Legislative Council Standing Committee on Social Issues

Substitute decision-making for people lacking capacity

Government Response

Recommendation 1

That the NSW Government pursue legislation establishing a single definition of 'capacity' applicable to legislation related to substitute decision-making for people lacking capacity.

That the legislative definition acknowledge the fact that a person's decision-making capacity varies from domain to domain and from time to time and defines 'capacity' in relation to a particular decision with reference to, but without being limited to, the following:

- the ability to understand information relevant to the decision
- the ability to retain that information for a period that allows the decision to be made within an appropriate timeframe
- the ability to utilise that information in the decision-making process
- the ability to foresee the consequences of making or not making the decision
- the ability to communicate the decision to others

That legislation should in addition ensure that a person is not considered incapable of making a particular decision simply on the basis of their having a disability.

Referral to NSW Law Reform Commission (LRC)

The question of capacity is a very complex one, already canvassed in the Capacity Toolkit, a resource available from the Department of Justice and Attorney General. The Capacity Toolkit is a guide to assessing a person's capacity to make legal, medical, financial and personal decisions. The Capacity Toolkit was created in response to requests from lawyers, medical professionals, health workers, carers and advocates who required more information about capacity, some general capacity principles and guidelines on assessing a person's capacity to make decisions.

However, it is not possible to capture all of the nuances of the question of capacity in a simple legislated definition. It continues to be the case that the common law will need to inform and expand on any definition precisely because, as the recommendation states, a person's decision-making capacity varies from domain to domain and from time to time.

Notwithstanding this, the Government acknowledges that certain elements of the common law definition of capacity, such as those contained in the recommendation, might be usefully referred to in legislation. Given the complexity of the legal issues, the Government favours referring this issue to the Law Reform Commission to develop a suitable legislative definition of capacity for incorporation into NSW legislation related to substitute decision-making for people lacking capacity. This would take into account the existing common law, the Capacity Toolkit, and

legislative developments in other jurisdictions, such as the United Kingdom and Alberta, Canada.

The Government considers the last part of the recommendation, as far as it relates to the *Guardianship Act 1987*, that legislation should make it clear that a person is not considered incapable of making a particular decision simply on the basis of their having a disability, should be considered by the Law Reform Commission as part of its consideration of the issue of capacity.

The Government supports the last part of the recommendation in relation to the *NSW Trustee and Guardian Act 2009*, that legislation should make it clear that a person is not considered incapable of making a particular decision simply on the basis of their having a disability.

Recommendation 2

That the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to explicitly require a presumption of capacity as the starting point for any considerations.

Supported in part

The Government supports the proposed amendment as it relates to the *NSW Trustee and Guardian Act 2009*.

The Government considers that, in relation to the *Guardianship Act 1987*, this matter should be referred to the Law Reform Commission. The common law already recognises a presumption of capacity and although an attempt to codify this may appear straightforward, there are a number of policy and legal complexities involved in amending the *Guardianship Act 1987* in this manner.

Recommendation 3

That the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to include a statement to the effect that a person is not to be presumed to lack capacity simply because they make a decision that is, in the opinion of others, unwise.

Supported in part

The Government supports the proposed amendment in relation to the *NSW Trustee and Guardian Act 2009*.

In relation to the *Guardianship Act* 1987, the Government supports the intention behind the proposition that a person is not to be presumed to lack capacity simply because they make a decision that is, in the opinion of others, unwise. Although the inclusion of the suggested statement appears unremarkable, the statement, as currently worded, adopts the position of a presumption of a lack of capacity, which is inconsistent with the approach of Recommendation 2 which explicitly requires a presumption of capacity as the starting point for any considerations. There remain a number of unresolved questions about the scope of this statement and how it would

operate in practice. The Government therefore favours the referral of this issue to the LRC for consideration.

Recommendation 4

That the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to include an explicit statement to the effect that the legislation supports the principle of assisted decision-making.

