

**Review of the Guardianship Act  
1987: Question Paper 4**

Legal Aid NSW submission to  
New South Wales Law Reform  
Commission

*May 2017*

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**Legal Aid**   
NEW SOUTH WALES

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## Table of Contents

About Legal Aid NSW .....	2
Ch 2. Enduring guardianship.....	3
Ch 3. Guardianship orders and financial management orders.....	4
Ch 4. A registration system .....	6
Ch 5. Holding guardians and financial managers to account.....	7
Ch 6. Safeguards for supported decision making.....	9
Ch 7 Advocacy and investigative functions .....	10
Ch 8 Procedures of the Tribunal .....	12

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides civil law services to some of the most disadvantaged and vulnerable members of our society. Currently we have over 150 civil lawyers who provide advice across all areas of civil law.

The specialist Mental Health Advocacy Service of Legal Aid NSW provides representation to clients in the Guardianship Division of the NSW Civil and Administrative Decisions Tribunal (**the Tribunal**) on a direct representation basis and when the Tribunal orders that the client be separately represented. Solicitors in Legal Aid NSW regional offices also provide representation in guardianship matters.

The Legal Aid NSW Children's Civil Law Service (**CCLS**), established in 2013, provides a targeted and holistic legal service to young people identified as having complex needs. The CCLS also facilitates representation of its clients in matters before the Tribunal, either through liaising with the young person's separate representative to ensure the young person's views are heard, or directly representing the young person in the proceedings.

Legal Aid NSW provided 614 advice and minor assistance services relating to guardianship to clients in 2015–2016. We also provided 264 representation services in guardianship matters, through both in-house and private practitioners.

Legal Aid NSW welcomes the opportunity to respond to *Question Paper 4: Safeguards and procedures*.

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## Ch 2. Enduring guardianship

### *Q2.1 Witnessing an enduring guardianship appointment*

Legal Aid NSW considers that the current witnessing requirements for enduring guardianship appointments contain sufficient safeguards. In particular, Legal Aid NSW does not think it necessary or desirable to require two people to witness an enduring document. It can already be difficult for ordinary people to find one qualified person to witness a document. A requirement for two witnesses would increase this difficulty and may deter people from appointing an enduring guardian.

We acknowledge that there are disputes about whether a person making an appointment did so voluntarily and understood the effect of the appointment. However it is not likely that further witnessing requirements will eliminate such disputes, as voluntariness and capacity can be context-dependent and are often difficult to determine in an objective manner.

### *Q2.2 When enduring guardianship takes effect*

Legal Aid NSW does not support a statutory procedure that must be followed before an enduring guardianship takes effect. A requirement for registration or an application for a declaration from the Tribunal would add complexity and expense to the process and could deter people from agreeing to act as guardian. It would also add to the workload of the Tribunal unnecessarily.

If there is uncertainty or a dispute as to whether the appointment has come into effect, an enduring guardian can apply to the Tribunal for an order declaring the appointment is in effect. We do not think that a Tribunal application should be required routinely, in cases where there is no uncertainty or dispute over this issue.

### *Q2.3 Reviewing an enduring guardian appointment*

Legal Aid NSW would support expanding the Tribunal's powers to review an enduring guardianship appointment. Specifically, we would support the Tribunal being given the power to review the making, revocation, operation and effect of an enduring guardianship, in line with the Tribunal's review powers in respect of powers of attorney.

### *Q2.4 Ending an enduring arrangement*

As the Question Paper notes, an enduring guardian may only resign after giving written notice in a prescribed form, signed by the enduring guardian and an 'eligible witness' (a lawyer, registrar, Trustee and Guardian employee or approved Service NSW employee). After the appointment has taken effect, Tribunal approval is also required. Legal Aid NSW suggests that these processes could be simplified. For instance, before the appointment has taken effect, a simple written notice, which does not require witnessing, should be sufficient. After the appointment has taken effect, a requirement to notify the Tribunal, rather than Tribunal approval, could be required. The *Guardianship Act* could then be amended to allow the Tribunal, after receiving a notice of resignation, to list the matter if necessary, to determine whether a guardian should be appointed. Alternatively, if the

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Public Guardian or a new body is empowered to investigate whether a person is in need of a guardian, the enduring guardian could notify that body, who could take appropriate action to ensure the appointer obtains support with decision-making or has a guardian appointed.

