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8 February 2017

**By e-mail: nsw_lrc@justice.nsw.gov.au**

Dear Commissioners

**Review of the *Guardianship Act 1987*:**

**IDRS Response to Question Paper 3: The role of guardians and financial managers**

**About the Intellectual Disability Rights Service**

The Intellectual Disability Rights Service ('IDRS') is a community legal centre and disability advocacy service that provides legal and other advocacy for people with intellectual disability throughout New South Wales. IDRS advocates for policy and law reform and undertakes a range of community education with a view to advancing the rights of people with intellectual disability. IDRS also operates the Criminal Justice Support Network ('CJSN') which supports and advocates for people with intellectual disability when they are in contact with the criminal justice system as victims or defendants.

**General**

IDRS supports a supported decision making model wherever possible whilst recognising that substituted decision making may be needed as a last resort. IDRS emphasises the need to be aware of the complexity of decision making capacity when drafting policy and legislation. The particular complexity is that the law attempts to cater for very disparate groups of people for whom the nature of their decision-making incapacity are fundamentally different.

IDRS focus in this paper draws on our experience working alongside one of these groups, people with intellectual disability.

The comments made in this submission must be viewed in light of these statements.

## Question 2.1: Who can be an enduring guardian?

**(1) Who should be eligible to be appointed as an enduring guardian?**

An enduring guardian is appointed when a person has decision-making capacity. IDRS is in favour of the criteria currently in place for enduring guardians and does not see a need for change.

**(2) Who should be ineligible to be appointed as an enduring guardian?**

IDRS considers that the current restrictions provided under the *Guardianship Act 1987* (NSW) (the Act) for appointment as an enduring guardian are appropriate.

## 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 guardian?**

IDRS suggests the tribunal should consider the following factors when deciding whether to appoint a particular person as a guardian:

- Whether the person is 18 years of age or older;
- Whether the person is compatible with the person for whom a guardianship order is to be made;
- Whether the person understands the nature of the role of guardian and is willing and able to undertake the role, including applying the principles set out in the Guardianship Act;
- Whether there is any conflict of interest between the person and the person in for whom a guardianship order is to be made.

IDRS accepts the current provision in s17(2) of the Act which effectively provides the above requirements do not apply to the appointment of the Public Guardian.

**(2) Who should be ineligible to act as a guardian?**

A person should be ineligible to act as a guardian:

- If the person is under the age of 18;
- If the person is in a paid relationship with the person under guardianship;
- If the person has a conflict of interest with the person under guardianship that cannot be satisfactorily managed or resolved;
- If the person has a history of criminal activities in past decision-making roles;
- In circumstances where the tribunal is not satisfied of the person's bona fides.

## 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 tribunal should be able to appoint the Public Guardian as a last resort in circumstances where the person subject of an application does not have a suitable person willing to be appointed as guardian or where there is conflict about the interests of the person to the extent that no private person proposed is able to focus on the person's personal and social well-being. In these circumstances, it is important that there be an alternative available for a person in need of a guardian.

(2) **Should there be any limits to the Tribunal's ability to appoint the Public Guardian? If so, what should these limits be?**
The Tribunal should only be able to appoint the Public Guardian after having given active consideration to whether there is any other person who is appropriate and willing to be the guardian of the person the subject of the application, and having decided that there is not.

## 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?**
An advantage of a community guardianship program could be that it will facilitate personal relationships between the guardians and person under guardianship, providing a better basis for decision-making for the personal and social wellbeing of the person. This will be particularly relevant for an isolated person who does not have informal supports, a person who needs advocacy as well as guardianship plus the benefits of a personal relationship.

Disadvantages of such a program could be that the community guardian will be in a position to exploit the vulnerability of the person under guardianship. To minimise risk, community guardians would need to pass through thorough recruitment and training procedures and receive regular support and supervision. This would require allocation of significant resources to management of the community guardianship program. It should not be seen as a cheap option but a better option in the interests of the person with adequate resourcing.

