THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref:ELS:PWel1202249

16 February 2017

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

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

Dear Mr Cameron,

Review of the *Guardianship Act 1987* – Question Paper 3: The role of guardians and financial managers

The Law Society of New South Wales appreciates the opportunity to comment on Question Paper 3: The role of guardians and financial managers. The Law Society's Elder Law, Capacity and Succession Committee contributed to this submission and the Human Rights Committee supports it.

Question 2.1: Who can be an enduring guardian?

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

The Law Society considers that the current eligibility requirements set out in section 6B of the *Guardianship Act 1987* ("the Act") for appointment as an enduring guardian are appropriate.

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

The Law Society considers that the current restrictions provided in section 6B of the Act for appointment as an enduring guardian are appropriate.

In particular, the current prohibition on persons who are involved in the provision of services, or their family members, to the person making the appointment for a fee or reward, are appropriate. Any legislative scheme that provided for commercial guardians or guardians who are remunerated for performing this role would be very complex as conflicts of interest are inherent where remuneration is provided.

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?

The Law Society considers that the requirements set out in section 17(1) of the Act are appropriate.

17 Who should be ineligible to act as a guardian?

The Law Society considers that the requirements set out in section 17(1) of the Act are appropriate.

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 Law Society considers that the Tribunal should continue to be able to appoint the Public Guardian as a guardian. The current requirement that the Public Guardian is appointed where the Tribunal is satisfied that there is no other person who it is satisfied is appropriate to be the person's guardian is appropriate and should remain.[1]

(2) Should there be any limits to the Tribunal's ability to appoint the Public Guardian? If so, what should these limits be?

The current requirement that the Public Guardian is appointed where no other appropriate person is available is appropriate and should remain.

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?

The Society is unable to identify the benefits of a community guardianship program.

The introduction of a community guardianship program would be costly as volunteers would require suitable training and ongoing support and oversight to effectively perform their role as guardian.

(2) Should NSW introduce a community guardianship program?

The Law Society does not support the introduction of a community guardianship program.

(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?**

The Law Society does not support the introduction of a community guardianship program.

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?

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[1] Section 17(3).

The Law Society considers that the current considerations under section 25M(1) of the Act are appropriate. The Society also considers it appropriate that the Supreme Court continues to hear applications by private managers for reward.[2]

The Law Society notes that it is not clear whether the general principles in section 4 of the Act apply where a person does not have a disability. It may be beneficial to confirm that these general principles apply. We note that this would be consistent with current practice in the Supreme Court and Tribunal.

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

The Law Society considers that the current "suitable person" requirement under section 25M(1) of the Act, as interpreted by the Supreme Court and Tribunal, is appropriate.

The Law Society notes that the Supreme Court has observed that it "would be unwise" to attempt to define the matters that can be considered when applying the test of suitability, but has nevertheless identified a range of factors that it has considered in relation to this issue.[3] It may be helpful to include a non-exhaustive list of factors in the Act.

The Law Society notes that under the current legal framework a private manager is supervised by the NSW Trustee and Guardian. This provides appropriate oversight of the private manager's financial administration of a person's estate. The NSW Trustee and Guardian can apply to have a private manager removed if they do not comply with the directions of NSW Trustee and Guardian.

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

The Law Society considers that it would be appropriate to introduce common eligibility criteria for the appointment of private guardians and private managers. The requirements set out in section 17(1) of the Act would be appropriate to both roles.

In addition, the Law Society suggests that people who have been convicted of certain offences, including fraud and domestic violence, should be excluded from these roles. A person who is bankrupt should be excluded from being a private manager. However, we query if bankruptcy should prohibit a person from being appointed to make personal or health decisions.

The characteristics identified should not be exhaustive or prescriptive. Any legal framework should be flexible and responsive to the needs of a person who requires the assistance. Ultimately, the Tribunal should be able to determine who is suitable depending on the circumstances of the case.

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

The Law Society notes that currently the Supreme Court may appoint a private manager for reward. This is appropriate. The Supreme Court will only appoint a private corporation if certain safeguards are in place, such as insurance and the capping or scrutiny of fees.

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[2] *Ability One Financial Management Pty Ltd v JB* [2014] NSWSC 245 [290].
[3] *Question Paper 3:The role of guardians and financial managers*, page 13 para [2.43].

If the scope for the appointment of private corporations to act as financial managers were to be expanded, a regulatory regime to provide oversight, supervision and scrutiny of the financial administration of a person's estate would be required.