## Ch 3. Guardianship orders and financial management orders

### *Q3.1 Applying for a guardianship or financial management order*

Legal Aid NSW does not have any concerns about the process for applying for these orders.

### *Q3.2 Should time limits apply to financial management orders?*

Legal Aid NSW considers that financial management orders should have time limits that are consistent with those currently provided for guardianship orders, unless the Tribunal orders otherwise. This would mean a default position that a continuing order should initially be in force for one year, and should be renewable for up to three years.

Placing time limits on financial management orders would be consistent with Australia's obligations under the *United Nation Convention on the Rights of Persons with Disabilities* ('**the Convention**') to ensure that:

*measures relating to the exercise of legal capacity are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.<sup>1</sup>*

Having time limited orders is particularly important for young people exiting care, whose capacity to manage their money will, in many cases, improve with age and increased maturity and independence.

If the Tribunal is satisfied that the person has a permanent disability and makes a specific finding to that effect that the person shall not become capable of managing their estate, the Tribunal should be able to make an ongoing order.

### *Q3.3 Should the Guardianship Act require the Tribunal to consider which parts of a person's estate should be managed?*

Yes. Legal Aid NSW has concerns that at times the Tribunal makes overly restrictive orders that encompass all of the person's assets and income when the person may have the capacity to manage their income. We are aware of instances where an application was made for a financial management order regarding assets only, but the Tribunal made an order that encompassed the person's pension as well. These orders can be very

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<sup>1</sup> Convention on the Rights of Persons with Disabilities article 12

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disempowering, and can have a serious effect on a person's life, their autonomy and ability to pursue their own goals.

Currently section 25E provides that the Tribunal may exclude a specified part of the person's estate from a financial management order. This provision has not always been effective in protecting the rights of our clients. We therefore support amendment to require the Tribunal to consider which parts of a person's estate should be managed, in line with the NSW Legislative Council Standing Committee on Social Issues' recommendation.<sup>2</sup>

#### *Q3.4 When orders can be reviewed*

The provisions regarding review of financial management orders should be consistent with those regarding review of guardianship orders. As noted above, financial management orders should generally be time limited, which would then require a review at the end of the order to determine if another order is needed. If this does not occur, and the Tribunal continues to make indefinite orders, there should be provision for periodic reviews. Where the Tribunal is satisfied that the person will not become capable of managing their estate, it should be able to make an indefinite order and/or dispense with periodic reviews. However, particularly where the person is young, if there is any prospect that the person's capacity will improve, or that an order will become unnecessary for another reason, orders should be regularly reviewed.

#### *Q.3.5 Reviewing a guardianship order*

When conducting an end-of-term review, the Tribunal should consider the same matters as it considers when making a guardianship order.<sup>3</sup> This should be set out in the statute. We also suggest that the Tribunal consider whether the current guardian is the most appropriate person to be appointed, as circumstances may change during review period. For instance, the Office of the Public Guardian may no longer be the appropriate guardian if someone else is available to act as guardian, or the existing guardian may no longer be able to carry out his or her duties.

#### *Q3.6 Should the Guardianship Act expressly allow the Tribunal to revoke a financial management order if the person no longer needs someone to manage their affairs?*

Legal Aid NSW agrees that the Tribunal should be able to revoke a financial management order if the person no longer needs someone to manage their affairs. This appears to overlap with 25P(2) of the Act, which allows the Tribunal to revoke a financial management order if the person is capable of managing their affairs. This overlap would need to be addressed in the drafting of any amendments.

Legal Aid NSW would also support legislative confirmation that a financial management order can be revoked if the Tribunal is satisfied that there is no practical utility in the order. This would cover situations where the person subject to the order may still lack decision-

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<sup>2</sup> NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 19.

<sup>3</sup> At present we note that this is whether the person is "because of a disability, totally or partially incapable of managing his or her person" (*Guardianship Act 1987* (NSW) ss 3(1) and 14), but that this may change as a result of the current review.

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making capacity, but is in prison, or is resisting the order to the extent that it has become impossible to implement. Although these situations are often currently captured by the “best interests” provision,<sup>4</sup> it is not necessarily an accurate description of the grounds for revoking the order.

