THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref:ELCS:MTks1270050

5 June 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 4: Safeguards and procedures

The Law Society of NSW appreciates the opportunity to comment on *Question Paper 4: Safeguards and procedures*. The Law Society's Elder Law, Capacity and Succession, Human Rights and Criminal Law Committees contributed to this submission.

As a general principle, the Law Society considers it imperative that any measure which increases the functions or workload of organisations operating within the guardianship scheme, including the creation of any new bodies or organisations, must be sufficiently funded. It is also important to ensure that any changes to the scheme do not detract from those parts of the scheme which currently operate effectively.

Question 2.1: Witnessing an enduring guardianship appointment

What changes, if any, should be made to the *Guardianship Act 1987* (NSW) concerning:

(a) the eligibility requirements for witnesses

The Law Society is of the view that the current witnessing requirements under the *Guardianship Act 1987* ("Act") are appropriate with one exception. It is recommended that the eligibility requirements for witnesses be amended to remove the eligibility of a Registrar of the Local Court. It is observed anecdotally that Registrars of the Local Court have demonstrated a reluctance to witness enduring guardianship documents in any event.

The witness to an enduring guardianship document should be a lawyer. A lawyer is appropriately qualified to explain the nature and effect of the document and to take adequate instructions from the person entering into the guardianship document.

(b) the number of witnesses required, and

The Law Society is concerned that the increased focus on witnessing requirements may be misplaced. It is more important to ensure that the principal and the proposed enduring guardian understand the nature and extent of their obligations under the appointment document.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

The Law Society is of the view that one witness to the execution of an enduring guardian document is sufficient. Requiring more than one witness is impractical and introduces an unnecessary barrier. Requiring more than one witness in and of itself does not necessarily result in a protection against abuse where a person is being pressured into appointing a particular person as their enduring guardian. Additional witness requirements may also result in delay in entering into enduring guardianship arrangements, or agreements not coming into effect where only one witness has witnessed the document prior to the appointor losing capacity.

(c) the role of a witness?

We consider that the witness ought to certify that they explained the effect of the document to the appointor as is required, for example, under the *Powers of Attorney Act 2003* (NSW). The witness should also be required to certify that they have seen appropriate identification documents when witnessing an appointor's signature.

The Law Society is of the view that it is not necessary for a standard guardianship appointment form to include a list indicating what an appointor must understand before signing the document. The requirement that the legal practitioner has explained the operation of the enduring guardianship appointment is sufficient.

Question 2.2: Should the *Guardianship Act 1987* (NSW) contain a procedure that must be followed before an enduring guardianship appointment can come into effect? If so, what should this process be?

An enduring guardianship appointment should come into effect when the appointor becomes a person in need of a guardian.[1]

The Law Society does not support a registration system for enduring guardianship documents as recommended, for example, by the Victorian Law Reform Commission.[2] A system of registration prior to an appointment coming into effect would cause uncertainty, particularly in circumstances involving delay between the execution and registration of the document.

The Law Society suggests that creating specific procedures to be followed before an enduring guardianship appointment comes into effect would be impractical. The current safeguards within the Act provide sufficient protection. Enduring guardianship appointments differ from power of attorney documents in this respect. Power of attorney documents are more susceptible to abuse and such abuse is likely to have more serious ramifications than appointments of enduring guardians, which deal with issues such as where that person is to live and the treatment to be received, rather than access to financial assets.

Question 2.3: Are the powers of the NSW Civil and Administrative Tribunal to review an enduring guardian appointment sufficient? If not, what should change?

The powers of the Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT") to review, revoke, replace and vary functions of an enduring guardianship appointment are narrower than NCAT's powers to review an enduring power of attorney. We agree with the following comments as noted in the submission in response to this question paper dated 12 May 2017 sent on behalf of NCAT:

> Having consistent powers across the two types of review would be beneficial as the powers currently available when receiving an enduring guardianship

[1] *Guardianship Act 1987* (NSW) s 6A (1)(a).
[2] Victorian Law Reform Commission, Guardianship, Final Report 24 (2012) rec 264, 271-272.

appointment could be seen as cumbersome and potentially adds to the cost of a review hearing.

Question 2.4: Ending an enduring arrangement

What changes, if any, should be made to the *Guardianship Act 1987* (NSW) concerning:

(a) the resignation of an enduring guardian, and

(b) the revocation of an enduring guardianship arrangement?

The Law Society considers that there is no need to change the Act with respect to the resignation of an enduring guardian or the revocation of an enduring guardianship arrangement.

