9] (h) the community should be encouraged to apply and promote these principles.[10]

Question 4.2: Should guardians and financial managers be required to give effect to a person's "will and preferences"?

5. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 9(2). See also Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) rec 4-3.
6. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 11.
7. See Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report 67 (2010) rec 4-3.
8. *Guardianship of Adults Act* (NT) s 4(5)(f)
9. *Guardianship of Adults Act* (NT) s 22(1)(d). See also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws,* Report 124 (2014) rec 4-8(e).
10. *Guardianship Act 1987* (NSW) s 4.

(1)	What are the advantages and disadvantages of the current emphasis on "welfare and interests" in the Guardianship Act's general principles?	We are, in principle, strongly of the view that any new legislation be based on the principle of 'will and preference'. However, we are aware that there are often circumstances concerning people with a mental illness where the adoption of 'best interest' decision making may be the wisest choice over a decision based on 'will and preferences'. The nature of mental illness means that a person's will and preference may vary over time and, at times, quite rapidly. This can mean that decisions based on the preferences at one point in time may not reflect the person's preference for the majority of their lives. Consequently, we are firmly of the view that any new Guardianship Act should allow substitute and supportive decisions to be based on both principles and that the Act should include guidelines on when to use either principle.
(2)	Should "welfare and interests" continue to be the "paramount consideration" for guardians and financial managers?	
(3)	What could be the benefits and disadvantages of requiring guardians and financial managers to give effect to a person's will and preferences?	
(4)	Should guardians and financial managers be required to give effect to a person's will and preferences?	

Question 4.3: Should NSW adopt a "substituted judgment" model?

(1)	What could be the benefits and disadvantages of a "substituted judgment" approach to decision-making?	Consideration should be given to the 'substituted judgement' model, whereby decision-makers attempt to make a decision as if they were the person under guardianship making that decision. However, we recognise the limitations of this principle especially in those persons with a mental illness where their previously expressed views may have been influenced by their mental illness and may not accurately express their preferences at those times of their lives when they were not affected by a mental illness. In addition, we note the absence of any reference to family members and carers in relation to the formation of the view of guardians and financial managers using the 'substituted judgement' model. Family members and carers may be in the best position to advise guardians and financial managers on the preferences of the person prior to the limitations that necessitated the guardianship order. For this reason the views of family members
(2)	Should the Guardianship Act require guardians and financial managers to give effect to the decision the person would have made if they had decision-making capacity (that is, a "substituted judgment" approach)?	
(3)	If so, how would guardians and financial managers work out what the person would have wanted? Should the legislation set out the steps they should take?	

		and carers must be taken into consideration in any application of the 'substitute judgement' model.

Question 4.4: Should NSW adopt a "structured will and preferences" model?

(1)	What could be the benefits and disadvantages of a "structured will and preferences" approach to decision-making?	We are broadly in favour of the 'structured will and preference' model whereby the best estimate of the persons will and preferences is given precedence over principles for decision making. However, we recognise the limitations of these principles particularly in people with mental illness and the application of this principle needs to be qualifies with the insertion of limitations such as: • when such a decision would 'pose a serious risk' to the person's or other's 'personal and social wellbeing' • would place them at risk of serious physical, emotional or psychological harm • the preservation of a person's assets must not be the overriding consideration in determining harm. We are supportive of the arguments in this paper that the views of family members and carers should be taken into consideration by guardians and financial managers in determining the persons will and preferences. We would also like to see built into any new model the requirement for regular and timely reviews of the underlying rationale made by guardians and financial managers in their decision-making, with input from family members and carers, to continually assess that the decisions remain consistent with these guiding principles.
(2)	Should guardians and financial managers be required to make decisions based upon a person's will and preferences?	
(3)	If so, how would guardians and financial managers work out a person's will and preferences? Should the legislation set out the steps they should take?	
(4)	What should a guardian or financial manager be required to do if they cannot determine a person's will and preferences?	
(5)	Should a guardian or financial manager ever be able to override a person's will and preferences? If so, when should they be allowed to do this?	

Conclusion

Many thanks for considering our response to your discussion papers on this important review of the Guardianship Act 1987. We would welcome the opportunity to further discuss our views with you should the opportunity arise. Our contact details are provided below.

Yours Sincerely,

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