(2) **Should NSW introduce a community guardianship program?**
Yes, IDRS supports trialling of a community guardian program provided that adequate resources are allocated to the management of the program and the support and supervision of community guardians.

(3) **If NSW does introduce a community guardianship program:**
**(a) Who should be able to be a community guardian?**

If NSW does introduce a community guardianship program, interested persons who meet the relevant private guardian criteria should be eligible for appointment. IDRS supports the Victorian community guardianship model.

**(b) How should community guardians be appointed?**

Initially, IDRS would see community guardianship being available as an option for the Public Guardian to delegate its guardianship authority to a community guardian where appropriate for the person under guardianship. If the relationship works well for both parties, the community guardian could be proposed to be appointed as guardian by the Tribunal if an order is still required at review of the guardianship order.

**(c) Who should recruit, train and supervise the community guardians?**

Community guardians should be trained, recruited and supervised by the Public Guardian. They should be accountable to the tribunal when orders are reviewed. Having the two layers of oversight will act as a stronger safeguard against exploitation.

## 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?**

The tribunal should consider:

- The nature of the financial decisions likely to be necessary;
- The nature and extent of the estate to be managed;
- The financial competency of the proposed private manager;
- The compatibility of the potential manager with the person whose estate is to be managed;
- Ability to manage appropriately any actual or potential conflict of interest;
- Any declaration of bankruptcy or conviction for offences relating to money or dishonesty; and
- The views of the persons whose estate is to be managed.

The Tribunal should be able to exercise discretion in these matters

**(2) Should the *Guardianship Act* include detailed eligibility criteria for private managers or is the current 'suitable person' test sufficient?**

IDRS supports an approach which gives the tribunal flexibility; see list in 2.5(1) above.

(3) **Should the same eligibility criteria apply to private guardians and private managers? If so, what should these common criteria be?**

Common eligibility criteria relevant to both roles include compatibility with the person the subject of the tribunal order; absence of conflict of interest, or the ability to appropriately manage any conflict of interest; and willingness and ability to undertake the role.

Private managers should additionally be able to show an ability to manage property and finances equivalent to the size and complexity of the estate in question.

(4) **What are the benefits and disadvantages of appointing private corporations to act as financial managers?**

IDRS supports the option to appoint private corporations as an alternative to the NSW Trustee and Guardian, giving some choice to persons who do not have a private person to appoint as financial manager. This may be particularly relevant where a person has a large and complex estate.

Potential disadvantages of appointing a private corporation are that personal relationships do not develop between a manager and a person whose estate is under management, such that the manager is not able to effectively determine the needs and wishes of the person whose estate is under management, or have proper regard to the person's personal and social wellbeing when making decisions. The person may then become frustrated and/or disadvantaged because they are not being put at the centre of decision-making.

IDRS notes that in our experience these same disadvantages generally apply to the appointment of the NSW Trustee and Guardian.

Further, the fees charged by private corporations may eliminate them as a viable option for many people, and may give rise to conflicts of interest. If private trustee companies are to be appointed, the person subject to the financial management order should not have to pay double fees to the NSW Trustee and Guardian as well as the private Trustee company.

## Question 2.6: Should the NSW Trustee be appointed only as the 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?**

IDRS suggests that this principle be expressed as follows:
The Tribunal may only commit the estate (or part of the estate) of a person to the NSW Trustee if the Tribunal cannot appoint another suitable person with a personal relationship with the person as the manager of that estate.

IDRS acknowledges that there will be circumstances when no available private person can be appointed due to conflict of interest or being unable to act appropriately as financial manager due to conflict about decisions.

## 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?**
IDRS considers that such a planning mechanism could be useful for subsequent appointments with interested persons registering their views. This would be particularly useful for a person who has always been in the care of a family member.