Question 2.5: Would you like to raise any other issues about enduring guardianship procedures?

We do not wish to raise any other issues about enduring guardianship procedures.

Question 3.1: What are your views on the process for applying for a guardianship or a financial management order?

The Law Society considers that the current process is appropriate.

Question 3.2: Time limits for orders

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

We consider that NCAT ought to have the power to make temporary orders with a time limit of longer than 30 days where circumstances warrant such an order and medical evidence is available to indicate further time is required. Having regard to NCAT's workload, longer time limits for temporary orders may also be more suitable as it unnecessarily adds to the workload of NCAT to require NCAT to extend temporary orders with 30 day limits.

NCAT ought to have the power to make or renew a temporary order for up to 6 months in duration where medical evidence is available to indicate necessity.

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

We observe anecdotally that time limited financial management orders may cause financial managers to make decisions driven by the impending expiration of a financial management order rather than allowing a long term approach to financial management of the estate. It is the view of some members that as s 25N of the Act empowers NCAT to make financial management orders reviewable after a specified time, the current procedure for the protected person or an interested person to apply for a financial management order to be reviewed is appropriate.

However we consider that, on balance, the need to give effect to Article 12 of the *UN Convention on the Rights of Persons with Disabilities* by imposing time limits on financial management orders should be given greater weight. This would be consistent with the principle of least restriction.[3]

[3] See also s 4(b) of the Act.

Question 3.3: Should the *Guardianship Act 1987* (NSW) require the NSW Civil and Administrative Tribunal to consider which parts of a person's estate should be managed?

The Act already allows for NCAT to consider which parts of a person's estate should be managed and we consider these provisions should not be altered.

We note that NCAT will often exclude a person's pension from the part of a person's estate which is under a financial management order. This is consistent with the need to ensure a person under financial management enjoys the greatest extent of autonomy that is suitable in their circumstances.

Question 3.4: When orders can be reviewed

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

We recommend against any change to the process for reviewing guardianship orders.

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

The requirement that financial managers provide accounts affords some degree of oversight as a safeguard against misuse and abuse. However, as indicated in answer to question 3.2 above, regular reviews may more effectively check whether a person still requires a financial management order and whether there are any less restrictive options available.

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

The Law Society supports the comments made in the Law Society of NSW's Young Lawyers Civil Litigation Committee submission that 'any requirement for review in the new statutory framework be curbed with a limited ability for the Tribunal to avoid review obligations where it is satisfied, beyond doubt, that the protected person has no reasonable prospect of recovery'.

Question 3.5: Reviewing a guardianship order

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

The Law Society takes the view that specifying factors for NCAT to consider when reviewing a guardianship order is unlikely to provide any safeguard against abuse.

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

Section 4 of the Act already sets out the general principles which NCAT will have regard to when reviewing a guardianship order.

Question 3.6: Grounds for revoking a financial management order

(1) Should the *Guardianship Act 1987* (NSW) 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 note that the Act already allows NCAT to revoke a financial management order in circumstances where the person no longer needs someone to manage their financial

affairs as it is a relevant factor when considering whether the order is in the person's best interests.

Another option would be to include a specific ground for revoking a financial order in circumstances where a person no longer needs someone to manage their affairs.

Question 3.7: What procedures should apply if a guardian or a financial manager dies?

When making an order, NCAT ought to include a substitute guardian or manager who can be appointed in the event of the death or incapacity of the first guardian or manager.

When a guardian dies, where no substitute is appointed or available, then by default the role vests temporarily in the Public Guardian until such time as an alternative can be appointed. We suggest consideration be given to allowing the NSW Trustee and Guardian to be temporarily vested with the role of a financial manager, if a financial manager dies. Having regard to the recent significant reorganisation of the powers and structure of the NSW Trustee and Guardian, we are concerned that the necessary organisational capacity to perform this role may still be developing.

Information regarding enduring guardianship and financial management emphasising the importance of substitute guardians and managers should be emphasised in educational materials.

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?

The Law Society sees little benefit in implementing a registration system. Potential disadvantages include uncertainty as to when and whether documents are valid as well as additional costs. We do not consider that registration would provide any additional protection against the abuse of people under guardianship or financial management.

(2) Should NSW introduce a registration system?

For the reasons outlined above, we consider that NSW should not introduce a registration system.

(3) Should NSW support a national registration system?

As stated above, we do not consider that any potential advantages of a registration system outweigh the potential disadvantages.