### *3.7 Procedures if a guardian or financial manager dies*

Legal Aid NSW supports the recommendation of the Standing Committee that if a private manager dies, the NSW Trustee and Guardian should assume management of the estate until a new manager is appointed.

## Ch 4. A registration system

Legal Aid NSW’s casework in guardianship matters has not identified concerns that would be addressed by a registration system. For example, we are not aware of concerns about persons falsely claiming to be guardians. We have not seen evidence that registration would reduce the incidence of abuse or unreasonable behaviour by guardians.

Legal Aid NSW acknowledges that there are some benefits of a register, such as helping people to locate their documents. However we are not persuaded that the benefits of a register exceed the costs. Some of the benefits of a register are only available if it is mandatory to register an appointment. However this imposes extra costs and complexity on all people appointing a decision-maker, even when their needs are simple and their estates are small and do not include real property.

Currently, enduring powers of attorney can be registered at existing land title registers if the attorney is required to deal in real property.

Legal Aid NSW does not support a requirement to register court and tribunal orders. Currently it is possible to find out if a person is subject to an order by contacting the Guardianship Division of NCAT. Orders are regularly amended so a register of orders could quickly become out of date.

A register would only be useful to third parties, such as banks and healthcare providers, if they could search it. This raises privacy concerns. If there is to be a register, Legal Aid NSW recommends that third parties should be able to ascertain the existence of an appointment or order, but not to access its contents.

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<sup>4</sup> *KDP* [2016] NSWCATGD 24 [40]-[41] following *P v NSW Trustee and Guardian* [2015] NSWSC 579

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## Ch 5. Holding guardians and financial managers to account

### *Q5.1 A statement of duties and responsibilities*

Legal Aid NSW supports the inclusion of a statement of duties and responsibilities of guardians and financial managers. This statement should include the matters suggested by the Victorian Law Reform Commission (**VLRC**) and listed in Question Paper 4 at [5.10], but should be in plain English. We also support a requirement for guardians and financial managers to sign an undertaking to comply with these duties and responsibilities.

If financial managers fail to observe these duties and responsibilities, they should be able to be removed from their appointment and be liable to repay any monies they have inappropriately obtained from the principal's estate. The NCAT (but not the Guardianship Division) should have the power to make restitution orders.

If guardians fail to observe the duties and responsibilities, breach should be dealt with under the existing arrangements, such as by issuing a direction to the guardian or revoking the guardian's appointment. This could be expressly provided for in the legislation.

The statement of duties and responsibilities would also have an educative function for both guardians and financial managers.

### *Q5.3 Reporting requirements for private financial managers*

Legal Aid NSW does not support the proposed amendment. A requirement to submit accounts annually does not seem unduly onerous.

### *Q5.4 Removing financial managers*

Legal Aid NSW does not have concerns about the current arrangements.

### *Q5.5 Reporting requirements*

Legal Aid NSW has not seen any need for, and does not support a requirement for, guardians to submit regular reports on their activities. We suspect there would be uncertainty over the scope of such a report, and there would be a risk that guardians would report selectively. There would also be the question of who would read such a report, and what action the receiving body would take in response.

### *Q5.6 Directions to guardians*

Legal Aid NSW does not support a change to the current arrangements. Allowing 'interested persons' (most likely family members) to apply for a direction to a guardian could see family disputes playing out in the Tribunal, and could undermine the role and responsibilities of the guardian. If a family member considers that the guardian is not

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performing his/her role properly, the family member may apply for a review and variation of the order.<sup>5</sup>

#### *Q5.7 Removing private guardians*

Legal Aid NSW does not have pressing concerns about the current arrangements that enable the Tribunal to review and revoke the appointment of a private guardian. We do not consider it necessary to exhaustively set out the circumstances in which this can happen. There is merit in allowing the Tribunal to take into account the individual circumstances of each case. However, it may be useful to refer to any statement of duties and responsibilities, if one is formulated.

#### *Q5.8 Reviewing decisions of public bodies*

There is a need for more effective and timely internal review. As the case study below illustrates, we have had difficulty getting NSW Trustee and Guardian to act promptly on behalf of its clients. We are concerned that with the abolition of the position of Manager, Quality Services, these difficulties may increase.

