Review of Guardianship Act 1987

Question Paper 4

Seniors Rights Service

Safeguards and Procedures

2. Enduring Guardianship

Question 2.1 Witnessing an enduring guardianship appointment

What changes should be made to the Guardianship Act 1987 concerning:

(a) Eligibility requirements of witnesses
(b) Number of witnesses required
(c) Role of Witnesses

We refer to Question 2.1(a) and (b) and state the current laws are adequate.

In relation to role of witnesses the current law requires that the appointor understand the nature and effect of the document (section 6C(1)(e) Guardianship Act 1987). This is a broad test. We would support the inclusion in the legislation of further detail as to what an appointor must understand such as the scope of the guardian's powers, when the appointment commences, and when the appointment can be revoked.

Question 2.2 When enduring guardianship takes effect

Should the Guardianship Act 1987 contain a procedure that must be followed before an enduring guardianship document can come into effect? If so, what should this process be?

If there were to be a register of guardianship appointments, medical evidence could be filed by the guardian with the register indicating that the guardianship appointment has commenced. The medical evidence would need to show that the older person no longer had the mental capacity to make accommodation, lifestyle and medical and dental decisions or it would need to show that, although the older person had mental capacity, they were so physically frail to be at risk of harm even with services assisting them in place.

If the older person wanted to challenge this evidence an application could be made to the NSW Civil and Administrative Tribunal to review the evidence and consider any other medical opinions tendered by the older person.

Question 2.3 Reviewing an enduring guardian's appointment

Are the powers of the NSW Civil and Administrative Tribunal to review an enduring guardianship appointment sufficient? If not what should change?

The NSW Civil and Administrative Tribunal should have the power to review the making, revocation and operation of an enduring guardianship appointment.

Currently, the Tribunal can only review the guardianship appointment to see if it is in the best interests of the appointor that it be revoked. If it decides to revoke the appointment it can make a guardianship order (section 6K(2)(3) Guardianship Act 1987). It cannot review a guardianship appointment as to whether the older person had capacity to make it nor can it review a revocation of a guardianship appointment as to whether the older person had capacity to make it. We are of the view that the Tribunal should have these additional powers of review.

Question 2.4 Ending an enduring arrangement

What changes if any should be made to the Guardianship Act 1987 concerning

(a) The resignation of an enduring guardian; and

(b) The revocation of an enduring guardianship arrangement

The current legislation would appear to be adequate.

In relation to revocation of enduring guardianship appointments, there are currently prescribed forms for revocation and the older person's signature is required to be witnessed by a solicitor, barrister, Registrar of the Local Court, or person from NSW Trustee and Guardian who has completed appropriate course.

In relation to resignation of a guardian there is a prescribed form in the Guardianship Regulation and the signature of the guardian must be witnessed by a solicitor, barrister or Registrar of the Local Court, or person from NSW Trustee and Guardian who has completed the appropriate course. If the guardian resigns and the older person lacks capacity the Guardianship Division of NCAT must be notified.

If there was a register in place there should be a requirement to register these documents on the register.

Question 2.5 Other Issues

Would you like to raise any other issues about enduring guardianship procedures?

Seniors Rights Service makes no further comment.

3. Guardianship Orders and Financial Management

Question 3.1 Applying for guardianship and financial management order

What are your views on the process for applying for a guardianship or a financial management order?

It is important that the application in relation to the older person is served on the older person so they are aware of the basis of the application. We support the Tribunal serving the application on the subject person to ensure service of the application**.** We understand the Tribunal is undertaking a trial where parties to the application must serve the documents on the Tribunal and each other. We understand that the Tribunal shall still prepare and serve a copy of all documents on the subject older person.

Question 3.2 Time Limits for Orders

(1) Are the time limits that apply to guardianship orders appropriate? If not what should change?

(2) Should time limits apply to financial management orders? If so what should these time limits be?

(1) The current time limits for guardianship orders are adequate.

(2) In relation to financial management orders we recommend that the Tribunal have a discretion to set time limits on financial management orders based on the circumstances of the case presented at the hearing. For example, if a person's capacity may improve based on medical evidence then a date should be set for a review. Further scheduled reviews might also be in the best interests of the older person to ensure the appointed private manager continues to undertake their functions in the best interests of the older person.

Question 3.3 Limits to the scope of financial management orders

Should the Guardianship Act 1987 require the NSW Civil and Administrative Tribunal to consider which parts of the person's estate should be managed?

We agree, consistent with the UN Convention, that the Guardianship Act 1987 should be worded to consider which parts of the estate should be managed rather than which parts of the estate should not be managed. A person should be allowed to manage that part of their estate of which they are capable of managing. For example a person may be able to manage day to day expenses for necessities but have difficulty with more complex transactions relating to real estate and property.

Question 3.4 When Orders can be reviewed

(1) What changes if any should be made to the process of reviewing guardianship orders?

(2) Should the NSW Civil and Administrative Tribunal be required to review financial management orders regularly?

(3) What other changes, if any, should be made to the process of reviewing financial management orders?

We refer to Question 3.4(1). The current end of term reviews and own motion reviews, or reviews at the instigation of a person concerned with the welfare of the older person based on new information, are adequate.

We refer to Question 3.4 (2). We recommend that the Tribunal have a discretion to order a review of a financial management order every 12 months or 3 years as appropriate. The order would be based on medical evidence presented at the hearing as to the likelihood of the person to regain capacity or where circumstances indicated a review would be prudent to ensure that the order continues to operate in the best interests of the older person.

We refer to Question 3.4(3). We refer to our comments in 3.4(2) above.

Question 3.5 Reviewing a guardianship order

(1) What factors should the NSW Civil and Administrative Tribunal consider when reviewing a guardianship order?

(2) Should these factors be set out in the Guardianship Act 1987?

We refer to Question 3.5(1). The factors to consider in a review would include whether the elements of a guardianship order are satisfied.

These factors include whether the older person lacks the capacity to make certain lifestyle decisions, whether the informal arrangements are working or there is a need for a guardianship order, whether an order would operate in the best interests of the older person.

A person concerned with the welfare of an older person may have new information to indicate that there needs to be a change in functions of the guardian, a different guardian appointed, or that the order lapse.

We refer to Question 3.5(2). It would be of assistance to have the considerations of the Tribunal set out in the legislation for clarity.

Question 3.6 Grounds for revoking a financial management order

(1) Should the Guardianship Act 1987 expressly allow the NSW Civil and Administrative Tribunal to revoke a financial management order if the person no longer needs someone to manage their affairs?

(2) What other changes, if any, should be made to the grounds for revoking a financial management order?

We refer to Question 3.6. We agree there should be a basis for revocation of an order on the basis that "there is a no longer a need for a person's affairs To be under

management". This may be the case because the person has regained capacity or because informal arrangements are working in the best interests of the person there may be no need for a financial management order.

However, we do get calls from people who are carers of an older person going into aged care seeking to enter resident agreements and arrange finances for the older person and they are not an appointed attorney. The older person lacks capacity to make the appointment. In these situations they have found they need a formal appointment to enter into legal contracts and deal with financial institutions. Formal appointments are often required to deal with third parties.

Question 3.7 Procedures that apply if a guardian or financial manager dies

What procedures should apply if a guardian or financial manager dies?

We recommend that if a private financial manager dies the NSW Trustee and Guardian should automatically be appointed until another person applies to be private manager.

We agree the Public Guardian should become the person's guardian if there is no surviving or alternative guardian under an enduring guardianship appointment until another person applies to be guardian.

4. Registration System

Question 4.1 Benefits and Disadvantages of a Registration System

(1) What are the potential benefits and disadvantages of a registration system? Do the benefits outweigh the disadvantages?

(2) Should NSW introduce a registration system?

(3) Should NSW support a national registration system?

SRS supports the creation of a national register for power of attorney and guardianship instruments. SRS supports the implementation of compulsory filing of documents by attorneys, at least on an annual basis, on decisions taken and financial expenditures.

SRS supports that financial institutions, solicitors, aged care homes and medical professionals be able to search the register to confirm the validity of the authorized representative.

Privacy may need to be balanced against the use and access of the register.

Family members might have genuine reasons to search the register to ensure appropriate documents are in place to protect older relatives, however, there is also the risk they could access the register for the purpose of exploiting the older person. A

recommendation might be for the older person to specify which family members they want to have access to the register upon making the document.

Question 4.2 The features of a registration system.

If NSW was to implement a registration system, what should be the key features of the system?

SRS supports the implementation of a mandatory register for power of attorney and guardianship appointments.