(2) **What could be the benefits and disadvantages of such a succession planning mechanism?**
A key benefit of such a mechanism is that the person who has always provided support may be able to reflect their understanding of the will, preferences and views of the person who is or may be the subject of an order, where that person may otherwise have difficulty doing so. This could be relevant where a number of persons are proposing themselves in the role of guardian.

(3) **When deciding who to appoint, should the Tribunal be required to give effect to the wishes expressed in a succession planning statement?**
Because circumstances can change, a succession planning statement should be a relevant consideration in making any appointment but the tribunal should take into account all relevant circumstances at the time a guardianship order or financial management order is required and appoint the most suitable person at the time.

## 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? If so, what should be included in this list?**
Because enduring guardian appointments are made by a person with capacity, generally the appointer should decide what powers and functions an enduring guardian should have. However, IDRS supports the inclusion of a list of possible functions being available as a guide for people considering appointment of an enduring guardian.

(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?**
IDRS supports a list of exclusions, similar to that proposed by the Victorian Law Reform Commission, including:

- Making or revoking the person's will;
- Making or revoking an appointment, enduring appointment or common law advance directive;
- Voting on behalf of the person in a Commonwealth, state or local election, referendum or plebiscite;
- Entering into or dissolution of marriage;
- Decisions about the care and wellbeing of any children of the person;
- Entering into surrogacy arrangements;
- Managing the estate of the person when they die;
- Consenting to an unlawful act.

## 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?**
IDRS does not see any benefits in allowing the tribunal to make plenary orders.
We only see disadvantage in power to appoint a plenary guardian. The primary disadvantage is that they leave the person the subject of the orders with no autonomy and may enable unnecessary limitations on the person.

(2) **Should the *Guardianship Act*:**

**(a) Continue to enable the Tribunal to make plenary orders?**
No. IDRS opposes the continuation of the option of plenary orders

**(b) Require the Tribunal to specify a guardian's powers and functions in each guardianship order?**
Yes.

**(c) Include some other arrangement for granting powers?**
No.

## 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?**
IDRS supports the inclusion in the Act of a non-exhaustive list of powers and functions that the tribunal can grant to a guardian. The list should include a general provision giving the Tribunal authority to grant an ancillary power which enables the guardian to

give effect to their decisions. For example, if a guardian has been given authority to make decisions about a person's' accommodation, the guardian may also need, as a last resort, to be able to authorise police or ambulance officers to assist in taking the person to accommodation in accordance with a decision of the guardian.

**(2) Should such a list:**

**(a) Set out all the powers that a guardian can exercise, or**

**(b) Should it simply contain examples?**

The list of powers and functions should simply contain examples of the powers that a guardian can exercise, so as not to limit the Tribunal's ability to tailor an order to the needs of an individual in their specific circumstances.

## 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?**

IDRS supports the inclusion of a list of exclusions in line with the list set out at 3.1(2) above in relation to enduring guardians.

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

**(1) What powers and functions should be available to a private manager?**

IDRS supports the approach recommended by the Victorian Law Reform Commission which provides for the legislation to contain a non-exhaustive list of powers in relation to 'financial matters' that the tribunal could give to a financial manager.

As a general principle the powers of the private manager should be defined by the tribunal in the order that it makes. In this way the tribunal will be required to consider which powers are necessary to give the financial manager and make more detailed orders for a person's estate, more in line with a range of functions responding to the level of assistance needed to ensure management of the person's finances in the interest of their personal and social well-being. This would enable the Tribunal to

consider what level of authority is 'least restrictive' and tailored to meet the needs of the individual. If this approach were adopted, then the current role of the NSW Trustee in providing directions to a private manager about the estate should be reconsidered.

At present financial management orders are inflexible, all or nothing orders unresponsive to the level of individual ability, risk and circumstances. In effect, financial management orders are primarily plenary orders in contrast to guardianship orders which are almost never plenary. The only flexibility is in the Tribunal's ability to exclude part of the estate.