#### **Case Study – Jim**

Jim was living in a very dilapidated house on valuable land. If the house was sold, he would have sufficient funds to purchase a townhouse. A real estate agent was willing to coordinate the sale of the house and the purchase of a townhouse. The NSW Trustee and Guardian agreed in principle to this plan but were unable to act quickly enough to facilitate the transactions. Eventually the real estate agent contacted Legal Aid NSW and Legal Aid NSW contacted the NSW Trustee and Guardian on behalf of Jim. However repeated contacts were ineffective in producing any timely action. Jim continued to live in a very cold house with a leaky roof that he could not afford to fix. Eventually Legal Aid NSW contacted the Manager, Quality Services, who was able to assist Jim. Legal Aid NSW understands this position has now been abolished.

#### *Q5.9 Should NSW introduce new criminal offences to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager?*

Legal Aid NSW does not consider that this is necessary at this time. As noted in the Question Paper, there are existing offences concerning fraud, corrupt benefits, and neglect that would be relevant to misconduct by a guardian or a financial manager. Existing offences should not be duplicated. The commission of offences by a person in a position of trust, such as a guardian or financial manager, is a matter that would be relevant in sentencing. It is an aggravating factor if an offender abused a position of trust in relation to the victim, or if the victim was vulnerable because the victim had a disability.<sup>6</sup>

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<sup>5</sup> *Guardianship Act* ss 25, 25B, 25C.

<sup>6</sup> See *Crimes (Sentencing Procedure) Act* ss 21A(k) and 21A(l).

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### *Q5.10 Civil penalties*

At present, Legal Aid NSW does not have sufficient evidence that the current procedures for responding to abuse, exploitation and neglect by guardians and financial managers are not sufficient. We are not confident that a new civil penalty provision would reduce the incidence of abuse, or otherwise address gaps in the current system. We also see a risk that civil penalties could deter people from acting as guardians and financial managers.

### *Q5.11 Compensation orders*

Legal Aid NSW would support a power for NCAT to make compensation orders against guardians and financial managers if their failure to comply with their obligations causes loss. However, it would not be appropriate for the Guardianship Division to make such orders; another Division of NCAT, such as the Consumer and Commercial Division, would be a more suitable location for these proceedings.

## Ch 6. Safeguards for supported decision making

### *Q6.1 Safeguards for formal supported decision-making model*

In our response to Question Paper 2, Legal Aid NSW noted that if formal acknowledgement of supportive decision-making arrangements is to occur, there should be minimal intrusion of the state into these essentially private arrangements. That is:

1. Functioning informal support arrangements should be permitted and encouraged to remain informal.
2. Formal appointment of supporters should occur only when there is a need for formality—for example, to enable access to medical records and information from health professionals.
3. Formal support arrangements should be positioned as a potential alternative to guardianship and substitute decision-making. The Tribunal should be precluded from making a guardianship order if a supported decision-making arrangement is available that would enable the person to make important life decisions.

At this time, in the absence of evidence of widespread exploitation of people with disabilities by their supporters, we do not support the imposition of statements of duties, monitors, reporting and record-keeping requirements, or review mechanisms. People who have decision-making supporters have not given up their legal right to make decisions, so the imposition of heavy-handed safeguards does not appear warranted.

If a person who has formally appointed a supporter wishes to revoke that appointment, the process should be similar to the revocation of a power of attorney—that is, the person may do so by writing to the supporter advising them that the appointment is revoked.

If there is a concern that the supporter is exercising undue influence over the supported person, and is abusing or exploiting the person, this would be a matter suitable for investigation by the Public Guardian or a new public advocate, discussed below.

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Legal Aid NSW recommends a different approach if the Tribunal is given the power to appoint a supporter. In this case, as the supporter arrangement is being imposed by the state, the state should take steps to ensure that it is functioning as expected. The supporter should be required to acknowledge a statement of duties, and the arrangement should be regularly reviewed.

## Ch 7 Advocacy and investigative functions

### *Q7.1 Assisting people who are not under guardianship*

Legal Aid NSW would support NSW guardianship legislation empowering the Public Guardian to assist people with decision making disabilities without a guardianship order. In some cases, such assistance could avoid the need for guardianship.