SRS states that such a register should be funded by the government and fees should not be charged for the registration of appointments or revocations.

SRS supports the view that the NSW Civil and Administrative Tribunal could advise the Registrar of the financial management and guardianship orders that it makes.

SRS recommends that attorneys appointed under power of attorney appointments registered on the register be subject to random audits in order to mitigate against financial elder abuse.

5. Holding guardians and financial managers to account

Question 5.1 A statement of duties and responsibilities

(1) Should the Guardianship Act 1987 and or the NSW Trustee and Guardian Act 2009 include a statement of the duties and responsibilities of guardians and financial managers?

(2) If so:

(a) What duties and responsibilities should be listed in the statement?

(b) Should guardians and financial managers be required to sign an undertaking to comply with these duties and responsibilities?

(c) What should happen if guardians and financial managers fail to observe these duties and responsibilities?

Guardians and Financial Managers are under a duty to comply with fiduciary obligations to the older person.

We would support a statement of these duties and responsibilities in similar terms to that set out by the Victorian Law Reform Commission Guardianship Final Report 24 recommendation 288.

In considering financial penalties against guardians and financial managers for breach of their obligations, such a proposal would need to be weighed against the effectiveness in ensuring compliance with fiduciary duties as against ensuring

guardians and financial managers bona fide actions in best interests of the older person are protected.

Question 5.2 The supervision of private managers

What, if anything, should change about the NSW Trustee and Guardian's supervisory role under the NSW Trustee and Guardian Act 2009?

We are of the view that private managers should remain supervised by the NSW Trustee and Guardian as part of their role and that they regularly review the accounts of private managers as this acts as a balance against possible elder financial abuse.

Question 5.3 Reporting requirements for private managers?

Should the NSW Trustee and Guardian Act 2009 be amended to allow the NSW Trustee and Guardian to decide how often private managers should lodge accounts?

We would recommend that private managers lodge accounts every 12 months with the NSW Trustee and Guardian as a protection against elder financial abuse.

Question 5.4 Removing private financial managers from their role

(1) When should the NSW Civil and Administrative Tribunal be able to remove a private manager from their role?

(2) Should the Guardianship Act 1987 set out the circumstances in which the NSW Civil and Administrative Tribunal can remove a private manager?

The Tribunal can revoke a financial management order, at request of a financial manager, if it is in the older person's best interests, or if the older person has regained capacity (section 25P(2) Guardianship Act 1987).

The legislation could specify that the Tribunal have the power to remove a private manager if the private manager becomes insolvent, bankrupt or a paid carer for the person whose estate is being managed, similar to section 26 of the Guardianship and Administration Act 200 QLD s26(1)(a) s26(2).

Question 5.5 Reporting requirements of private guardians

Should private guardians be required to submit regular reports on their activities? If so, to whom should they be required to report?

Any requirement for guardians to submit regular reports should be balanced against the consideration that we should not discourage persons from becoming guardians on the belief the role will be too onerous. Annual reports could be made on the status of the older person's welfare to the Public Guardian in a simple format.

Question 5.6 Directions to guardians

Who should be able to apply to the NSW Civil and Administrative Tribunal for directions on the exercise of the guardians functions?

We support the current law that enables guardians to apply to the Tribunal for directions in relation to their role. We would be cautious in extending this role to others as persons in family conflict may make applications to frustrate the role of the guardian in decision making and use resources of the Tribunal (where that Tribunal has already determined the guardian's role in cases of family dispute by making a guardianship order). There are already protections in place to apply for a review of the order if the guardian is not fulfilling their role.

Question 5.7 Removing private guardians from their role

(1) When should the NSW Civil and Administrative Tribunal be able to remove a private guardian from their role?

(2) Should the Guardianship Act 1987 set out these circumstances

The Tribunal has a current discretion under a review of a guardianship order to remove a guardian from their role when they are not meeting their obligations to the older person under the section 4 Principles of the Guardianship Act 1987. This would appear to be adequate protection.

Question 5.8 Reviewing decisions and conduct of public bodies

What, if anything, should change about the mechanisms for reviewing the decisions and conduct of the NSW Trustee and Guardian and the Public Guardian?

The process for internal review and external review to Administrative Division of NSW Civil Administrative Tribunal appear adequate. Perhaps the time limit could be extended from 28 days to allow people some more time to lodge their application and obtain legal advice.

Question 5.9 Criminal offences

Should NSW introduce new criminal offences to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager?

SRS supported having criminal offences for breaches by an attorney of their fiduciary obligations to the principal similar to the Power of Attorney legislation in Queensland.

Question 5.10 Civil penalties

Should NSW introduce new civil penalties for abuse exploitation or neglect committed by a guardian or financial manager?

We refer to comments in Question 5.1 above. The advantage of civil penalties is that there is a lower burden of proof to establish breach of these fiduciary obligations.

Question 5.11 Offences, civil penalties and compensation orders

Should NSW legislation empower the NSW Civil and Administrative Tribunal to issue compensation orders against guardians and financial managers?

SRS supports the view that Tribunal be vested with the power to order that financial managers pay compensation where loss was caused by failure to comply with their fiduciary obligations. Currently the Victorian Civil and Administrative Tribunal has powers to make compensation orders where an attorney breaches their fiduciary obligations causing loss to an older person.

Clause 5.12 Other Issues

Would you like to raise any other issues about how guardians and financial managers can be held responsible for their actions?

SRS makes no further comments.

6. Safeguards for supported decision-making

Clause 6.1 Safeguards for a supported decision-making model

If NSW introduces a formal supported decision-making model, what safeguards should this model include?

We support the view that the appointer should be free to revoke a supported decision making instrument if they have the capacity to do so. A supported person should be able to ask the Tribunal to revoke a supported decision making order at any time.

We also support the view of the Victorian Law Reform Commission that "any person with an interest in the affairs of the supported person" could apply for a review if they believe:

- In the case of a personal appointment, that the supported person lacked the capacity to make the appointment;
- The appointment was not validly made;
- The supported person no longer has capacity to participate in the arrangement or they no longer consent to it
- The supporter is acting in breach of their responsibilities
- The order is no longer appropriate to the supported person's needs, or
- The supporter is exercising undue influence over the supported person.

7. Advocacy and investigative functions

Question 7.1 Assisting people without guardianship orders

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship?

We support the Public Guardian having authority to assist people with disability who are not under guardianship.

We support the establishment of a separate public advocate to have investigatory functions to investigate allegations of elder abuse against vulnerable older people. These investigations could be conducted at the public advocate's own motion or at the instigation of a complaint by public or professional or police officer.

Where an older person has capacity and is not under guardianship the older person should be consulted in relation to all aspects of the investigation and any prosecution should only take place with the older person's consent.

Question 7.2 : Potential new systemic advocacy functions

What, if any, forms of systemic advocacy should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to undertake?

We would support the view that the Public Guardian should continue its role to be a voice for groups of people under guardianship orders in relation to issues that affect them collectively. They should continue to provide recommendations to governments on guardianship legislation.

Question 7.3 : Investigating the need for a guardian

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to investigate the need for a guardian?

We support the Public Advocate to have powers to investigate the need for a guardian. The Public Advocate may become alerted to this need through a report of suspected elder abuse.

Question 7.4 Investigating suspected abuse, exploitation or neglect.

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to investigate suspected cases of abuse, exploitation or neglect?

SRS is not convinced the Public Guardian should have an investigatory role although it supports an independent public advocate having such a role.

SRS observes that issues of conflict can arise when implementation and investigation are conducted by the same entity. Certainly the public guardian

might request an investigation and then respond to the reports from or results of that investigation but it should not conduct the investigation.

SRS is also concerned the Public Guardian would not have the necessary skill set, experience or training for an investigation role.

SRS notes that any investigation function should apply to those at risk of abuse regardless of their capacity status.

Question 7.5 Investigations upon complaint or own motion

If the Public Guardian or a public advocate is empowered to conduct investigations, should they be able to investigate on their own motion or only if they receive a complaint?

The public advocate should be empowered to conduct investigations, and investigate a complaint of their own motion or if they receive a complaint.

Question 7.6 Powers to compel information during investigations

What powers, if any, should the Public Guardian or a public advocate have to compel someone to provide information during an investigation?

SRS agrees that public advocates or public guardians should have the power to require people to provide information. However, we note the coercive powers may inhibit reporting and may not be appropriate to domestic situations. Further, such powers should be restricted and carefully used to ensure it is in the best interests of the older person.

Question 7.7 Powers of Search and Entry

What powers of search and entry, if any, should the Public Guardian or public advocate have when conducting an investigation?

