NCAT
NSW Civil &
Administrative Tribunal

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Mr Alan Cameron AO
Chairperson
New South Wales Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

31 January 2017

Dear Mr Cameron,

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

Question paper 2 addresses the issue of 'Decision-making models' and question paper 3 addresses the issue of 'The role of guardians and financial managers'. As the Tribunal is an independent body which exercises a range of quasi-judicial functions under the *Civil and Administrative Tribunal Act 2013* (NSW) and the *Guardianship Act*, we do not propose to comment on matters of policy. Accordingly, we have sought to limit our comments, where relevant, to the operation of the current legislative scheme and potential implications for the functioning and resourcing of the Tribunal in relation to certain proposals for legislative reform.

In relation to **question paper 2**, the Tribunal has focused its comments on the discussion:

- concerning whether a formal supported decision-making model should be introduced in NSW (Questions 5.1 and 5.2);
- as to whether substitute decision-making should be retained as an option (Question 5.3);
- as to whether public agencies should be able to be appointed as supporters or co-decision-makers (Question 6.5).

In relation to **question paper 3**, the Tribunal has focused its comments on the discussion:

- as to whether community volunteers should be able to act as guardians (Question 2.4);
- as to whether the *Guardianship Act* should include a succession planning mechanism (Question 2.7);
- as to the powers and functions enduring guardians (Question 3.1);
- as to whether the Tribunal should be able to make plenary orders (Question 3.2);
- as to the powers and functions of tribunal-appointed guardians (Question 3.3).

Question paper 2

Questions 5.1 and 5.2: Whether a formal supported decision-making model should be introduced and its key features

Question paper 2 raises for discussion (at [5.9]-[5.32]) whether NSW should adopt a supported decision making model and, if so, what its basis and parameters should be.

The question paper also indicates (at [5.4]) that the Commission has "reached the tentative conclusion that there is scope for NSW to do more through our laws to encourage and promote supported decision-making" and seeks views both as to whether such a formal framework should be introduced and the key features of any such framework.

In our view there would appear to be a number of different approaches that could be adopted in order to achieve this aim, including the following:

1. To maintain the present system with recognition of supported decision making and the express legislative requirement that a Court or Tribunal must give preference to informal supported decision making. Guardianship and/or financial management orders would only be made as a last resort where supported decision making is not possible.

2. Legislative designation of a hierarchy of supporters who derive their power to act by virtue of the legislation. An example of where a person derives their power to act from legislation is contained in the 'person responsible' hierarchy provided for in Part 5 of the *Guardianship Act*.

3. The formal appointment of a supporter by a suitable body, such as a Court or Tribunal.

Which of these legislative models, if any, is introduced is a matter of policy and the Tribunal does not express a view as to this. However, should an approach be taken along the lines of one of these models, we make the following comments.

If adopted, approaches 1 and 2 have the potential to provide appropriate recognition to the role of supported decision making.

The approach outlined at 1 would be largely consistent with the current requirement under the *Guardianship Act* that when considering whether to make a guardianship order, the Tribunal must consider whether it is practicable for services to be provided to the person without the making of an order (s 14(2)(d)). The Tribunal must also have regard to the principle that a person's freedom of decision-making and freedom of action should be restricted as little as possible (s 4(b)).

In principle, approaches 1 and 2 would be unlikely to have significant workload or resourcing implications for the Tribunal.

In relation to the third possible approach, experience suggests that a formal appointment process would, almost of necessity, become legalistic and contentious. In addition, it would be likely to relate to a far greater proportion of people with disabilities than those in relation to whom applications are made under the current substituted decision making regime contained within the *Guardianship Act*. In order to try and gain an understanding of the degree of the impact on those people who are currently informally supported, should the

third approach be adopted, we have drawn on data from the 2015 ABS Survey of Disability, Ageing and Carers[1] (the 2015 ABS Survey).