IDRS suggests that legislative change to enable financial management orders that are more flexible and reflective of individual needs should be one of the key goals of the review of the legislation.

In addition, IDRS considers that financial management orders should generally be subject to review by the Tribunal as with guardianship orders. The purpose of the review should be to ensure that the order is still necessary and that it is working in the interests of the person under management.

While there could be exceptions to this requirement in specific circumstances where there is no likelihood of the person's financial capacity improving, IDRS believes the legislation should require periodic review of most financial management orders.

**(2) What powers and functions should the NSW Trustee have when acting as a financial manager?**

IDRS supports an approach for the NSW Trustee which is consistent with the approach suggested for private managers in 3.5(1) above.

**(3) Are the current arrangements for granting powers to private managers adequate? If not, how should powers be granted to private managers?**

IDRS supports an approach for private managers as set out in 3.5(1) above.

**(4) Should the legislation list the powers that a financial manager cannot exercise? If so, what should be on this list?**

IDRS supports the approach recommended by the Victorian Law Reform Commission to provide a non-exhaustive list of decision-making powers that the tribunal cannot give to a financial manager, including:

- To make or revoke the person's will;
- To manage the person's estate on their death;
- To restrict the person's personal decision-making autonomy in a way that cannot be reasonably justified in order to ensure proper management of their finances;

- Entering into a transaction which creates a conflict, unless the transaction has been specifically allowed in the order.

## 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?**
There are benefits in keeping the roles separate because different skills are required to perform them. Further, in our experience, a person who is appointed as a guardian does not always want the responsibility of financial management.

(2) **What are the benefits and disadvantages of combining the roles of guardians and financial managers?**
Conflicts of interest may arise where a person is responsible for accommodation and financial decisions. Having two people involved creates checks and balances.

(3) **Should the roles of tribunal-appointed guardians and financial managers remain separate?**
Yes. There is still the option of appointing the same person as guardian and financial manager, provided the same person is suitable for both roles.

## 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?

IDRS considers that in addition to the current principles in the Act, guardians and financial managers should be required to:

- Exercise their powers in a way that is appropriate to the person's characteristics and needs;
- Consider the importance of promoting the person's happiness, enjoyment of life and wellbeing;
- Consider the will and preferences of the person and
- Consider the ability of the person to maintain their preferred living environment and lifestyle.

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

(1) **What are the advantages and disadvantages of the current emphasis on 'welfare and interests' in the *Guardianship Act's* general principles?**

The advantage of the current emphasis on 'welfare and interests' is that it allows the circumstances of people with disability under the undue influence of others, or who hold variable views, or who have extremely limited ability to communicate or to understand options and consequences, to be addressed.

The disadvantage is that decisions are not being made in accordance with a person's will and preferences wherever reasonably possible.

**(2) Should 'welfare and interests' continue to be the 'paramount consideration' for guardians and financial managers?**

IDRS supports the approach proposed by the Victorian Law Reform Commission, namely, that guardians and financial managers should have an overarching responsibility to act in a way that promotes the personal and social wellbeing of a person.

**(3) What could be the benefits and disadvantages of requiring guardians and financial managers to give effect to a person's will and preferences?**

A benefit of requiring guardians and financial managers to give effect to a person's will and preferences is that it promotes the person's autonomy.

A disadvantage of requiring guardians and financial managers to give effect to a person's will and preferences is that, on occasion, to do so would put the person, or others, at an unacceptable risk of serious harm. A further disadvantage in some cases would be that, because of previous limitations on the person's environment, the person may be unaware of potential options which would have changed their will and preferences.