### *Q7.2 Potential new systemic advocacy functions*

Legal Aid NSW would also support the introduction of an express advocacy function for the Public Guardian (or a new public advocate) in the *Guardianship Act*. Legal Aid NSW does not have a strong view on whether the legislation needs to specify the forms of systemic advocacy that can be undertaken.

### *Q7.3 Investigating the need for a guardian*

Legal Aid NSW would support the *Guardianship Act* empowering the Public Guardian or a public advocate to investigate the need for a guardian. This would fill a gap in the current system where, prior to an application for guardianship, no agency has the power to investigate the need for a guardian. This body should also have the power to apply for a guardianship and/or financial management order.

### *Q7.4 Investigating suspected abuse, exploitation or neglect*

Legal Aid NSW supports the introduction of an investigative function for either the Public Guardian or a new public advocate. The *Guardianship Act* should expressly empower the Public Guardian (or new advocate) to investigate the suspected exploitation, abuse or neglect of people with decision making disabilities.

In response to the Australian Law Reform Commission (**ALRC**) inquiry into elder abuse, Legal Aid NSW agreed that “state and territory public advocates / guardians should have a consent-based power to investigate the abuse and neglect of older people.” The ALRC identified an ‘investigation gap’, which is the absence of any state power to investigate allegations of behaviour that is not criminal, but may result in harm to a vulnerable older person. Elder abuse helplines report that older people and their advocates contact the helpline seeking support and assistance, but without the power or capacity to investigate whether the older person is being abused, it is difficult to respond appropriately.

An equivalent investigation gap exists in relation to the suspected abuse and neglect of a person with decision making disabilities. A person with a disability may not wish to contact the police with concerns about a carer, as this would damage the relationship. However they may consent to an investigation by the Public Guardian or similar, who could:

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- ascertain whether the person is being exploited, abused or neglected
  - offer referrals to support services, legal advice, accommodation or other services
  - assist the person to contact those services, and
  - advocate on their behalf.

It would be essential to adequately resource the Public Guardian or new advocacy body so the relevant agency can properly discharge these new functions.

#### *Q7.5 Investigations on complaint or own motion*

Legal Aid NSW considers that the investigating agency should be able to begin an investigation if it has reasonable suspicion that a person is being exploited, abused or neglected, and it should not have to wait for a complaint to be made. However the investigation should only proceed with the consent of the person. This respects the person's right to self-determination, and ensures that people with disability are not subject to state intrusion into their affairs in situations where people without a disability are not.

If the investigating agency has concerns about the person's capacity to consent (or withhold consent) to an investigation, the usual avenues regarding the appointment of a guardian are available. It might also be necessary to provide that if the investigating agency has reasonable grounds to suspect that the person is withholding consent as a result of coercion or intimidation, an investigation could occur without consent.

#### *Q7.6 Powers to compel information*

The investigating agency should have the power to compel people to provide information, produce documents, or participate in an interview. The power should be subject to the privilege against self-incrimination, as it is in the *Guardianship and Administration Act 1986* (Vic), the *Public Guardian Act 2014* (Qld), and the *Guardianship of Adults Act* (NT).

#### *Q7.7 Powers of search and entry*

Legal Aid NSW does not support conferring a power on the investigating agency to enter and inspect premises without consent. If there are concerns that a person with a disability is being abused or neglected, the police have the power to enter without consent.

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## Ch 8 Procedures of the Tribunal

### *Q8.2 Parties to guardianship and financial management cases*

Legal Aid NSW considers that adult children involved in the care of the person should be parties to guardianship and financial management cases. While a person who 'has care of the person' is entitled to be a party, this is not always broad enough to capture adult children who are concerned with and provide assistance to the person, but do not have care of the person. These children are not currently parties unless they are joined to the proceedings.

### *Q8.3 The requirement for a hearing*

It might occasionally be more convenient for the Tribunal to make a decision without holding a hearing, for example, where the matter is urgent, there is professional evidence, and the person subject to the order or proposed order is unable to take part. However as the Question Paper notes, some people prefer to communicate in person rather than in writing. Hearings should continue to be the usual way the Tribunal makes decisions.

### *Q8.4 Notice requirements*

The adult children of a person about whom an application is made should receive notice of the application.