SRS submits that the Public Advocate should be able to apply for a warrant to enter a home should there be suspicion of serious risk of harm. We reiterate our previous recommendation that the Public Advocate should have the investigatory role separate to the role of the Public Guardian. The Public Advocate could liaise closely with police forces to arrange entry into a home where there was evidence of elder abuse.

Question 7.8 A new Public Advocate office

Should NSW establish a separate office of the Public Advocate? If so, what functions should be given to this office-holder?

The problems associated with the abuse, exploitation and abuse of incapable and vulnerable older persons may be considered in the light of what arrangements, if any, may be in place for the management of their financial affairs and the guardianship of their person.

The different regimes in place for financial management and guardianship give rise to varying levels of risk for the older person. Firstly, formal management and guardianship orders made by the Supreme Court of NSW or by NCAT provide the highest level of accountability and security and consequently the lowest risk of abuse.

Secondly an older person may have made a formal Enduring Power of Attorney and/or an Enduring Guardian appointment. Such appointments may provide greater choice, flexibility and other advantages for the older person. However there is a lower level of accountability in relation to actions taken by the attorney/guardian and therefore a greater risk of abuse.

Thirdly management of the financial affairs and guardianship decisions on behalf of the incapable older person may be undertaken on an informal basis by a relative or friend. Such person may, for example be a co-signatory to the older person's bank account and have access to their bank account password. Such informal arrangements give rise to the lowest level of accountability and therefore the greatest risk of abuse particularly where the older person is socially isolated and has significant assets.

The abuse of incapable older persons may come to the attention of their friends or distant relatives. Such potential whistleblowers may have a genuine concern for the welfare of the older person but they may also be reluctant to become actively involved and take the necessary steps of applying to the Supreme Court or NCAT for a financial management and /or guardianship order.

It is in those circumstances in particular, that whistleblowers should be able to report allegations of abuse to an independent **Public Advocate** who could then investigate and if appropriate make application for financial management and guardianship orders.

Where an Enduring Power of Attorney and Enduring Guardianship are in place the Public Advocate may apply for a review.

It is submitted that NSW establish a separate office of the **Public Advocate** which would be independent of the NSW Trustee and Public Guardian and independent of any judicial body.

The functions of the **Public Advocate** may include :-

- Receiving and investigating where appropriate complaints of elder abuse and determining whether application should be made to Supreme Court or NCAT for financial management and guardianship orders and for review of an Enduring Power of Attorney.

- Acting as applicant of last resort in proceedings in the Court or NCAT. For greater certainty as to the standing of the Public Advocate to act as an applicant the relevant legislation may be amended by adding the Public Advocate as a party.

See *Guardianship Act* (sections 25I and 25S) ; *Powers of Attorney Act 2003* (section 35) ; and *NSW Trustee and Guardian Act 2009* (sections 41 and 54) .

- As a party to Court or NCAT applications the Public Advocate could use the available processes of issuing summonses requiring the production of relevant documents.

- Applying to the Supreme Court for directions to NSW Trustee; and also applying to NCAT for administrative review of decisions by NSW Trustee on behalf of persons under management and also decisions by Public Guardian. The Public Advocate would be added as a party. See attached *NSW Trustee and Guardian Act 2009* (sections 61 and 62); and *Guardianship Act* (section 80A)

- Investigating complaints of elder abuse and where appropriate referring matters of alleged criminal conduct to the police.

Question 7.9 Other Issues

Would you like to raise any other issues about the potential advocacy and investigative functions of the Public Guardian or a new public advocate?

SRS makes no further comment.

<u>Chapter 8 : Procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal</u>

Question 8.1 Composition of the Guardianship Division and Appeal Panels

(1) Are the current rules on the composition of the Guardianship Division and Appeal Panels appropriate?

We support the appointment of 3 members to a hearing of the Guardianship Division of the NCAT. One lawyer, a member with a medical professional qualification and a member with a community based qualification.

If not, what would you change?

Question 8.2 Parties to Guardianship and Financial Management Cases

(1) Are the rules on who can be a party to guardianship and financial management cases appropriate?

We refer to our comments in Question 7.8 to this submission that the Public Advocate should be able to be a party to NCAT proceedings.

We are also of the view that the other people who are currently parties to an application are appropriate. The parties include the applicant, the subject person, the

wife husband or defacto partner or carer, the Public Guardian and NSW Trustee and Guardian, the enduring guardian, enduring power of attorney, anyone joined by the Tribunal as a party.

(2) If not, who should be a party to these cases?

We refer to Question 8.2(1).

Question 8.3 The requirement for a hearing

When if ever would it be appropriate for the Guardianship Division to make a decision without holding a hearing?

We are of the view that hearings are appropriate to ensure that the views of the subject person are considered when making any guardianship or financial management orders or conducting a review of the orders. It is appropriate parties and their legal representatives (where in attendance) can hear the evidence and then put forward their views. We support hearings where the older person attends ideally in person or otherwise by video conferencing or telephone.

Question 8.4 Notice requirements

(1) Are the current rules around who should receive a notice of guardianship and financial management applications and reviews adequate? If not, what should change?

It may be arguable that the children of the subject person should receive a notice of the application for an order or a review as they would often have an interest in the welfare of the older person and all children may not be applicants.

(2) If people who are not parties become entitled to notice, who should be responsible for notifying them?

It is submitted that there may be a role in ensuring that the Tribunal officers at least contact all parties and children of the older person and check they have been notified of hearing dates and received a copy of the application from the applicant.

Question 8.5 When a person can be represented

When should a person be allowed to be represented by a lawyer or a non lawyer?

We are of the view that the current considerations set out in the Practice Direction of the Guardianship Division of NCAT for leave for legal representation are adequate. The considerations include:

- The nature of seriousness of the interests of the party that are affected by the proceedings;
- Whether the parties interests and point of view conflict with those of other parties;

- Whether the proceedings involve complex legal or factual issues;
- Fairness between the parties. It may be unfair if one party is represented but another is not, particularly if the subject person is unrepresented or the parties are in conflict;
- Whether representation may assist a party to focus on the relevant issues and may promote a conciliatory approach to proceedings.

We would recommend that where an application is made for legal representation and leave is refused that written reasons for the refusal be provided by the Tribunal.

Question 8.6 Separate Representatives

How should separate representation be funded?

The separate representative conveys the wishes of the subject person to the Tribunal and objectively assesses the evidence to determine what is in the person's best interests.

We understand Legal Aid fund separate representatives or , where there is no entitlement to Aid, appoint a separate representative in most cases.

We would recommend Legal Aid consider SRS as an avenue for separate representation for clients who are socially and economically disadvantaged..

Question 8.7 Representation of a Client with impaired capacity

Should the Guardianship Act 1987 (NSW) or the Civil and Administrative Tribunal Act 2013 (NSW) allow a person to be represented by a lawyer in Guardianship Division cases when the person's capacity is in question?

When a person lacks capacity to understand the nature of the legal proceedings they are unable to be legally represented. The solicitor may be able to act as a McKenzie Friend to aid the older person before the Tribunal. The solicitor can act as a separate representative if appointed by the Tribunal to do so.

Question 8.8 Timeframes for finalizing Guardianship Division cases

What if any changes to the legislation are required to support the timely finalization of Guardianship Division cases?

We would make the observation that guardianship cases should be resolved in a timely matter. Often there is conflict surrounding the person with capacity impairment which could place that person at risk if orders are not made promptly. We note the Tribunal is able to make a temporary order until opportunity for a full hearing and permanent orders are made.

Question 8.9 Appealing a Guardianship Division decision

(1) Is the current process for appealing a Guardianship Division case appropriate and effective?

Generally a party has a right to appeal to the Internal Appeal Panel on a question of law against a final decision of the Tribunal. The party does not require permission or leave before such an appeal will be heard.

If however a party wishes to appeal on any other ground other than a question of law against a final decision, the party must obtain the permission or leave of the Appeal Panel to do so.

If the person argues that the Tribunal misunderstood the facts or the evidence, leave to appeal is required.

It is our view that these provisions are an adequate application of appeal rights.

A consideration might be given to an extension of time limit of 28 days for Guardianship Division matters as the subject person may take longer to get legal advice on appeal rights due to disability constraints and challenges.

(2) If not, what could be done to improve this process?

We refer to our comments in Question 8.9(1).

Question 8.10 Privacy and Confidentiality

What, if anything, should be changed in the law to protect the privacy of people involved in the Guardianship Division cases?

We are of the view that the current rules where there identity of the subject person and anyone involved in the case cannot be published or broadcast is adequate provision for privacy.