**(4) Should guardians and financial managers be required to give effect to a person's will and preferences?**

IDRS proposes a hierarchy of principles to guide guardians and financial managers, as follows:

- Firstly, in line with the Australian Law Reform Commission Recommended Guideline 3-3(2)(a), a substitute decision-maker must consider the will, preferences and rights of the person;
- Secondly, if a person's will, preferences and rights cannot be ascertained, then the decision-maker must try to ascertain the person's likely will and preferences, but in the context of the personal and social wellbeing of the person;
- Thirdly, any decision must be the least restrictive of the person's rights but must avoid an unacceptable risk of serious physical, psychological, emotional, financial or other harm occurring to the person.

## 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?**

A 'substituted judgement' approach to decision-making may preserve a person's autonomy. However, a disadvantage is that decision-makers may impose their own views or values when deciding what a person would have wanted, or may not be able to determine what a person would have wanted.

(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)?**

IDRS does not support a solely substituted judgment approach. The application of this model would be very limited for example for the small proportion of people with intellectual disability who have not had capacity at any time of their life to make their will and preferences relevant to complex decisions known.

(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?**

If a substituted judgment approach is adopted, the legislation should set out the steps guardians and financial managers should take to work out what the person would have wanted. IDRS sees merit in a decision-maker considering the factors put forward by the Victorian Law Commission, namely:

- The wishes and preferences the person expresses at the time a decision needs to be made, in whatever form the person expresses them;
- Any wishes the person has previously expressed, in whatever form the person has expressed them;
- Any considerations the person was unaware of when expressing their wishes which are likely to have significantly affected those wishes;
- Any circumstances that have changed since the person expressed their wishes which would be likely to significantly affect those wishes; and
- The history of the person, including their views, beliefs, values and goals in life.

But these factors must be weighed agains the risk of harm to the person in their present circumstances

## 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?**

A benefit of this approach to decision-making is that it provides guidance to decision-makers about what steps to take if a person's will and preferences cannot be determined.

A disadvantage of this approach is that a decision made in accordance with the person's will and preference might undermine the person's personal and social wellbeing.

**(2) Should guardians and financial managers be required to make decisions based upon a person's will and preferences?**

As set out in 4.2(4) above, IDRS proposes a hierarchy of principles to guide guardians and financial managers, as follows:

- Firstly, in line with the Australian Law Reform Commission Recommended Guideline 3-3(2)(a), a substitute decision-maker must consider the will, preferences and rights of the person;
- Secondly, if a person's will, preferences and rights cannot be ascertained, then the decision-maker must try to ascertain the person's likely will and preferences, but in the context of the personal and social wellbeing of the person;
- Thirdly, any decision must be the least restrictive of the person's rights but must avoid an unacceptable risk of serious physical, psychological, emotional, financial or other harm occurring to the person.

**(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?**

To work out a person's will and preferences, IDRS supports the approach taken in the *My Health Records Act 2012* (Cth), which sets out the following steps:

1. Give effect to the person's will and preferences;
2. If a person's will and preferences cannot be determined, give effect to their likely will and preferences, where possible consulting people who may be aware of these preferences. A person's previous will and preferences, as well as their values and beliefs, should be considered when determining their likely will and preferences;
3. If a person's likely will and preferences cannot be determined, acting in a way that promotes their personal and social wellbeing.

**(4) What should a guardian or financial manager be required to do if they cannot determine a person's will and preferences?**

If a guardian or financial manager cannot determine a person's will and preferences, they should be required to follow steps 2. and 3. set out in 4.4(3) above, that is:

1. If a person's will and preferences cannot be determined, give effect to their likely will and preferences, where possible consulting people who may be aware of these preferences. A person's previous will and preferences, as well as their values and beliefs, should be considered when determining their likely will and preferences;

2. If a person's likely will and preferences cannot be determined, acting in a way that promotes their personal and social wellbeing.

**(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?**

A guardian or financial manager should be able to override a person's will and preferences in order to avoid an unacceptable risk of serious physical, psychological, emotional, financial or other harm occurring to the person.

We thank you for the opportunity to make this submission.

[redacted]

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