The 2015 ABS Survey reported that 17.5% of the NSW population had a disability[2]; 5.1% having a profound or severe disability that affected one or more core activities of living.[3] In 2015 the population of NSW was over 7.6 million,[4] meaning approximately 1.33 million people in NSW identified as having a disability. The survey does not distinguish on a state by state basis between purely physical disabilities and disabilities that give rise to a cognitive or decision making impairment. However, in the 2012 ABS Survey, which did include this comparison by state and territory, and assuming no significant changes over this three year period, 18.4% of the then 1.3 million were identified as having a 'mental or behavioural disorder' (which included dementia, mental illness, and intellectual disability) and a further 2.8% had identified physical disabilities which may also be associated with cognitive impairment, such as stroke or acquired brain injury. [5] Thus, it can be estimated that those people who have a disability that give rise to a cognitive impairment is in the order of 282,000.

For the financial year 2015-16, the Tribunal attended to 10,384 applications or reviews of orders which included applications for guardianship, financial management and applications to consent to medical and dental treatment.[6] We note that in many cases separate applications for guardianship and financial management orders related to the same person. Accordingly, the number of persons in respect of whom applications have been made in that financial year is considerably less than 10,384.

The relatively low number of applications contrasted with the number of people in NSW estimated as having a disability that affects cognition suggests:

- informal supported decision making is already extensively and effectively operating for many people in the NSW community.
- the 'person responsible' scheme in Part 5 of the *Guardianship Act* is working effectively. This scheme provides for the automatic substitute decision making hierarchy of 'person responsible' for consent to medical and dental treatment where the patient does not have capacity to provide or withhold his or her own consent.
- the appointment of enduring guardians and attorneys pursuant to enduring powers of attorney is meeting the needs of many people.

We also note that the introduction of a formal supported decision-making model has the potential to lead to a shift in the approach taken by organisations that provide services to people with disabilities, namely, that such organisations may increasingly require the appointment of a supporter rather than relying on current informal support arrangements.

Given the relatively low number of appointments of substitute decision makers compared with the high number of people accessing services and support, an inference may be drawn

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[1] http://www.abs.gov.au/ausstats/abs@.nsf/mf/4430.0.

[2] ABS, Disability, Ageing and Carers, Australia: Summary of Findings, Data Cubes, Disability tables, Table 5.3, 2015. Available at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4430.02015?OpenDocument

[3] ABS, Disability, Ageing and Carers, Australia: Summary of Findings, Data cubes, Disability tables, Table 12.3

[4] ABS, Regional Population Growth, Australia, 2014-15. Available at: http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3218.0Main%20Features202014-15?opendocument&tabname=Summary&prodno=3218.0&issue=2014-15&num=&view=

[5] ABS, Disability, Ageing and carers, Australia: New South Wales, Table 12, 2012. Available at http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4430.02012?OpenDocument

[6] NCAT Annual Report 2015-2016, Graph 1 page 41. Available at: http://www.ncat.nsw.gov.au/Documents/ncat_annual_report_2015_2016.pdf

that informal supported decision making arrangements are currently being used for the majority of people with cognitive disability in NSW. If this is the case, then it remains a significant question whether the likely consequences associated with the introduction of a formal appointment process, including significant workload and resourcing implications for the Tribunal, are justified if informal supported decision making arrangements are operating effectively.

Should, however, a formal supported decision making model be introduced, it should be ensured that it operates with as little legal complexity as possible and in a manner that provides appropriate safeguards for the supported person. In the latter respect, we note that paragraph 2.11 of question paper 2 makes reference to the necessary safeguards identified in the *UN Convention on the Rights of Persons with Disabilities* in order that any decision making model, including a supported decision making model, must adopt in order to be effective. We also note that further discussion about appropriate safeguards is to be addressed in question paper 4.

The Tribunal notes that any such legislation would need to clearly outline the circumstances in which a supporter could be appointed and by whom. We note the discussion in the question paper as to the distinction between the appointment of a supporter by the person needing decision-making support as opposed to a model that empowers a Court or Tribunal to appoint a supporter (at [5.20]-[5.32]).