Question 8.11 Access to Documents

(1) Who should be allowed to access documents from the Guardianship Division cases?

Parties should be able to access the documents in relation to a case and to obtain copies which are provided by the Tribunal.

In relation to non parties consideration needs to be given to the privacy of the subject person so that their private information is not on display to anyone claiming to have an interest in older person's affairs but who does not have a significant enough interest to be joined as a party. Careful consideration needs to be given to this release of information, or if any information to such persons is to be released.

(2) At what stage of a case should access be allowed?

Parties should be given access to documents before the hearing so that they can review the material before the hearing is conducted and be familiar with the evidence before the Tribunal.

Question 8.12 Other Issues

Would you like to raise any other issues about the procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal?

SRS makes no further comment.

Review of the Guardianship Act 1987

Question Paper 5

Seniors Rights Service

Medical and Dental Treatment and Restrictive Practices

Question 2 Capacity to consent to medical and dental treatment

Question 2.1 Incapable of giving consent

1. **Is the definition of a person incapable of giving consent to the carrying out of medical and dental treatment in s 33(2) of the Guardianship Act 1987 (NSW) appropriate? If not, what should the definition be?**

   The principles of capacity are that capacity is decision specific and that a person should be assumed to have capacity to make a decision unless proven otherwise. Capacity can be partial, temporary or fluctuating.

   We support the current definition of determining whether a person is able to consent to medical and dental treatment as set out in s33(2) of the Guardianship Act 1987 as it is a decision specific test.

   We would support that the definition of capacity in the Attorney General Tool Kit NSW and the principles for assessment of capacity be incorporated in the legislation.

   Definition of capacity
   A person has capacity to make a decision if they:
   - *Understand the facts involved;*
   - *Understand the main choices;*
   - *Weigh up the consequences of the choices;*
   - *Understand how the consequences affect them;*
   - *Communicate their decision*

   Capacity Assessment Principals
   - *Always presume a person has capacity;*
   - *Capacity is decision-specific*
   - *Don't assume a person lacks capacity based on appearances*
   - *Assess the person's decision making ability not the decision they make;*
   - *Respect a person's privacy*
   - *Substitute decision making is a last resort.*

2. **Should the definition used to determine if someone is capable to consenting to medical or dental treatment align with the definitions of capacity and incapacity found elsewhere in the Guardianship Act 1987 (NSW)? If so, how could we achieve this?**

   As capacity to make a decision is decision specific it would be difficult to have one definition of capacity which aligned with all facets of decision making under the Guardianship Act. For example, the ability to make a lifestyle decision about where to live and a decision about the management of finances are separate areas of decision making which require separate tests for capacity.

   We refer above to our recommendation that there could be a general definition of capacity which focuses on a decision specific test and principles for assessment as set out in the Attorney General Tool Kit NSW. These definitions would guide assessors determining capacity but should not replace the legal decision specific tests for capacity. It is important the older person is given as much scope to be autonomous and make their own decisions for as long as they are able to.

<u>Question 3 Types of medical and dental treatment</u>

Question 3.1 : Withholding or stopping life sustaining treatment

1. **Should Part 5 of the Guardianship Act 1987 (NSW) state who, if anyone, can consent to withholding or stopping life sustaining treatment for someone without decision- making capacity?**

   Case law of the Guardianship Division of NCAT NSW, as stated, provides authority that Guardians with appropriate Health Care function can withdraw life sustaining treatment where there is medical evidence to show that this treatment would be futile and inconsistent with good medical practice.

   We submit that there should be similar clarification as to when a person responsible as defined under the Guardianship Act has the authority to withdraw life sustaining treatment, in circumstances where there is medical evidence to show that this treatment would be futile and inconsistent with good medical practice.

2. **If so, who should be able to consent and in what circumstances?**

   We refer to out comments in 3.1 (1) above.

Question 3.2 Removing and using human tissue

1. **Should Part 5 of the Guardianship Act 1987 (NSW) state who, if anyone, can consent to the removal and use of human tissue for a person who lacks decision-making capacity?**

SRS does not receive requests for advice in relation to this area of the enquiry and makes no comment.

2. **If so, who should be able to consent and in what circumstances?**

   We refer to our comments in Question 3.2 (1) above.

Question 3.3 Treatment by a registered health practitioner

Should the definition of medical and dental treatment in Part 5 of the Guardianship Act 1987 (NSW) include treatment by a registered health practitioner?

We support the definition of medical and dental treatment being extended to treatment by a registered health practitioner so that the consent of a person responsible is required for treatment of a person lacking capacity by these practitioners.

Question 3.4 Types of treatment covered by Part 5

1. **Are there any other types of treatment excluded from Part 5 of the Guardianship Act 1987 (NSW) (or whose inclusion is uncertain) that should be included?**

   SRS makes no further comment. The treatments covered by Part 5 of the Guardianship Act 1987 include minor treatment, major treatment and special treatment and appear to cover most treatments.

2. **Should any types of treatment included in Part 5 of the Guardianship Act 1987 (NSW) be excluded?**

   We refer to our comments in Question 3.4(1).

<u>Question 4. Consent to Medical and Dental Treatment</u>

Question 4.1 Special Treatment

1. **Is the definition of special treatment appropriate? Should anything be added? Should anything be taken out?**

   Special Treatment – consent of NCAT

   SRS does not receive calls in relation to the categories of special treatment. SRS notes that it is appropriate the Tribunal consent to special treatment as special

treatments are categories of treatment which are more invasive and guardians should only be able to provide consent with the prior consent of the Tribunal.

2. **Who should be able to consent to special treatment and in what circumstances?**

   We refer to our comments in Question 4.1 (1) above.

3. **How should a patient's objection be taken into account?**

   We refer to our comments in Question 4.1 (1) above.

4. **In what circumstances could special treatment be carried out without consent?**

   We refer to our comments in Question 4.1 (1) above.

Question 4.2 Major Treatment

1. **Is the definition of major treatment appropriate? Should anything be added? Should anything be taken out?**

   The definition of major treatment would appear to be appropriate.

2. **Who should be able to consent to major treatment and in what circumstances?**

   The Tribunal or a person responsible should be able to consent to major treatment.

   Major Treatment – consent of person responsible

   We refer to the current law which also enables a person responsible to override a persons' objection in relation to major treatment where the person has no understanding of treatment and the treatment will cause only reasonably tolerable or transitory distress to the person.

   We recommend that this law be examined closely to determine if Tribunal consent should be required to major treatment in all circumstances where the person objects , as some of the major treatments appear to have significant impact on persons health. The person responsible should in these circumstances be able to demonstrate to the Tribunal the procedure is in the older person's best interests.

3. **How should a patient's objection be taken into account?**

   We refer to our comments in Question 4.2 (2) above.

4. **In what circumstances could major treatment be carried out without consent?**

   We agree with the current legal position that major treatment may be carried out without the older person's consent where urgent treatment is needed to save the person's life, prevent serious damage to the patient's health or to prevent the patient from suffering or continuing to suffer significant pain and distress.

Question 4.3 Minor Treatment

1. **Is the definition of minor treatment appropriate? Should anything be added? Should anything be taken out?**

   We support the current definition of minor treatment.

2. **Who should be able to consent to minor treatment and in what circumstances?**

   The Tribunal or person responsible should be able to consent to minor treatment as currently required.

3. **How should a patient's objection be taken into account?**

   Minor Treatment – Consent of person responsible

   In this instance, as the treatment is minor treatment, we agree with current law that the patient's objection may be overridden by the person responsible where:

   - the Tribunal's consent is obtained and the person responsible is satisfied the procedure is manifestly in the patient's best interest, OR

   - where the person has no understanding of treatment and the treatment will cause only reasonably tolerable or transitory distress to the person.

4. **In what circumstances could minor treatment be carried out without consent?**

   We agree with the current legal position that minor treatment may be carried out without the older person's consent where urgent treatment is needed to save the person's life, prevent serious damage to the patient's health or to prevent the patient from suffering or continuing to suffer significant pain and distress.

   We also agree where there is no person responsible, or cannot be contacted or unwilling to make a decision, that doctor can treat where necessary, where the treatment promotes the patient's health and well being and patient does not object to treatment.

Question 4.4: Treatment that is not medical or dental treatment

Does the Guardianship Act NSW (1987) deal with treatments that fall outside of the Part 5 regime adequately and clearly?

Treatments that fall outside the Part 5 regime should still require the consent of the person responsible as a protection for the older person, such as alternative health therapies. This could be specified in the legislation.