Question 4.2: If NSW was to implement a registration system, what should be the key features of this system?

The Law Society does not support any registration system except as is necessary for the registration of powers of attorney or financial management orders to permit dealings with land.

Question 5.1: A statement of duties and responsibilities

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

The Law Society is concerned that prescribing the duties and responsibilities of guardians and financial managers in a specific list may unnecessarily restrict the generality of the overall principles guiding guardians and financial managers under s 4 of the Act. The requirement, for example, that a guardian and financial manager act in the

best interests of the subject person should be the over-arching or guiding principle, and may be less effective if it is complicated with a list of things a guardian or financial manager ought or ought not to do in furtherance of their duties.

(2) If so:

(a) what duties and responsibilities should be listed in this 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?

We do not support a requirement that guardians and financial managers must sign an undertaking to comply with these duties and responsibilities. In the event a statement of duties or responsibilities is incorporated, the Act and the *NSW Trustee and Guardian Act 2009* should include a broad statement recommending that a financial manager should obtain legal advice regarding their duties and responsibilities before exercising their powers.

Question 5.2: What, if anything, should change about the NSW Trustee and Guardian's supervisory role under the *NSW Trustee and Guardian Act 2009* (NSW)?

The Law Society does not consider that the supervisory role of the NSW Trustee and Guardian should change. The current supervisory role is cost effective and we are aware of only limited and less beneficial alternatives. The NSW Trustee and Guardian reviews annual accounts which is a sufficient exercise of its supervisory role. In default of the NSW Trustee and Guardian being available to exercise its supervisory role, the annual accounts could be filed with NCAT. NCAT is not currently adequately resourced to perform this role so it would be necessary for NCAT to receive additional appropriate resources if this function is added to its role.

Surety bonds

The unilateral introduction and blanket imposition of surety bonds by the NSW Trustee and Guardian in exercising its supervisory role is problematic. The Law Society is not aware of the evidentiary basis for the introduction of the surety bond scheme or of any evidence that shows that the current safeguards against maladministration or fraud are inadequate for Tribunal appointed financial managers. We consider that the mandatory imposition of a surety bond for all privately managed estates has led to unfair and unnecessary expense in a number of cases.

The Law Society notes that, in cases where the imposition of a surety bond is unnecessary, the cost of the bond reduces the funds available to care and provide for the living expenses of managed persons. Where there is no immediate or long-term benefit to the managed person, it cannot be argued that the imposition of this cost is in the best interests of the managed person.

In some circumstances, surety bonds may provide some recompense to a person affected by wrong-doing; however in most instances the bonds are unnecessary and expensive.

Question 5.3: Should the *NSW Trustee and Guardian Act 2009* (NSW) be amended to allow the NSW Trustee and Guardian to decide how often private managers should lodge accounts?

The *NSW Trustee and Guardian Act 2009* should not be amended to allow the NSW Trustee and Guardian to decide how often private managers should lodge accounts.

Accounts should be lodged annually to ensure adequate supervision of private financial managers. The requirement for annual reporting is a requirement for many types of businesses.

Question 5.4: Removing private financial managers from their role

(1) When should a private financial manager be removed from their role?

Sections 25N to 25U of the Act which allow NCAT to revoke or confirm the appointment of a financial manager are appropriate. In addition, the Act should provide that NCAT may remove an appointed financial manager where the financial manager becomes insolvent; bankrupt; a paid carer for the person who is being managed; has committed an offence against the person or has been the recipient of a domestic violence order sought by or on behalf of the person the subject of the order; is serving a term of imprisonment; is struck off the roll of solicitors or barristers; or otherwise has an incapacity to fulfil the requirements of the role.

(2) Should the *Guardianship Act 1987* (NSW) set out the circumstances in which a private financial manager can or must be removed from their role more clearly?

The matters outlined in our response to Question 5.4(1) above should be set out in the Act as matters NCAT should consider when exercising its discretion to remove a private financial manager.

Question 5.5: Should private guardians be required to submit regular reports on their activities? If so, to whom should they be required to report?

We do not consider that any additional reporting requirements should be imposed upon private guardians.

Question 5.6: Who should be able to apply to the NSW Civil and Administrative Tribunal for directions on the exercise of a guardian's functions?

We suggest that it is appropriate that guardians continue to be able to apply to NCAT for directions on the exercise of the guardian's functions. To extend the class of persons capable of seeking directions may give rise to attempts to re-litigate matters which had previously been addressed.