Clear guidance would also need to be provided as to the criteria that must be satisfied before a Court or Tribunal could appoint a supporter for a person and whether or not it is proposed that such a scheme would include criterion in relation to the person's capacity to effectively utilise a supporter. Any such legislative scheme would also need to make clear the circumstances in which the appointment of a supporter or co-decision maker could be reviewed and, in appropriate circumstances, be removed from that role.

Similarly, clear guidance would be required as to the appropriate legislative pathway should a supported person's cognition decline such that the person can no longer be truly supported in their decision making. Particular reference should be made to the obligations of appointed supporters in these circumstances to ensure that supported decision making does not become substituted decision making by default.

Related to these issues is that of the likely need for training and education for the members of those health professions who may be involved in providing evidence in hearings in which a person's capacity to be supported is under consideration, as distinct from the current legislative tests that many health professions are much more familiar with concerning substituted decision making. Similarly, training and education would need to be provided for appointed supporters in their role as supporters as opposed to substitute decision makers.

Question 5.3: Whether substitute decision-making should be retained as an option

Question paper 2 raises for discussion (at [5.33]-[5.44]) whether NSW should retain substitute decision making as an option even in the event that the Commission recommends formal supported decision-making as the preferable statutory model. We note that the issue has been considered in a number of different fora.

In the 2014 report on *Equality, Capacity and Discrimination in Commonwealth Laws*,[7] the Australian Law Reform Commission ('ALRC') suggested that policy reform must include consideration of instances where a representative decision maker is appointed as a person

[7] ALRC, *Equality, Capacity and Disability in Commonwealth Law*, Report 124 (2014).

is not able to make a decision even with support and determining the will and preferences is impracticable.[8]

In its submission to the same ALRC inquiry, the Australian Guardianship and Administration Council noted that while there needs to be "careful development of supported decision-making practices", supported decision-making cannot "completely replace substitute decision-making and there will be an ongoing need for substitute decision-making in limited circumstances."[9]

In the 2010 report on *Substitute decision-making for people lacking capacity*,[10] the NSW Legislative Committee Standing Committee on Social Issues noted that a spectrum of responses is required, including zero intervention, assisted decision-making and substitute decision-making.[11]

In its submission to the UN Committee on the Rights of Persons with Disabilities, the Australian Government acknowledged that "while it is important that the legal capacity of persons with disabilities is respected to the fullest extent possible, there are circumstances in which substituted decision-making may be the only available option."[12]

Question paper 2 (at [5.42]) also makes reference to those provisions of the *Guardianship Act* that already ensure that substitute decision making is only available as an option of last resort and the same point is made earlier in this submission. As noted in a recent decision of the Tribunal:[13]

> The Tribunal has a discretion as to whether or not to make a guardianship order, even where it has concluded that the subject person is "a person who has a disability" for the purposes of the *Guardianship Act*. Not all people with a disability who are incapable of making life decisions should be regarded as being in need of a guardianship order and there are important principles in the *Guardianship Act*, particularly in ss 14(2) and 4 of that Act, which govern the circumstances in which the Tribunal should make an order.

The decision of KDP [2016] NSWCATGD 24 provides an illustration of the circumstances in which the revocation of orders can occur on the basis of there being appropriate informal support for a person despite a finding that a person remains incapable of managing their own financial affairs.

It can be observed that were substitute decision making to be replaced entirely by supported decision making this would be likely to lead tto substituted decision making being relabelled supported decision making for many people who have a significant cognitive impairment. This would occur, for example, when the subject person was not capable of communicating or of exercising any decision making function. If future legislation failed to recognise the reality of people's circumstances then this could render the legislation ineffective or, at worst, fail to empower and protect the rights of people with significant cognitive impairment.