Questions 4.5 Categories of Treatment as a Whole

1. **Does the legislation make clear what consent requirements apply in any particular circumstance? If not, how could it be clearer?**

   SRS is of the view that the current categories are reasonably clear.

2. **Do you have any other comments about the treatment categories and associated consent regime in Part 5?**

   SRS refers to its response in Question 4.5(1) above.

Question 4.6 Person Responsible

1. **Is the "Person responsible" hierarchy appropriate or clear? If not, what changes should be made?**

   One observation is that where there hierarchy falls to a close friend or relative of the older person this person may be difficult to determine. An older person may have several close friends or relatives. We note the observation the Tribunal has not issued any further guideline on who can be a close friend or relative of the person though it is able to do so.

   Where there are disputes arising as to who is the person responsible in the hierarchy or disputes arise amongst several persons responsible about the care in an older person's interests an application can be made for a guardianship order.

   For this reason SRS educate older people on planning ahead and making a guardianship appointments so that there is no dispute as to who is the person responsible for making medical and dental treatment decisions when the older person loses mental capacity to make those decisions for themselves.

2. **Does the hierarchy operate effectively? If not, how could its operation be improved?**

   We refer to our comments in 4.6 (1) and importance of an older person making a guardianship appointment.

Question 4.7 Factors that should be considered before consent

Are the factors a decision-maker must consider before consenting to treatment appropriate? If not, what could be added or removed?

The factors a decision-maker must consider before consenting to treatment as set out in section 40 the Guardianship Act 1987 are appropriate.

Question 4.8 Requirement that consent be given in writing?

Is the requirement that consent requests and consents must be in writing appropriate? If not, what arrangements should be in place?

SRS is of the view that the current practices are adequate and if consents are taken verbally these consents should be recorded by medical practitioners in their medical notes.

Question 4.9 Supported decision-making for medical and dental treatment decisions.

1. **Should NSW have formal supported decision-making scheme for medical and dental treatment decisions?**

   SRS would support a formal and informal supported decision making model which could operate for older people who have capacity to understand the nature and effect of medical treatments with supports. Suitable open ended questions could be asked by the medical professional to the older person, with the support person, to determine if the older person had capacity to understand the treatment. Caution should be exercised that any informal support person does not seek to override or unduly influence the older person. After the medical professional has spoken to the older person with a support person the professional should speak to the older person on their own to gauge their understanding. We refer to our previous submissions in relation to supported decision making models in Question Paper 2 and how these might work for the benefit of the older person.

2. **If so, what should the features of such a scheme be?**

   SRS refers to it's response in Question 4.9 (1) above.

Question 4.10 Consent for sterilization

1. **Who if anyone should have the power to consent to sterilize a person?**

   SRS does not give advice in relation to this area and makes no comment.

2. **In what ways, if any could the Guardianship Act 1987 (NSW) better uphold the right of people without decision-making capacity to participate in a decision about sterilization?**

   SRS refers to it's response in Question 4.10 (1) above.

Question 4.11 Pre- conditions for consent to sterilization

What matters should the NSW Civil and Administrative Tribunal be satisfied of before making a decision about sterilization?

SRS does not give advice in relation to this area and makes no comment.

Question 4.12 Matters that should not be taken into account in sterilization decisions

1. **Is there anything the NSW Civil and Administrative Tribunal should not take into account when deciding about sterilization?**

   SRS does not give advice in relation to this area and makes no comment.

2. **Should these be stated expressly in the Guardianship Act 1987 (NSW)?**

   SRS refers to it's response in Question 4.12 (1) above.

Question 4.13 Legislative recognition of advance care directives

1. **Should the legislation specifically recognize advance care directives?**

   An advance care directive is a record of the older person's wishes about treatment that they would like to have or not have in the event of life – threatening illness or injury. An advance care directive must be made whilst an older person has capacity and be voluntary, give clear and specific details about the treatments an older person would accept or refuse and be current and extend to the circumstances at hand (NSW Sydney Local Area Health Advance Care Directive).

We support the recognition in legislation of advance care directives to make it clear that these documents are enforceable in NSW and binding on medical practitioners once made known to them by their patients.

2. **If so, is the Guardianship Act 1987 (NSW) the appropriate place to recognize advance care directives?**

   SRS submits that the Guardianship Act 1987 (NSW) or similar legislation would be an appropriate place to recognize advance care directives. SRS recommends advance care directives are attached to a guardianship appointment form so that the guardian is aware of the existence of the directive and can communicate the older person's wishes to the medical practitioner. An appropriate directive form could be included as part of the regulations. We refer to the Central and Eastern Sydney Area Health Service Advance Care Directive as a sample form for consideration.

Question 4.14 Who can make an advance care directive

Who should be able to make an advance care directive?

An advance care directive should be able to be made by a capable adult who understands what and advance care directive is, the consequences of making one, and the nature and effect of the treatments they are refusing as set out in the advance care directive. An older person's doctor would witness their signature as the doctor can certify the older person had the capacity to understand the effect of the treatments they were accepting or refusing.

Question 4.15 Form of an advance care directive

What form should an advance care directive take?

An advance care directive should set out the treatments that an older person wishes to receive or not receive in a particular set of circumstances, and their signature should be witnessed, preferably by their medical practitioner who can explain to them the nature and effect of the treatments they are agreeing to receive or not receive.

An appropriate directive form could be included as part of the regulations to introduced legislation. We refer to the Central and Eastern Sydney Area Health Service Advance Care Directive as a sample form for consideration.

Question 4.16 Matters an advance care directive can cover

What matters should an advance care directive be able to cover?

An advance care directive can cover

- The medical treatment a person does or does not want to receive in certain circumstances;
- Specify who their guardian or person responsible is for medical and dental decision making
- Specify their values (what is important to them if they are ill? What they would find acceptable if their quality of life was impaired to a certain level?)

This information could help the medical professional decide on appropriate treatment consistent with the older person's wishes when they had capacity to the circumstances at hand.

Question 4.17 When an advance care directive should be invalid

In what circumstances should an advance care directive be invalid?

An advance care directive should be followed to respect a person's wishes as to treatment when they had capacity. There would be certain exceptions if it could be shown the person did not have capacity to make the directive, or it was made because of inducement or coercion, or if at the time it was made the person did not understand the consequences of making the decision, or relied on incorrect assumptions. This is why it is important that the directive be witnessed by the person's medical practitioner to ensure that these influences are not present and that the person sees the practitioner on their own.

Question 4.18 : Part 5 offences

1. **Are the various offences of treating without authorization and the maximum penalties that apply appropriate and effective?**

   The penalties would appear to be appropriate. There should be more serious penalties for a person conducting special treatment or clinical trials without consent of Tribunal as is the case with the current law.

2. **Is there a need for any other offences relating to medical and dental treatment?**

   SRS makes no further comment.

<u>Question 5 Clinical Trials</u>

Question 5.1 Definition of Clinical Trial

How should the Guardianship Act 1987 (NSW) define clinical trial?

SRS does not give advice in relation to this area and makes no comment.

Question 5.2 Categories of Medical Research

1. **Should there be more than one category of medical research?**

   SRS does not give advice in relation to this area and makes no comment.

2. **If so, what should those categories be and what consent regimes should apply to each?**

   SRS does not give advice in relation to this area and makes no comment.

Question 5.3 Who can consent to clinical trial participation

1. **Who should be able to approve a clinical trial?**

   SRS does not give advice in relation to this area and makes no comment.

2. **Who should be able to consent to a patient's participation in a clinical trial if the patient lacks decision-making capacity?**

   SRS refers to it's response in Question 5.3 (1) above.

3. **How can the law promote the patient's autonomy in the decision-making process?**

   SRS refers to it's response in Question 5.3 (2) above.

Question 5.4 Considering the views and objections of patients

1. **If the patient cannot consent, should the decision maker be required to consider the views of the patient?**

   SRS does not give advice in relation to this area and makes no comment.

2. **What should happen if a patient objects to participating in a clinical trial? Should substitute consent be able to override a patient's objection? If so, in what circumstances?**

   SRS does not give advice in relation to this area and makes no comment.

Question 5.5 Preconditions for consent

What preconditions should be met before a decision maker can consent to participation?

SRS does not give advice in relation to this area and makes no comment.

Question 5.6 Requirements after consent

What should researchers be required to do after consent is obtained?

SRS does not give advice in relation to this area and makes no comment.

Question 5.7 Waiver of clinical trial consent requirements

Are there any circumstances in which the individual consent requirements of clinical trials should be waived?

SRS does not give advice in relation to this area and makes no comment.