### *Q8.5 When a person can be represented*

Legal Aid NSW strongly advocates for a right to legal representation for a person who is subject to a guardianship order or financial management order or an application for such orders. The making of a guardianship order and/or financial management order has serious legal and practical consequences. A person risks losing their legal capacity to make decisions and can be forced to move out of their home and live as directed by another, to undergo medical treatment, and lose control over their money. With these consequences at stake, a person should not have to seek leave to be legally represented. The right to legal representation should be considered to be an element of 'the appropriate and effective safeguards to prevent abuse' that are required by article 12 of the Convention.

In the Mental Health Review Tribunal, there is a right to legal representation. This Tribunal can order a person to stay in a mental health facility as an involuntary patient. It can also make an order for electro-convulsive therapy, and make a financial management order. Because these orders have a serious effect on the liberty of the person, legal representation is necessary. Legal Aid NSW submits that where the Guardianship Division of NCAT is considering an application for an order that has similar impacts on the liberty of the person, there should be a right to legal representation.

This right to legal representation is meaningless if people are unaware of the right, do not have the capacity to exercise it, or are unable to afford legal representation. The case study of Max, below, illustrates that even where the formal safeguards of the *Guardianship*

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Act are complied with, the absence of legal representation for vulnerable people can create a risk that natural justice has not been afforded.

### **Case Study – Max**

A Legal Aid NSW solicitor observed Max’s hearing at the Tribunal. Max was in his seventies and had presented at hospital at least weekly for the last year with non-specific symptoms. During his most recent admission, the hospital staff refused to discharge him, and made an application for a guardian to be appointed. Evidence was provided that Max’s home was unclean and he did not want to eat the food provided by Meals on Wheels. The hospital staff considered that Max would be better off in an aged care facility. Max indicated that his preference was to continue to live independently.

The Tribunal was satisfied that Max was in need of a guardian, and appointed the Public Guardian. The order included the function of deciding where Max was to live, and the power to ensure that Max complies with the decision of the guardian.

It was not clear that Max understood the nature of the proceedings, or their outcome. Max had been served with the application (as required by section 10 of the *Guardianship Act*) but it was unclear whether Max was able to read or understand the written information that had been provided to the Tribunal by the hospital staff.

Legal Aid NSW is not aware of how frequently vulnerable people like Max appear in the Tribunal without legal representation. However we note that between 2014 and 2016, there are four reported decisions where the Tribunal appointed a guardian with a coercive accommodation function and there was no legal representation.<sup>7</sup>

Legal Aid NSW considers that, at least where there is an application for a guardianship order with an enforcement power (under section 21A), the person should be advised of their right to legal representation and given information about Legal Aid NSW services. If those people take up this opportunity, there would be resourcing implications for Legal Aid NSW. However it would be difficult to argue that there is compliance with article 12 of the Convention if vulnerable people are subjective to coercive orders without the opportunity of legal representation.

The suggestion that ‘people who cannot afford lawyers may be disadvantaged if other parties are represented’ (QP4 at 8.38) does not carry weight in relation to guardianship proceedings because such proceedings are not adversarial and only one person’s freedoms are at stake.

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<sup>7</sup> *ERX* [2016] NSWCATGD 15; *SMD* [2015] NSWCATGD 40; *BLC* [2016] NSWCATGD 2; *FQM* [2016] NSWCATGD 19.

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Legal Aid NSW solicitors have sought to act for young people subject to financial management orders before the Tribunal and have been refused. They were only permitted to act as a separate representative.

The requirement for leave to be represented should remain for people other than the person subject to the application or order.

#### *Question 8.6 Separate representatives*

As noted in the Question Paper, Legal Aid NSW appoints a legal representative in most cases where the Tribunal makes an order for separate representation. The means test is not applied. However, in an increasing number of matters the client is not economically or socially disadvantaged and accordingly is not within the class of persons that Legal Aid NSW was established to represent under a grant of aid.

The referral of these clients to Legal Aid NSW for representation enables NCAT to secure the services of an experienced and independent practitioner. It is the referral aspect of this service (rather than the provision of free legal services) which is required by NCAT in a small but significant number of matters.