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[8] Ibid, note 1, paragraph 2.106, [60].
[9] AGAC, Responses to the Issues Paper, *Submission 51 to the ALRC Inquiry, - Equality, Capacity and Disability in Commonwealth Laws,* 2014 [5].
[10] NSW Legislative Committee Standing Committee on Social Issues, *Substitute decision-making for people lacking capacity*, Report 43 (2010)
[11] Ibid, [5.64].
[12] Australia, Submission to the UN Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention–Equal Recognition before the Law*, 2014 [16].
[13] *AWL* [2016] NSWCATGD 16, [22].

Question 6.5: Public agencies as supporters or co-decision-makers

Question paper 2 raises for discussion (at [6.12]-[6.20) whether public agencies should be able to act as supporters or co-decision-makers.

As noted in the question paper, under the *Guardianship Act* the Tribunal may appoint a private person, the Public Guardian, or the NSW Trustee and Guardian as a substitute decision-maker. The paper also notes a number of submissions to the effect that public agencies may not be suited to support roles ([6.15]-[6.18]). The paper also refers to the NSW Ombudsman's submission (at [6.19) that "it is important to recognise that many people who require decision making support do not have access to family or other informal supports, or may prefer to gain the support from independent parties".

A practical question therefore arises that if the Tribunal were to be given the function of formally appointing supporters, what options would be available if the person is without informal supports within the community? The Tribunal notes the potential detriment to those people who, as a result of their isolation or lack of family or other supports, would be excluded from a potential supported decision-making scheme if public agencies could not act as supporters and may, as a result, be forced into a substitute decision making pathway.

Question Paper 3 comments

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

Question paper 3 raises for discussion (at [2.28]-[2.32]) how, in the event that NSW introduces a community guardianship program, community volunteers should be appointed as guardians.

Whether or not NSW introduces community volunteer guardians is a matter of policy and the Tribunal does not express a view about this. However, if a mechanism similar to that outlined at paragraphs 2.29 to 2.30 is introduced in NSW, it is likely to have significant workload and resource implications for the Tribunal should it be given legislative responsibility in relation to the appointment of community guardians.

In addition to the initial appointment process, there would need to be a robust mechanism for the supervision and review of community volunteer guardians which would also have significant implications for the Tribunal if it was given responsibility in this regard.

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

Question Paper 3 raises for discussion (at [2.64]-[2.69]) whether the *Guardianship Act* should allow relatives, friends and others to express their views as to who should be a person's guardian or financial manager in the future.

The Tribunal acknowledges the importance of this issue and the challenges faced by relatives, particularly parents, of adults with lifelong cognitive disability and their wish to put in place arrangements for the care and support of loved ones when they are no longer able to do so. The current scheme under the *Guardianship Act* does not provide a mechanism for the views and wishes of a family member in relation to future decision making arrangements for a loved one to be taken into account.

The Tribunal notes that the question paper makes reference (at [2.66]) to a recommendation made by the Victorian law Reform Commission[14] ("VLRC") that "family members, carers and

[14] Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 197.

decision-makers for a person with 'ongoing impaired decision-making capacity' could file a 'succession document' with the Victorian tribunal. In this document, they could state their wishes about what the person's future decision-making arrangements should be."

If it is proposed that that NSW adopt such an approach, clear legislative guidance would need to be given as to how the Tribunal should have regard to such wishes, noting also that at the time of a future hearing, any previously expressed wishes by parents or other relatives may no longer reflect the person's circumstances at the time the need for an order arises. There is also the practical issue of how and by whom the expression of such wishes are to be recorded for future consultation if appropriate.

It is also noted that the introduction of a model such as that recommended by the VLRC is likely to have significant workload and resource implications for the Tribunal both in relation to the filing of "succession documents" and consideration at potential future hearings if the Tribunal were to be given a role in this regard.

Questions 3.1 and 3.3: What powers and functions should enduring guardians and tribunal-appointed guardians have?