Question 5.8 Other Issues

Do you have any other comments about the consent requirements for clinical trials?

SRS does not give advice in relation to this area and makes no comment.

Question 6 The relationship between the Guardianship Act and mental health legislation

Question 6.1 Relationship between Guardianship Act and Mental Health Act

1. **Is there a clear relationship between the Guardianship Act 1987 (NSW) and the Mental Health Act 2007 (NSW)?**

   Where a person is admitted to a mental health facility and is under an order of the Mental Health Review Tribunal it is submitted that these orders take precedence over a guardianship order under the Guardianship Act 1987. We submit that the Mental Health Review Tribunal should be the decision maker for all medical decisions in circumstances were a person is detained in a mental health facility.

SRS would advise an older person in relation to guardianship orders under the Guardianship Act 1987(NSW). Whilst we get some mental health enquiries we often refer these clients to the Mental Health Advocacy Service at Legal Aid.

2. **What areas if any are unclear or inconsistent?**

   We refer to our comments in Question 6.1 (1) above.

   We note that if it is currently unclear whether a voluntary patient in a mental health facility can discharge themselves if they are under a guardianship order with the Public Guardian for medical and dental function, then this needs to be clarified. The guardianship legislation needs to state whether the medical and dental function includes mental health treatment on an involuntary basis.

3. **How could any lack of clarity or inconsistency be resolved?**

   We refer to our comments in Question 6.1 (1) and (2) above.

Question 6.2 Relationship between Guardianship Act 1987 (NSW) and the Forensic Provisions Act

1. **Is there a clear relationship between the Guardianship Act 1987 (NSW) and the Forensic Provisions Act?**

   SRS does not give advice in relation to this area and makes no comment.

2. **What areas if any are unclear or inconsistent?**

   SRS refers to our comments in Question 6.2 (1) above.

3. **How could any lack of clarity or inconsistency be resolved?**

   SRS refers to our comments in Question 6.2 (1) above.

Question 6.3 Whether mental health laws should always prevail

1. **Is it appropriate that mental health laws prevail over guardianship laws in every situation?**

   Mental Health Review Tribunal is a specialist Tribunal to deal with the mental health of its patients. SRS understands that the Tribunal is set up with different objectives to balance the needs of the person, to protect the safety of the person, and the general community.

The Guardianship Division of NCAT deals with a high volume of older people with cognitive impairments as well as people with intellectual disability and is a Tribunal seeking to focus on best interests and welfare of the older person and make substitute decision making orders as a last resort.

The Tribunals had 2 different philosophies and should be considered separately.

For the reasons noted above, if the person is admitted for mental health care in a hospital the decisions of the Mental Health Review Tribunal should prevail.

2. **If not, in which areas should this priority be changed?**

We refer to our comments in section 6.3 (1) above.

Question 7 Restrictive Practices

Question 7.1 Problems with the regulation of restrictive practices

What are the problems with the regulation of restrictive practices in NSW and what problems are likely to arise in future regulation?

SRS provides advice in relation to restrictive practices in private aged care facilities currently regulated by the Aged Care Act (Cth).

Restrictive Practices – NSW Health Guidelines for Aged Care

SRS sets out below information developed from the Department of Health publication ***How to support a restraint free environment in residential aged care*** (www.health.gov.au). SRS endorses the adoption of guidelines which encourage restraint free practices in aged care in accordance with these guidelines.

Most aged care homes support a restraint-free environment. This means no words, devises or actions will interfere with a resident's ability to make a decision or restrict their free movement. The use of any form of restraint confronts a resident's rights and dignity, and in some cases, may subject the resident to an increased risk of self-harm.

To ensure a resident has their individual needs identified and addressed is a priority of care. A restraint-free approach means that staff, management and resident representatives work together to identify these individual needs and to devise a care plan with preservation of the human rights of residents, especially when responding to challenging behaviours which the resident may be exhibiting. Prevention is the key to restraint-free environment and critical to this success is a partnership approach with the residents' representative.

Management of aged care homes do not support any action or the use of any device that does not have the consent of a resident or their representative. They will not use:

- *Physical mechanisms such as bed rails or lap-belts*
- *Medications including psychotrophic drugs*
- *Aversive treatment practices, punishment or yelling*
- *Locked doors where this is not necessary*

Under the Charter of Care Recipients' Rights and Responsibilities- Residential Care (Aged Care Act 1997, Schedule 1 User Rights Principles 2014) 1.g) states that a resident has the right " to live in a safe, secure and homelike environment, and to move freely both within and outside the residential care service without undue restriction". Also 1. u) states "to be free from reprisal, or a well-founded fear of reprisal, in any form for taking action to enforce his or her rights".

<u>When a decision may need to be made about restraint use</u>

The decision to use a form of restraint is not taken lightly and is only used as a measure of last resort. Resident Representatives need to be empowered to feel comfortable when discussing the potential for restraint when talking to staff, and need to involve the resident if appropriate.

The representative may ask the care staff these questions:

- *Why has the decision been made to use restraint?*
- *What are the alternatives to using restraint?*
- *Is the restraint chosen the least restrictive form of restraint for this person?*
- *How will the restraint be monitored?*
- *For how long will restraint be used?*

A decision about the least restrictive form of restraint possible may, as a last resort only, be necessary in situations where a resident is doing something that may result in them:

- *Harming themselves or others, or*
- *Experiencing a loss of dignity, or*
- *Causing damage to property, or*
- *Disrupting or severely embarrassing other residents.*

Prevention of these behaviours will always be a priority, and learning what may trigger any of these will have an ongoing focus of staff's attention. The decision to use restraint is a clinical decision.

Legal Requirements for consent to use restraint:

- *A family member must have a relevant guardianship order or Enduring Power of Attorney to have the legal capacity to consent to the use of restraint*
- *Consent may need to be obtained from the Guardianship Board/NCAT , particularly if the ongoing use of restraint is contemplated*
- *Service providers should obtain legal advice in cases where there is any doubt about the use of restraint.*

Common Misunderstandings about the use of restraint

- *Restraints decrease falls and prevent injury- false. Evidence of injury or death through strangulation or asphyxia resulting from the use of restraint is a real concern.*
- *Restraints are for the good of the resident- false. Evidence has shown that immobilization through restraint can result in chronic constipation, incontinence, pressure wounds, loss of bone and muscle mass, walking difficulties, increased feelings of panic and fear, boredom and loss of dignity.*
- *Restraints make care-giving more efficient- false. Evidence shows that although they might be a short-term solution they actual create greater dependence, have a dehumanizing effect, and restrict creativity and individualized treatment.*

Question 7.2 Restrictive Practices Regulation in NSW

1. **Should NSW pass legislation that explicitly deals with the use of restrictive practices?**

   SRS supports that the Tribunal have jurisdiction to make a guardianship order giving a guardian a restrictive practice function where this is deemed appropriate, and where the guardian has exhausted all other avenues for behavior management. We refer to our comments and Department of Health Guidelines in Question 7.1 above.

2. **If so, should that legislation sit with the Guardianship Act or somewhere else?**

   SRS suggests restrictive practice legislation should be implemented to govern aged care providers and that such legislation should be passed by the Commonwealth as the Commonwealth funds aged care homes and the Aged Care Act (Cth) regulates these providers. We refer to our comments and Department of Health Guidelines in 7.1 above.

3. **What other forms of regulation or control could be used to deal with the use of restrictive practices?**

   SRS refers to its comments in Question 7.1 and 7.2 above.

Question 7.3 Who should be regulated

Who should any NSW regulation of the use of restrictive practices apply to?

SRS suggests restrictive practice legislation be implemented to govern aged care providers and that such legislation might be more suitably passed by the Commonwealth as the Commonwealth funds aged care homes and the Aged Care Act (Cth) regulates these providers.

Question 7.4 Defining restrictive practices

How should restrictive practices be defined?

We refer to our comments in Question 7.1 above.

Question 7.5 When restrictive practices should be permitted

In what circumstances, if any, should restrictive practices be permitted?

We refer to our comments in Question 7.1 above.

Question 7.6 Consent and authorization mechanisms

1. **Who should be able to consent to the use of restrictive practices?**

   SRS recommends that the NCAT be the authority with the ability to provide a guardian with a restrictive practice function as a last resort, after having heard all the evidence in relation to possible treatment of the person, to prevent harm.