The disadvantages of appointing private corporations to act as financial managers include conflicts of interest. Conflicts are apparent where the future or continued employment arrangements of a manager are involved in the management of a person's estate. Conflicts also arise as the primary obligation of the corporation is to act in the interests of its shareholders.

(5) Should the Tribunal be able to appoint a corporation to be a private manager? If so, under what circumstances should this occur?

The Law Society considers that the current requirement that the Supreme Court hear applications by corporations to be a private manager is appropriate. The Law Society does not agree that the Tribunal should be able to appoint a corporation as a private manager due to the conflict of interest concerns mentioned above.

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?

As noted at question 2.3(1) above, the Law Society considers that current requirement that the Public Guardian is appointed where no other appropriate person is available is appropriate and should remain.

The Law Society agrees that the Act should also state explicitly that the Tribunal can only appoint the NSW Trustee as a last resort.

(2) If so, how should this principle be expressed in the Act?

The Law Society suggests that this wording should be similar to section 15(3) of the Act regarding the appointment of the Public Guardian.

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?

The Law Society supports the inclusion of a succession planning mechanism in the Act.

(2) What could be the benefits and disadvantages of such a succession planning mechanism?

The benefits of a succession planning mechanism include enabling relatives, friends and others to express their views on a person's future guardian or financial manager.

The Law Society notes that where a person has decision-making capacity they can appoint an attorney and prepare for their future financial and other care arrangements should they lose mental capacity. However, a person who lacks decision-making capacity is not in a position to plan and prepare for their future.

(3) When deciding who to appoint, should the Tribunal be required to give effect to the wishes expressed in a succession planning statement?

The Law Society does not consider that it would be appropriate for the Tribunal to be required to give effect to the wishes expressed in a succession planning statement. The Tribunal should be bound to take such a statement into consideration when appointing a guardian or manager. However, the Tribunal should continue to be required to take all relevant circumstances into consideration at the time a guardianship order or financial management order is required and appoint the most suitable person at the time an appointment is necessary.

The Law Society supports the Victorian Law Reform Commission's recommendations on this issue. Namely, that a tribunal should be required to consider a succession document but not give effect to these wishes as the tribunal's decision must be made in light of the current circumstances.[4]

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 on this list?

The current powers under the Act are sufficiently broad and a detailed list of the powers and functions is not required. However, it may be helpful to include a more detailed list in guidance material.

(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?

The Law Society suggests that a prescriptive list should not be included in the Act. The Tribunal examines all the relevant circumstances in particular cases when making orders. The Tribunal requires broad powers and discretion when undertaking this function. A prescriptive approach to powers and functions may limit the Tribunal's ability to make orders that address the needs of individuals who require an order.

However, a non-exhaustive list may be appropriate. This could include certain categories of decision-making with significant or grave consequences, for example: entering into or ending a marriage or a sexual relationship, reproductive decisions, or disposals or dispositions of real property (including succession planning). The inclusion of such a list may be helpful, both for guardians and parties affected, to be able to know and understand the limits of the powers that can be granted under the appointment. The Tribunal should retain its discretionary powers to enable the most appropriate orders to be made to address a person's individual circumstances and needs.

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?

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[4] Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012), as cited in Question Paper 3 at p 18 para [2.66].

The Law Society considers that the Tribunal should not be able to make plenary orders. The Tribunal currently makes broadly worded orders to suit a person's particular circumstances.

The Law Society is of the view that the jurisdiction to make plenary orders may be in contravention of the UN Convention on the Rights of Persons with Disabilities, as this would permit full substituted decision-making.

(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?**

As noted above, the Law Society considers that the Act should not continue to enable the Tribunal to make plenary orders.

The Law Society considers that the current powers under the Act are sufficiently broad. The inclusion of a list of powers and functions in each guardianship order may be helpful, both for guardians and parties affected, to know and understand the limits of the powers that can be granted under the appointment.

Other arrangements for granting powers are not required in the Act.

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?

Please see response to question 3.1(1) above. These comments apply to court appointed guardians as well as enduring guardians.

(2) Should such a list:
- **(a) set out all the powers that a guardian can exercise, or**
- **(b) should it simply contain examples?**

Any list should not attempt to set out all the powers that a guardian can exercise. Examples would be helpful and could be included in guidance material.

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?

Please see response to question 3.1(2) above. These comments apply to court appointed guardians as well as enduring guardians.

(2) If so, what should be included in this list?

Please see response to question 3.1(2) above. These comments apply to court appointed guardians as well as 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?

A private manager should have the power to deal with all of a person's assets.