Question 5.7: Removing private guardians from their role

(1) When should a private guardian be removed from their role?

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

The Law Society suggests that NCAT should consider similar factors to those outlined in response to Question 5.4(1) when deciding whether a private guardian should be removed from their role.

Question 5.8: 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 Law Society is of the view that the mechanisms for reviewing the decisions and the conduct of the NSW Trustee and Guardian and the Public Guardian need not change as they appear to function adequately.

Question 5.9: Should NSW introduce new criminal offences to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager?

We do not consider that new criminal offences should be introduced to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager.

We suggest that when used in the abstract, the words 'abuse' and 'exploitation' amount to a value judgment which is very difficult to translate into the statutory language of an offence. The word 'abuse' is not defined in the question paper. By contrast, the Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016)[4] defined 'financial abuse' in a way which is essentially synonymous with fraud. Psychological, emotional, physical and sexual abuse were all defined in ways that are clearly directly regulated by the criminal law as serious forms of assault.

'Exploitation' in this context is a synonym for self-enrichment by misuse of a fiduciary relationship and, as the Question Paper notes,[5] s 192E and s 249E of the *Crimes Act 1900* (NSW) also already regulate that kind of conduct.

It follows that, unless there is further clarification regarding conduct which is unregulated, the only area that appears not to be currently covered by the *Crimes Act 1900 (NSW)* is 'neglect'. Sections 43A and 44 of the *Crimes Act 1900* (NSW) provide that it is an offence to fail to provide the necessities of life to a child or other person respectively where that conduct leads to a danger of death or serious injury to the person to whom the duty is owed. Neither section appears to cover the scenario where a person is appointed a guardian or financial manager and is simply negligent in their duties, such that the victim is left destitute but not in danger of death or injury.

The introduction of a broader form of offence in relation to neglect may be worthwhile such as 'without reasonable excuse, failing to provide for a person to whom a duty is owed under a guardianship or financial management arrangement'. However, we note again that the behaviour being regulated is not defined in the Question Paper and there is a need to be clear about what conduct is to be the subject of a criminal offence.

Additional offences may duplicate offences which already exist under the *Crimes Act 1900* (NSW). The NSW Legislative Council recommended creating an indictable offence of 'dishonestly obtaining or using an enduring power of attorney'.[6] We agree with the Australian Law Reform Commission's ("ALRC") view that this would be a substantial duplication of existing offences, and would not be likely to result in an increase in the number of prosecutions.[7]

The ALRC indicates there are evidentiary reasons why there are few prosecutions in this area under the current offence provisions,[8] including perhaps that the person who has had a guardian or financial manager appointed may be unable to provide cogent evidence.

Protection against abuse, exploitation and neglect would be better achieved though the allocation of resources for law enforcement and the prosecution of offenders utilising the offences which already exist.

---

[4] At pages 5 and 6.
[5] At [5.49].
[6] NSW, Legislative Council General Purpose Standing Committee No 2, *Elder Abuse in New South Wales*, Report 44 (2016), [6.101].
[7] Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [4.20], [4.35] - [4.40].
[8] Ibid, [4.13].

Question 5.10: Should NSW introduce new civil penalties for abuse, exploitation or neglect committed by a guardian or financial manager?

There might be conduct of the guardian or financial manager which falls short of the standards expected of a person in that position, but not so far short that it amounts to neglect, exploitation or abuse. In those instances, a civil penalty, including a ban on the person being a guardian or financial manager in the future, would be appropriate. There may be some instances where civil penalties result in some money being recovered as a result of a wrong being perpetrated or have some deterrent effect. We note, however, that a direct approach to educating people about abuse, neglect or exploitation should also be implemented.

Question 5.11: Should NSW legislation empower the NSW Civil and Administrative Tribunal to issue compensation orders against guardians and financial managers?

We consider that a person who is the subject of a guardianship or financial management order should be compensated and returned to the position they would have been in but for a wrong perpetrated against them.

In the event NCAT is vested with power to impose civil penalties and compensation orders, consideration ought to be given to how those additional powers will interact with other legislation allowing for compensation orders following a criminal prosecution. There is a need to ensure a person is not able to claim compensation twice, or be prevented from claiming any compensation, by virtue of the way the two schemes interact. There may also be reasons for a compensation order to be made prior to a criminal prosecution being finalised, for example in circumstances where the victim needs money to continue to receive care, food or shelter. However there would also need to be protections to ensure that any NCAT proceedings do not prejudice the guardian or financial manager in the parallel criminal proceedings.