2. **What factors should a decision maker have to consider before authorizing a restrictive practice?**

   We refer to our comments in section 7.1. We also refer to the considerations listed in this paper such as:
   - Whether it is in the person's best interest;
   - Whether the person's behavior will cause serious harm to themselves or others;
   - Whether the restrictive practice will benefit the person;

- Whether it is the least restrictive option and a last resort;
- If last resort and involves seclusion, whether supplied adequate food, bedding and clothing and toilet access;
- Whether there is a behavior support plan that includes a restrictive practice;
- Nature and degree of any significant risk associated with the restrictive practice;
- Whether the person will be safeguarded from abuse, exploitation and neglect.

3. **What should be the mechanism for authorization of restrictive practices in urgent situations?**

   SRS observes that the ability of the NCAT to make a short order in urgent situations until a full hearing can be heard would appear to be adequate precaution.

4. **What changes if any should be made to NSW's consent and authorization mechanisms for the use of restrictive practices?**

   We observe that restrictive practice decisions for persons lacking capacity should be made only with NCAT consent under restrictive practice order. We also refer to our comments in Question 7.1 and recommend inclusion of guidelines for aged care homes in the Aged Care Act.

Question 7.7 Safeguards for the use of restrictive practices

What safeguards should be in place to ensure the appropriate use of restrictive practices in NSW?

We refer to the need to monitor and implement best practice guidelines in regards to aged care staff monitoring and recording a resident's condition and behavior, and taking action if the restraint does not modify the behavior as recommended.

Question 7.8 Requirements about the use of behavior support plans

1. **Should the law include specific requirements about the use of behavior support plans?**

   We refer to our comments in 7.8(2) below as to the specific requirements of behavior support plans.

2. **If so, what should those requirements be?**

The support plans should document which acute health specialists have assessed the individual resident, the type and reasons for the restraint, how long to be used, monitoring of residents and ensuring their human rights and care needs are being supported

Review of the Guardianship Act 1987

Question Paper 6

Seniors Rights Service

Remaining Issues

Q1 Introduction

Q1.1 Other issues

Are there any issues you would like to raise that we have not covered in Question Papers 1-6?

SRS make no further comments.

Q2 Objectives, principles and language

Q2.1 Statutory objects

What, if anything, should be included in the list of statutory objects to guide the interpretation of guardianship law?

The statutory objects of the Guardianship Act should reflect the section 4 Principles of the current legislation but should also embody the human rights principles as set out in the United Nations Convention on the Rights of Persons with Disabilities.

Q2.2 General Principles

1. **What should be included in a list of general principles to guide those who do anything under guardianship law?**

   We support the inclusions of simple set of Principles similar to the section 4 Principles of the current legislation whilst including principles placing an emphasis on the will and preference of the older person, the right to privacy of the older person, and the human rights set out in the United Nations Convention on the Rights of Persons with Disabilities.

2. **Should there be multiple statements of principles that are tailored to particular decision-making situations? What are those situations and what principles should be included?**

   We would suggest that there should just be one set of principles so that the principles are easily understood and adopted by supporting and substitute decision makers.

Q2.3 Accommodating multicultural communities

How should multicultural communities be accommodated in guardianship law?

NSW has 1.2 million people aged over 65 years of age. More than 250,000 older people are from non-English speaking backgrounds. SRS conducts training programs to target CALD communities and acknowledges 11% of 10,000 people that accessed our advocacy and legal services were from CALD backgrounds.

SRS supports accommodating multicultural communities in guardianship law. SRS suggest the principles adopted in s5(3) of the Disability Inclusion Act might be adopted. These principles acknowledge that decision makers provide supports to persons from culturally and linguistically diverse backgrounds to access services and that decision makers be informed from consultation with the person's communities thus acknowledging the importance of cultural and family relationships in these communities.

Q2.4 Accommodating Aboriginal and Torres Strait Islanders

How should aboriginal people and Torres Strait Islanders be accommodated in guardianship law?

SRS supports accommodating aboriginal people in guardianship law. SRS supports principles similar to those set out in the Disability Inclusion Act s 5(2) being adopted.

Q2.5 Language of disability

1. **Is the language of disability the appropriate conceptual language for the guardianship and financial management system?**

   SRS submits that it might be more appropriate to move away from the term "disability" and use the term "decision making capacity" as this is more appropriate and defines what is being examined in making financial management and guardianship orders. SRS would support the inclusion of a legislative definition of capacity and refers to the Attorney General Tool Kit on capacity assessment as a useful guide as to the sorts of the provisions which could be included in the legislation to guide decision makers.

2. **What conceptual language should replace it?**

   We refer to our comments in Question 2.5(1) above.

Q2.6 Language of guardianship

What terms should be used to describe participants in substituted and supported decision making schemes?

SRS would support the use of the term "supporter" and "supported person" for decision making supporters and those they help, and "representative" and "represented person" for substitute decision makers and those they make decisions for.

Q2.7 Aboriginal and Torres Strait Islanders concepts of family

How could relationships be defined in the Guardianship Act 1987 (NSW) to take into account Aboriginal and Torres Strait Island concepts of family?

In relation to Aboriginal and Torres Strait Islander people so that "spouses" are recognised as "spouses married according to Aboriginal customary law" and a "relative" is a person who "is recognised as a relative under Aboriginal Tradition or Torres Strait Island custom".

Q3 Relationship with Commonwealth laws

Q3.1 Relationship between Commonwealth and NSW laws

What should be done to ensure the effective interrelationship between Commonwealth nominee or representative provisions and state based arrangements for managing a person's financial and personal affairs?

Where there is Commonwealth Legislation such as Social Security Act, Aged Care Act and National Disability Insurance Scheme which empower bodies to appoint decision making nominees for an older person, to avoid confusion, these bodies should be required to consider the existence of an guardians or financial managers under state based tribunal orders and appoint or approve only of the appointment of the same person.

Ideally, there would come a time when the Commonwealth is conferred the power to make laws in relation to guardianship and power of attorney and financial management matters and a national law would apply, resolving any confusion between the interaction of state based and commonwealth based laws.

Q4 Adoption information directions

What changes if any should be made to the Guardianship Act 1987 (NSW) that relates to adoption information directions?

SRS does not deal with this area of law.

Q5 Age

Q 5.1 Age threshold for guardianship orders

What should the age threshold for guardianship orders in the Guardianship Act 1987 (NSW) be?

SRS deals with applications for guardianship for persons 60 years and over and does not deal with applications for guardianship for younger persons on a case management basis.

Q5.2 Financial management orders for young people

Should the NSW Civil and Administrative Tribunal have power to make financial management orders for children and young people?

SRS deals with applications for guardianship for persons 60 years and over and does not deal with applications for guardianship for younger persons on a case management basis.

Q5.3 Appointing young people as guardians

Under what circumstances, if any, should the Tribunal be able to appoint 16 and 17 year olds as guardians?

SRS support the requirement that guardians be 18 years and over however SRS state that there would be scope for a younger person to be a guardian if the Tribunal were to tailor the order with powers consistent with the young person's decision making ability, and review the order.

Q5.4 Young people in NSW Civil and Administrative Tribunal proceedings

1. **Should young people have standing in the NSW Civil and Administrative Tribunal?**

   Carers Australia reports there are an estimated 104,500 carers who are young people between the ages of 15 and 25. In light of these statistics we would support the view that where a young person is a designated primary carer of an older person the subject of proceedings, that person should be able to participate directly in proceedings as a party and their views be taken into account.

2. **In what circumstances should the Tribunal be able to take the views of the young person into account?**

   We refer to our comments in Question 5.4 (1) above.

Q 5.5 Process for appointing parents as guardians

1. **Should NSW introduce a streamlined method for parents of adult children with profound intellectual disability to become their guardian when they turn 18 without the need or the Tribunal hearing?**

   We would support the implementation of a stream lined process for parents to become financial managers and guardians of their children once they turn 18, to assist them in making decision about an intellectually disabled child's affairs.

2. **What other mechanisms could be made available for parents to make decisions for an adult with profound decision making incapacity?**

   We refer to our comments in 5.5(1) above.

Q6 Interstate appointments and orders

Q6.1 Interstate court or tribunal appointments

1. **Are the arrangements in relation to interstate appointments in the Guardianship Act 1987 (NSW) operating well?**

   SRS agrees with the current process that an interstate order be given recognition in NSW by order of NCAT.

2. **Should the legislation clarify what the effect of registration of interstate appointments is and when it is required?**

   The current procedure for registration of the interstate appointments and that recognition takes place on registration would appear clear. Perhaps the principles developed in the case law could be set out in the legislation for clarity. We refer in this regard to the principles at point 6.7 on page 34.