The current provision to exclude a specified part of the estate from a financial management order should remain.[5]

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

The Law Society considers that private managers and the NSW Trustee should have the same powers and functions, in conformity with the legislation.

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

No comment.

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

The Law Society considers that the legislation should codify common law fiduciary obligations of financial managers, particularly in relation to avoiding conflicts of interest. If the financial manager were to enter into a transaction that would benefit him or her, then a specific power to authorise such a transaction should be included in the Act. This is an area where prescriptive powers and prohibitions would be beneficial.

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?

The Law Society considers that the roles of guardians and financial managers should remain separate. The statutory considerations for each role are different and this is appropriate.

The role of a guardian and financial manager are different and different skills are required in order to perform these roles.

(2) What are the benefits and disadvantages of combining the roles of guardians and financial managers?

The Law Society is unable to identify any benefits of combining the roles of guardians and financial managers.

Conflicts of interest may arise where a person is responsible for accommodation and financial decisions. There are benefits in two people performing separate roles and the checks and balances that are required when two people are involved.

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[5] Section 25E.

(3) Should the roles of tribunal-appointed guardians and financial managers remain separate?

The Society considers that these roles should remain separate.

We note that the public bodies performing these roles are separate, namely, the Public Guardian and the NSW Trustee and Guardian.

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?

The Law Society considers that the principles currently set out in section 4 of the Act are appropriate. However, consideration could be given to adopting a more person-centered approach that was enabling of the protected person where practicable and appropriate. This would be more in line with NDIS and the UN Convention on the Rights of Persons with Disabilities. If guardians and attorneys/managers observed principles that included supporting the person to be proactively involved in making decisions, and the guidance indicated that substitute decision-making was to be used as a last resort or if any less restrictive approach would place the person at risk of unacceptable harm, this may also obviate the need for formally appointed supporters.

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?

Advantages – encourages focus on the person who is the subject of the decision and on an outcome that will be good for them, and consideration of wider interests than merely a medical model or similar.

Disadvantages – placing welfare above all encourages a protective view, encourages substitution of one's own judgment of what might objectively be in the person's interest, rather than taking a subjective person-centred approach that takes greater note of what the person might like for themselves.

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

The Law Society supports the approach proposed by the Victorian Law Reform Commission, namely, that decision makers should have an overarching responsibility to act in a way that promotes the personal and social wellbeing of a person.[6]

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

Where the person's will and preference cannot be ascertained or place the person at risk, concepts are open to interpretation with potential difficulties understanding and applying the concepts. This does not take into account the impact of the person's

[6] Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012), as cited in Question Paper 3 at p 40 para [4.13].

impairment on their evaluation and expression of their will and preferences, such that they may not understand or mean what they say.

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

The Law Society's members have observed that it is not uncommon, for example, for an older person with dementia who is no longer able to live safely at home, to express the will and preference that they remain in their home rather than move to a nursing home or other supportive facility. If a guardian were required to give effect to a person's will and preferences in this circumstance, the older person may be at risk of serious harm.

The Society suggests that, where giving effect to a person's will and preferences exposes a person to an unacceptable risk of harm, a decision maker could determine the most appropriate accommodation options for the person, bearing in mind the overarching goal or promoting the person's personal and social well-being.[7]

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 judgment model may be appropriate for people who have never been able to express their will and preferences because of a serious cognitive or mental health impairment, and where giving effect to a person's will and preference exposes the person to an unacceptable risk of harm.

(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)?

This is relevant to people with dementia, where there would be a history of decision-making which means that this could be ascertained. However, this would be very difficult where a person has never been able to express their will and preferences because of a serious cognitive or mental health impairment.

It also does not take into account the wider circumstances, including medical developments and other changes to circumstances that may, if the person had been aware of them, have influenced or changed their views. A more nuanced approach would be beneficial.

(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?

Please see the above response.

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?

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[7] Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012), as cited in Question Paper 3 at p 40 para [4.49].

The Law Society considers that a structured will and preference model should be adopted in NSW. This would be in accordance with the rights and autonomy focus of the UN Convention on the Rights of Persons with Disabilities.

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

Please see response at question 4.2(4) above.

(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?

No comment.

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

No comment.

(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?

Yes, where there is an unacceptable risk of harm or it is not possible/practicable to implement the person's will and preference with the resources available.

If you have any queries about this submission, please do not hesitate to contact Chelly Milliken, Principal Policy Advisor, on (02) 9926 0218 or by email at chelly.milliken@lawsociety.com.au.

Yours sincerely,

[redacted]

President