Consideration should also be given as to who will have standing to bring the action on behalf of the person subject to the guardianship or financial management order; what representation is available to that person; and who is likely to benefit from punitive damages, for example, being ordered against a guardian or a financial manager.

Question 5.12: Would you like to raise any other issues about how guardians and financial managers can be held responsible for their actions?

We do not wish to raise any other issues about how guardians and financial managers can be held responsible for their actions.

Question 6.1: If NSW introduces a formal supported decision-making model, what safeguards should this model include?

We consider that it is not useful to precisely codify the safeguards which should be incorporated into a formal supported decision-making model, as it is necessary to ensure that each decision is made taking into account the particular circumstances at the time.

One of the key features of the NSW guardianship regime, contributing to its success and effective function, is its simplicity when compared with other more prescriptive regimes. This feature should be maintained if formal supported decision-making is implemented.

However we note that one example of a safeguard in a supported decision-making model would be an obligation on supporters and co-decision makers, depending on the model introduced, to notify NCAT if the supported person no longer has the capacity to make decisions with support.

Question 7.1: Should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship?

In other states, a Public Guardian or public advocate may assist in circumstances where a person would benefit from advocacy prior to an order being made. We consider that this model should be adopted in NSW as it might have the effect of resolving some disputes prior to an application being made to NCAT.

Question 7.2: What, if any, forms of systemic advocacy should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to undertake?

The Law Society is of the view that a public advocate could play a useful role in investigating allegations of systemic abuse or neglect in aged care facilities and group homes. Although these might already be matters for police, they appear to rarely be the subject of police investigations.

Question 7.3: Should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to investigate the need for a guardian?

A public advocate should be empowered to investigate the need for a guardian. However, we note that in order for a public advocate to investigate the need for a guardian, the advocate would presumably need to be notified. If there is someone in close contact with the person who can make such a notification, that person may be a suitable person to apply for a guardianship order, without the need to involve a public advocate.

Question 7.4: Should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to investigate suspected cases of abuse, exploitation or neglect?

In circumstances where the Public Guardian becomes involved, their role as the guardian of last resort for the person is at least to some extent inconsistent with the powers of investigation they might have. The Public Guardian has an over-riding duty to the victim, which is inconsistent with the objectivity ordinarily required of an investigating agency. However the Act should empower the Public Guardian or public advocate to investigate suspected cases of abuse, exploitation or neglect. Please refer to our response to Question 5.9 with respect to 'abuse, exploitation or neglect'.

Question 7.5: 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 Guardian or a public advocate ought to be empowered to conduct investigations by their own motion or after a complaint.

Question 7.6: What powers, if any, should the Public Guardian or a public advocate have to compel someone to provide information during an investigation?

The Public Guardian or a public advocate should have powers to compel someone to provide information during an investigation. If such powers are to be conferred then protections should be implemented so that any information provided will not be admissible as evidence against that individual in civil or criminal proceedings, other than proceedings arising out of the false or misleading nature of the information.[10]

[10] See for example s 61 of the *Coroners Act 2009* (NSW).

Consideration should also be given to ways to reduce confusion where the powers of NSW Police and the public advocate overlap.

Question 7.7: What powers of search and entry, if any, should the Public Guardian or a public advocate have when conducting an investigation?

The Law Society shares the views of the ALRC that only police agencies should have powers to enter and inspect premises without consent.[11]

In the event the Public Guardian or a public advocate is vested with search and entry powers, they should be provided with appropriate funding and training to develop an expertise in these skills to ensure that any new powers are appropriately exercised. For example, any search and entry powers must be exercised in accordance with the law and should consistently demonstrate good investigative techniques to ensure that any evidence duly obtained can be used.

Question 7.8: Should NSW establish a separate office of the "Public Advocate"? If so, what functions should be given to this office-holder?

We note the possible benefits of establishing a separate office of the Public Advocate outlined in paragraph 7.49 of the Question Paper. However we are also mindful that the creation of an office of a Public Advocate to operate in addition to the Public Guardian such as is the case in Queensland,[12] is likely to be less cost effective than conferring advocacy and investigative functions on a single office holder such as is the case in Victoria.[13]

We suggest that NSW adopt a framework in which the public advocate or Public Guardian undertakes systemic advocacy, has guardianship functions for adults and has powers to investigate complaints and allegations against a guardian and administrator.