Referral to NSW LRC

Assisted decision making occurs now in the context of families supporting and assisting other family members with disabilities, to make decisions. These arrangements are acknowledged and supported by the current guardianship legislation under which the formal appointment of a guardian is only made when necessary and not made if there are appropriate informal decision making mechanisms in place. The current system is the result of several legislative provisions read together, particularly the principles in section 4 of the *Guardianship Act 1987*, which provide;

> *It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:*
>
> *a) the welfare and interests of such person should be given paramount consideration,*
>
> *b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,*
>
> *c) such persons should be encouraged, as far as possible, to live a normal life in the community,*
>
> *d) the views of such persons in relation to the exercise of those functions should be taken into consideration,*
>
> *e) the importance of preserving the family relationships and the cultural and linguistic environments off such persons should be recognized,*
>
> *f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,*
>
> *g) such persons should be protected from neglect, abuse and exploitation,*
>
> *h) the community should be encouraged to apply and promote these principles.*

Section 14 (1) of the *Guardianship Act 1987* provides that it is only if the Tribunal is satisfied that a person is a person in need of a guardian, that it may make a guardianship order and s14(2)(d) requires the Tribunal to have regard to the practicality of services being provided to a person without the need for the making of an order.

The guardianship legislation supports informal or assisted decision making by family members or other private persons. If Recommendation 4 refers to assisted decision making by public agencies, then the Government supports referring this issue to the

LRC for further development as part of the reference proposed in response to Recommendation 5 (see below).

Recommendation 5

That the NSW Government consider amending NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to provide for the relevant courts and tribunals to make orders for assisted decision-making arrangements and to prescribe the criteria that must be met for such orders to be made.

That such consideration address the parameters of assisted decision-making, in particular the limit at which the assisting decision-maker's obligation to prevent harm overrides their responsibility to assist.

Referral to NSW LRC

The Government acknowledges, as the Standing Committee on Social Issues states, that modern thinking about people with disabilities is represented by the social model of disability, the presumption of capacity, the principle of least restriction and the importance of assisted decision-making.

Assisted decision making by family members and carers is part of our current guardianship system, although courts and tribunals do not make orders for these arrangements at present. Developing a specific legislative mechanism for assisted decision-making will require further consideration of a number of matters, including:

- the specific model of assisted decision making to be adopted,
- how that model applies to both private and public 'assistance'
- how the rights of a person with a disability are protected within such a model,
- the limits of assisted decision making given the presumption of capacity
- what review mechanisms are to be implemented,
- the increased complexity of decision-making and the impact that this will have on service delivery.

It is also important to ensure that the provision of assisted decision-making by public agencies is properly funded and staff are adequately trained.

The Government therefore supports referring this issue to the LRC for further development as part of a reference into assisted decision making.

Recommendation 6

That the NSW Government pursue an amendment to section 3 of the *Guardianship Act 1987* which removes the phrase 'because of a disability' from the definition of a *person in need of a guardian* contained in that section.

Not Supported

The Government acknowledges that there is not necessarily a nexus between disability and incapacity and that incapacity should not be inferred from disability

alone. At present the *Guardianship Act 1987* is the means by which the Guardianship Tribunal is able to make orders for people who have a disability, as defined in section 3, and who, because of that disability, have a partial or total incapacity in relation to managing themselves.

Other Acts provide the mechanisms by which guardianship is provided for other members of the community. For instance, the *Adoption Act 2000* provides a mechanism by which children can be adopted (that is, provided with a guardian). In the same way that the *Adoption Act 2000* focuses on children, the *Guardianship Act 1987* focuses on people with a disability.

The Government is concerned to ensure that removing the phrase "because of a disability" does not unintentionally broaden the scope of application of the *Guardianship Act 1987*, to any person who is incapable of managing their personal life for whatever reason, including, for instance, children, people who have lifestyle issues such as alcoholism, drug use, gambling problems, some personality issues or people who chose to live in a way that may be regarded as eccentric or unconventional. The proposed amendment would empower the Tribunal to make orders for such persons who do not have a disability.

Significant policy issues and major resource implications arise from this Recommendation. The Recommendation represents a fundamental policy shift in the extent to which individual autonomy should be supplanted by substitute decision making as sanctioned by the State. For instance, currently individuals who have drug and alcohol dependence issues receive assistance and support from specialized drug and alcohol services which operate separately from disability services and which place great emphasis on personal agreement and acceptance of service provision rather than substitute decision-making.

Recommendation 7

That the NSW Government consider an amendment to the *Guardianship Act 1987* to provide that the Tribunal may order certain aspects of evidence not be disclosed to parties to proceedings where such disclosure would not assist the Tribunal in reaching its determination and is not in the best interests of the person.