Question paper 3 raises for discussion whether the *Guardianship Act* should contain a more detailed list of the powers and functions that an adult can grant to an enduring guardian and the Tribunal to a tribunal-appointed guardian.

In relation to the powers and functions of tribunal-appointed guardians, we note that providing a non-exhaustive list of functions (as proposed at [3.35]) could have the benefit of bringing greater clarity and understanding of the potential content of orders for parties participating in Tribunal proceedings as well as greater certainty as to the extent of the functions granted to individuals and organisations required to recognise the orders.

The Tribunal also notes that the nature of matters before it requires that it is able to operate with a certain degree of flexibility and discretion. Any clarification of functions would need to accord with the Tribunal's role in applying the least restrictive approach and ensure that the Tribunal is not constrained in assessing and responding to a person's circumstances.

We make the same observations in relation to the powers and functions of enduring guardians. In addition, the Tribunal notes a particular issue arising from the inclusion of a health care function in an enduring guardianship appointment (under s 6E(1)(b)) in the context of decisions that may need to be made at the end stages of a person's life.

Although a regime exists under Part 5 of the *Guardianship Act* for a person responsible to provide lawful substitute consent for the carrying out of certain medical or dental treatment (without needing to be appointed by the Tribunal as a guardian), this is directed to proactive medical interventions only.[15] As a result, a person responsible is not authorised to make decisions about the withdrawal, cessation or non-provision of life-sustaining treatment. Even in circumstances where a guardian is appointed under the *Guardianship Act* with a medical and dental consent function, but without a health care function, the guardian does not have the authority under the medical consent function alone to decide to withdraw life-sustaining treatment for the person under guardianship. The Tribunal exercising functions under Part 5 of the *Guardianship Act* is similarly limited to decision making about proactive medical procedures.

However, a guardian appointed with a health care function does have the authority to make decisions in connection with health care that include decisions to withdraw life- sustaining

[15] *FI v Public Guardian* [2008] NSW ADT 263, [40].

treatment.[16] A decision to withdraw life-sustaining treatment must be made in accordance with the best interests of the protected person in the circumstances.[17] This judgment must be informed by having regard to whatever is known about the likely wishes of the protected person in the situation, reasonable medical opinion as to what is appropriate and the views of the family (including best friends and the like).[18]

The ability, however, of an enduring guardian to consent to the withdrawal of life-sustaining treatment will depend on the type and scope of the functions in the appointment. NSW case law is currently silent about the role and powers of enduring guardians in end of life decision-making.

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

Question paper 3 discusses (at [3.19]-[3.32]) whether the *Guardianship Act* should continue to enable the Tribunal to make plenary orders.

If the Tribunal is satisfied that it could and should make a guardianship order, it may make a plenary order or a limited order (s16(1)(c)). The Act prohibits the Tribunal from making a plenary order in circumstances where a limited guardianship order would suffice (s15(4)).

Under a plenary order, a guardian has unlimited authority over a person's life. This is in contrast to a limited guardianship order whereby the order must specify the extent to which the guardian shall have custody of the person under guardianship and which functions the guardian shall have (s16(2)).

Our records indicate that the Tribunal (including the records of the previous Guardianship Tribunal of NSW) has not made a plenary guardianship order in approximately 18 years. This approach is consistent with the requirement in the statute that a plenary order is, in effect, an order 'of last resort' and reflects the serious impact that the making of a plenary order would have on fundamental rights relating to self-determination.

It is difficult to see a circumstance in which a plenary order would be the least restrictive approach (in accordance with s 4(b) of the *Guardianship Act*) and would also appear to be inconsistent with Article 12 of the UN Convention on the Rights of Persons with Disability.

Malcolm Schyvens
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[16] *FI v Public Guardian* [2008] NSW ADT 263, [51].
[17] *FI v Public Guardian* [2008] NSW ADT 263, [53].
[18] *FI v Public Guardian* [2008] NSW ADT 263, [53].