3. **Should the Tribunal have a discretion not to recognise an appointment in certain circumstances?**

   There should be a discretion not to recognise an appointment if it is not in the best interests for the older person to do so. We refer to the example given in page 35 where an older person's estate was incurring additional fees from the NSW Trustee due to recognition with no tangible benefit as the aged care home accepted the ACT financial management order without recognition.

   The NCAT should also have discretion to decline to recognise the order if abuse is occurring and to refer the matter back to the original Tribunal for a review and revocation of the order.

4. **What if any other changes should be made?**

   We refer to our comments above.

Q6.2 Tribunal powers of review of interstate court or tribunal appointments

Should the Guardianship Act 1987 (NSW) clarify the powers of the Tribunal to vary an interstate recognition order?

We refer to our comments above. The NCAT should have discretion to decline to recognise the order, or review vary or revoke the order, if abuse is occurring and to refer the matter back to the original Tribunal for a review and revocation of the order.

Q6.3 Interstate enduring appointments

1. **Should interstate enduring appointments be reviewable in NSW?**

   SRS recommends that both enduring guardianship and power of attorney appointments in NSW and other states be reviewable by NCAT. This is important to prevent exploitation of a the decision makers fiduciary obligations under the document.

2. **Should NSW introduce a system of registration for interstate appointments? If so, should there be a process for confirming the powers confirmed by the interstate instrument or order?**

   SRS supports a national register of enduring power of attorney and enduring guardianship appointments. SRS is of the view that a register with random audits would assist in negating abuse of enduring power of attorney appointments in NSW.

Q7 Orders for Guardianship and Financial Management

Q7.1 A single order for guardianship and financial management

1. **Should there continue to be separate orders for guardianship and financial management?**

   SRS supports the view that the distinction between financial management and guardianship orders be maintained as financial decision making and personal decision making often requires significantly different skills. It would be, or course, important, if there are separate individuals in these roles for these individuals to work together.

2. **What arrangements would be required if a single order were to cover both personal and financial decisions?**

   We refer to our comments in Question 7.1A(1) above.

Q7.2 Effect of orders on enduring appointments

What arrangements should be made for the operation of enduring appointments when the NSW Civil and Administrative Tribunal or Supreme Court of NSW has also appointed a guardian or financial manager?

Guardianship Orders

Where a guardianship order is made the current law states that the enduring guardianship appointment is suspended. This works well where there is extensive family conflict as it clarifies who the decision maker will be.

If only a limited guardianship order is given, such as access, and it is intended that the guardian under the enduring guardianship appointment retain other functions, such as health care, it is recommended that this be specifically stated in the guardianship order to make decision making authority clear and resolve further disputes.

Financial Management Orders

In relation to a financial management order and a power of attorney appointment it is recommended that the legislation make it clear the financial management order suspends the enduring power of attorney appointment. If the financial management order is only to cover part of the estate and the attorney is to manage the other part this should be specified in the financial management order so decision making authority is clear and to resolve further disputes.

Q7.3 Resolving Disputes between decision makers

1. **How should disputes between decision makers be resolved?**

   We would recommend that disputes be resolved in the first instance through mediation. This could be conducted by a body established through NCAT.

2. **Who should conduct or facilitate any dispute resolution process?**

   We refer to our comments in Question 7.3 (1) above.

3. **What could justify preferring the decision of one substitute decision maker over another?**

   Caution should be exercised in preferring the decision of one substitute decision maker over the other. If the dispute cannot be resolved the matter should be referred to NCAT for directions.

Q8 Search and Removal Powers

1. **Is there a need for the provisions of the Guardianship Act 1987 (NSW) that empower police or NSW Civil and Administrative Tribunal employees to search premises and remove people deemed in need of protection?**

   We would submit that a coercive power by the Tribunal to remove a person from premises where they are at risk and place them in a safe environment would be required (s11) and obtain a search warrant and remove a person (s12). It is a power which should only be granted as a last resort based on the circumstances of the case. The police should only use such force as is reasonably necessary and appropriate and in the older person's best interests.

2. **What changes if any should be made to these provisions?**

   The Guardianship Act could include some legislative guidelines as to when such an order is appropriate. It would appear to be in cases where:

   - the health and safety of person is seriously at risk,

- to protect the older person and / or others from harm, and
- the police officer is unable to assist the older person reach an understanding of this risk and the need to move from the premises.
- Force should be used as a last resort and only as appropriate in the circumstances.

Q9 Enforcing Guardian's decisions

Q91. Enforcing guardians' decisions

1. **What provision (if any) should be made for a guardianship order to permit guardians to enforce their decisions?**

   We submit that the provisions in current legislation s21A, s21B, and s21C for the enforcement of a guardian's decisions are appropriate.

2. **What limits should be placed on any part of an order that permits such enforcement?**

   We submit the limits to liability of a guardian as set out in section 21A (2) are appropriate.

   We agree that if a specified officer such as an ambulance officer or police officer is authorised to implement the decision of a guardian and is to be entitled to use reasonable force as is necessary and appropriate then this should be explicitly stated in the order.

3. **Should any such provision expressly mention groups of people who may be permitted to enforce a guardian's decision, such as, for example, police officers or ambulance officers?**

   We support the expression in the order of the persons or class of persons who are able to implement the guardians' decision.

4. **What limits should be placed on the amount of force authorised to enforce any such decision?**

   We submit that any use of force should only be used as a last resort and only to the extent appropriate and proportionate in the circumstances. An officer should always try to explain to the older person the reasons for the decision and seek to obtain their understanding and consent to the decision before attempting an action with reasonable use of force.

Q10. Handling Personal Information

Q10.1 Access to personal information

In what circumstances should different decision-makers and supporters be able to access a person's personal, health or financial information?

We support the incorporation of the human right to privacy as recognised in the United Nations Convention of People with Disabilities being incorporated in the section 4 Principles of the Guardianship Act.

SRS support the view of the Victorian Law Reform Commission that attorneys under enduring power of attorney appointments, guardians under enduring guardianship appointments, financial managers and guardians under guardianship orders, all have the right to access personal information on behalf of an older person to the extent that it is relevant to the exercise of their functions.

Q10.2 Disclosure of personal information

1. **In what circumstances should various decision-makers and supporters be permitted to disclose a person's personal, health or financial information?**

   We support the exceptions to confidentiality set out in the Guardianship and Administration Act 2000 (Qld) which states disclosure:

   - Was authorised by law or the person to whom the information relates
   - It was necessary for legal proceedings under Guardianship and Administration Act 2000 (Qld)
   - It was authorised by a court or tribunal in the interests of justice
   - It was necessary to prevent serious risk to life, health, or safety
   - It was necessary to seek legal or financial advice or counselling, advice or other treatment, or
   - It was necessary to report suspected offence

2. **In what circumstances should various decision-makers and supporters be prohibited from disclosing a person's personal, health or financial information?**

   SRS support the view of the Victorian Law Reform Commission that a substitute decision maker should only collect personal information that is relevant to and necessary for carrying out their role and that it should be an offence for substitute decision makers to breach confidentiality.

Q11 Supreme Court

Q11.1 Supreme Court's inherent protective jurisdiction

What if anything should the legislation say about the relationship between the Supreme Court of NSW's inherent protective jurisdiction and the operation of guardianship law?

It would appear the current position is satisfactory as the Supreme Court has regard to the statutory regime set up by the Guardianship Act for specialist tribunals such as Guardianship Division of NCAT when exercising its inherit jurisdiction and only departs from it in exceptional circumstances.

Q11.2 Interactions between the Supreme Court and the Tribunal

1. **Are the provisions that deal with the interaction between the Supreme Court and the NSW Civil and Administrative Tribunal adequate?**

   Guardianship Order

   It is submitted that the current position that the Tribunal cannot make a guardianship order where there is an order in place by the Supreme Court in its inherent jurisdiction, unless the Court consents to the order, is adequate.

   Financial Management Order

   The current position that the Tribunal cannot make a financial management order if the "the question of the persons capability to manage their own affairs is before the Supreme Court" should be closely monitored. If there is no real issue in dispute as to the person's capacity the Supreme Court should provide prompt consent for the Tribunal to hear the matter.

   The Tribunal should be able to make orders in relation to financial management, where there is an order in place by the Supreme Court in its inherent jurisdiction, where the Court consents to the Tribunal making an order.

2. **What changes, if any, should be made to these provisions?**

   Refer to Question 11.2 (1).

Q11.3 Supervision, review and appeals

Are there any issues that should be raised about the Supreme Court of NSWs supervisory review and appellate jurisdictions?

SRS makes no further comment about the supervisory, review and appellate jurisdictions of the Supreme Court of NSW.