Question 7.9: Would you like to raise any other issues about the potential advocacy and investigative functions of the Public Guardian or a new public advocate?

We acknowledge that an Office of the Public Advocate may be created as a result of this consultation. We note, however, that the adequate resourcing of any such position without reducing the resourcing available to the Public Guardian is paramount to its success. Specific training in relation to assisting and protecting people lacking capacity, including the elderly, ought to be provided both to the new Public Advocate and also to the NSW Police.

Question 8.1: Composition of the Guardianship Division and Appeal Panels

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

(2) If not, what would you change?

The Law Society considers that it is important that those matters currently identified in Schedule 6(4) of the *Civil and Administrative Tribunal Act 2013* (NSW) as requiring a three member panel comprising a legal member, a professional member and a community member, should be retained. This composition appears to work appropriately in the interests of the just, quick and cheap resolution of the real issues having regard to the principles set out in s 4 of the Act.

---

[11] Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) [3.42].
[12] See *Guardianship and Administration Act 2000* (Qld) s 209(2) and *Public Guardian Act 2014* (Qld) s 12.
[13] *Guardianship and Administration Act 1986* (Vic).

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 consider that the rules about who can be a party to a guardianship or financial management case are appropriate. Other than in extraordinary circumstances, children under the age of 18 years should not be a party.

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

Please see our response in answer to Question 8.2(1) above.

Question 8.3: When, if ever, would it be appropriate for the Guardianship Division to make a decision without holding a hearing?

The Law Society considers that a decision should only be made without a hearing in circumstances involving ancillary or interlocutory orders.

Question 8.4: Notice requirements

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

The Law Society considers that the current rules are adequate and result in the appropriate people receiving notice of a guardianship or financial management application.

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

We do not consider it is necessary to provide notice to persons who are not parties.

Question 8.5: When should a person be allowed to be represented by a lawyer or a non-lawyer?

In any application before the Guardianship Division, a person who is the subject of an application should always be permitted to be represented by a lawyer without requiring leave of NCAT or the Court.

Some examples include financial management applications involving large and complex arrangements where there are interrelated family businesses, or where the subject person is the trustee of a trust. It remains appropriate that other persons may be permitted legal representation with leave of the Tribunal.

Question 8.6: How should separate representation be funded?

We consider that the general principle that parties each bear their own legal costs, other than when the Tribunal exercises its discretion to order otherwise, ought to remain. It is appropriate that when the Tribunal appoints a separate legal representative, Legal Aid NSW ought to bear the cost of such representation.

Question 8.7: 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?

A person should be allowed to be represented by a lawyer where their capacity is in question. The framework should operate in a similar fashion to legal representation being available to a person under the *Mental Health Act 2007*.

Any cost associated with engaging legal representation in such a case should be paid from the estate of the person and not funded through Legal Aid NSW.

Where a person has residual capacity to instruct a legal representative, although their capacity is otherwise in question, the person may instruct a legal representative. If the person clearly lacks capacity, then a separate representative should be appointed. The appropriate person to assess whether the person has capacity to provide adequate instructions is the legal representative proposed to be retained by the person whose capacity is in question.

We consider that costs ought to be borne by the person who is seeking the appointment of the legal representative.

Question 8.8: What, if any, changes to the legislation are required to support the timely finalisation of Guardianship Division cases?

The timely finalisation of NCAT cases is unlikely to be improved by the introduction of additional regulatory and other hurdles. The speedy, just and cheap resolution of matters ought to remain NCAT's goal.

Question 8.9: Appealing a Guardianship Division decision

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

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

The Law Society considers the current process is appropriate and effective.

Question 8.10: What, if anything, should be changed in the law to protect the privacy of people involved in Guardianship Division cases?

The Law Society considers the current privacy protections for people involved in Guardianship Division cases are sufficient.

Question 8.11: Access to documents

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

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

We note that the findings and evidence in NCAT proceedings are often of significant relevance in later Supreme Court capacity proceedings and other estate litigation. For this reason, a guardian or financial manager ought to be able to access those documents for the purposes of related proceedings. At present, the procedure for accessing such documents is unnecessarily cumbersome and expensive.

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?

We do not wish to raise any other issues about NCAT procedures.

Thank you once again, for the opportunity to provide comments to this inquiry. If you have any queries about this submission, please do not hesitate to contact Katrina Stouppos, Policy Lawyer, on (02) 9926 0212 or at katrina.stouppos@lawsociety.com.au.

Yours sincerely,

Michael Tidball
Chief Executive Officer