Legal Aid NSW submits that section 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) should be amended to include a provision that, where an order has been made that a party be separately represented, at the conclusion of the matter NCAT should consider whether in its view the party is able to pay for that representation without hardship. If NCAT forms that view, NCAT should have the discretion to order that the costs of the representation provided by Legal Aid NSW be paid by the party. This would ensure that Legal Aid NSW may continue to provide a separate representative in the maximum number of matters.

#### *Question 8.7 Representation*

The *Guardianship Act* should include a rule equivalent to that in section 152 of the *Mental Health Act 2007* (NSW), providing that the fact that a person is suffering from a mental illness, developmental or intellectual disability or other mental condition is presumed not to prevent the representation of the person by a lawyer before the Tribunal. This would preserve the person's right to legal representation, which is an important and valuable safeguard in guardianship proceedings, and also protects the legal representative who might otherwise be required to assess whether the person has the capacity to give instructions. Since one of the tasks of the Tribunal is to make a decision as to whether the person has capacity to make decisions, the legal representative should not be required to make this assessment.

#### *Q8.8 Timeframes for finalising Guardianship Division cases*

As QP4 notes, prioritising certain cases will simply cause delay for other matters. Increasing the resources available to the Guardianship Division is more likely to reduce delays overall. There should be a target of three to six months for a hearing.

Delays for clients and practitioners are caused by the Tribunal's practice of only setting down matters for two hours, even when it is clear that the matter is complex and will require

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longer. The result is multiple adjournments, with multiple two hour part-heard hearings. This may be an efficient use of time for the Tribunal but causes considerable stress for clients and inefficiencies for practitioners.

#### *Q8.9 Appealing a Guardianship Division decision*

Legal Aid NSW does not have concerns about the processes for appeal.

#### *Q8.10 Privacy and confidentiality*

##### Non-disclosure of evidence

Legal Aid NSW would be concerned about an amendment that would allow evidence not to be disclosed to the person the subject of the order, particularly if that evidence was relevant to the assessment of capacity. The rules of natural justice are an important safeguard in these proceedings.

##### Doctor-patient confidentiality

Legal Aid NSW understands that Tribunal officers and members make informal requests to medical practitioners for reports and information, and that practitioners comply with these requests. Our solicitors have represented clients who took strong objection to the provision of the medical report, and their wishes were overridden.

It is a serious matter to breach doctor-patient confidentiality, and Legal Aid NSW considers that the *Guardianship Act* should require the Tribunal to place greater weight on the protection of these communications than it does at present. Medical practitioners have ethical obligations to maintain confidentiality, except as required or authorised by law.<sup>8</sup> Where the Tribunal is aware that the person is capable of consenting, the Tribunal should seek an authority from the person for the release of confidential information. If the person does not provide an authority, the Tribunal should be required to consider whether the information should be sought without the consent of the person.

One way of legislating this requirement would be to insert a provision similar to section 126B of the *Evidence Act* into the *Guardianship Act*.

Section 126B of the *Evidence Act* provides that a court may direct that evidence not be adduced if adducing it would disclose a protected confidence. The court must give the direction if the harm to the protected confider outweighs the desirability of the evidence being given. In making this calculation, the court must consider the probative value of the evidence, the importance of the evidence in the proceedings, the harm caused to the protected confider, the public interest in preserving the confidentiality of protected confidences, and other matters: section 126B(4).

The Tribunal is not bound by the rules of evidence, and the only reference to protected confidences in the *Guardianship Act* concerns the disclosure of privileged documents (rather than their use in evidence): section 67 of the *Guardianship Act*. Legal Aid NSW considers that the *Guardianship Act* should provide that protected confidences should only

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<sup>8</sup> Australian Medical Association, *Code of Ethics*, 2.2.2.

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be admitted into evidence over the objection of the person where the harm to the protected confider caused by breaching the confidence is outweighed by the desirability of the evidence being given. In making this calculation, the matters listed in section 126B(4) of the *Evidence Act* would be relevant.

If the Tribunal or its officers consider that it is necessary to access confidential information over the objection of the person, the registrar should be directed to issue a summons to a medical practitioner. This would avoid encouraging medical practitioners to inadvertently breach their ethical obligations, as is the case when practitioners provide information in response to an informal request without the consent of the patient.

*Q.8.11 Access to documents*

Legal Aid NSW considers that parties to Guardianship Division matters should be able to access documents at any stage of the proceedings.