Not Supported

The Government considers that the existing provisions and processes are sufficient. The Guardianship Tribunal should not be exempt from the requirements of procedural fairness, nor should people with disabilities be denied the protection this doctrine affords them. Although applying this doctrine in a protective jurisdiction has particular challenges, it remains essential for the Tribunal to ensure a fair process for people with disabilities and other parties coming before the Tribunal. This involves appropriate disclosure of relevant information as required by the rules of procedural fairness.

The Guardianship Tribunal already has a discretion, under the existing rules of procedural fairness, to restrict disclosure of documents if exceptional circumstances apply. This might be exercised for example, if such disclosure would expose a person to serious harm. It is also noted that the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) states that people with disabilities are to be accorded the same legal rights as other members of the community. The

proposed amendment could infringe the UNCRPD by removing the protections of the doctrine of natural justice in cases involving people with disabilities.

Recommendation 8

That the NSW Government pursue an amendment of the *Guardianship Act 1987* by modeling section 14 (1) on section 25G to provide that:

The Tribunal may make a guardianship order in respect of a person only if the Tribunal has considered the person's capability to manage his or her person and satisfied that:

- the person is not capable of managing his or her person, and
- there is a need for another person to be appointed as guardian, and
- it is in the person's best interests that the order be made.

ADHC review

The proposed amendment changes the statutory test for the making of a guardianship order. The proposed amendment implies that a global incapacity is needed before an order can be made. It would remove that part of section 14(1) that currently applies to persons who, because of a disability, are partially incapable of managing themselves. The proposed amendment does this by removing the reference to a "person in need of a guardian", which is defined in section 3 to mean a person who, because of a disability, is totally or partially incapable of managing his or her person.

This proposed definition may also prevent a significant number of people from being able to access the support afforded by guardianship orders and create difficulties for service providers who rely on orders to be able to fulfill their obligations to clients.

The apparent purpose of the proposed amendment may already be achieved by the current legislative scheme - see s14, s4 and s 3 of the *Guardianship Act 1987*. See also *KAT [2009] NSWGT 12; FBN [2010] NSWGT 18; EOHD [2010] NSWGT 11; IF v IG [2004] NSWADTAP 3* at paragraphs 24 -31 and unreported Decision No. 67/99 Justice Windeyer, Protective List of the Equity Division of the Supreme Court of NSW, 29 November 1999, in relation to the effect and operation of the s4 principles.

The need for the proposed amendment can be considered as part of ADHC's review of the guardianship legislation.

Recommendation 9

That the NSW Government pursue an amendment of the *Guardianship Act 1987* so that, when considering the need for another person to be appointed as guardian, the Tribunal is to consider the adequacy of existing informal arrangements.

ADHC review

The current legislative scheme and supporting case law requires the Tribunal to consider the adequacy of existing informal arrangements. See in particular s 4(a), (b), (c), (e) and (f) and s 14 (2) (d) of the Guardianship Act 1987. See for example,

FBN [2010] NSWGT 18; EOHD [2010] NSWGT 11; TAH [2008] NSWGT 6; KAT [2009] NSWGT 12.

See also *IF v IG [2004] NSWADTAP 3* and *DL v Public Guardian and ors [2008] NSWADTAP 6.*

The need for the proposed amendment can be considered as part of ADHC's review of the guardianship legislation.

Recommendation 10

That the NSW Government consider the adequacy of existing provisions for the review of guardianship orders and in particular consider the possibility of annually reviewing guardianship orders or establishing a new protocol whereby the review of guardianship orders is triggered by evidence of regained capacity.

Not supported

The Government considers the existing provisions for the review of guardianship orders sufficient. At present, the guardianship legislation provides for the review of guardianship orders at the expiry of their term. Initial orders can be made for a maximum period of one year, so they are usually first reviewed on an annual basis. Subsequent orders may be made for longer periods of time and will be reviewed after that time. The Guardianship Tribunal considers the need for review when determining the length of the order.

Introducing a mandatory regime of reviews at a higher ratio than currently exists may be unnecessarily burdensome for the person subject to a guardianship order and is not considered cost efficient given the extra expense of mandated reviews. Sufficient provision already exists to undertake reviews as and when required. Any person with a genuine interest in the welfare of a person may seek a review of a guardianship order at any time on the basis of no further need or regained capacity. This includes the Public Guardian, who will seek a review if it becomes apparent to the Public Guardian that there is no longer a need for a guardianship order. The Tribunal can also initiate an own motion review of a guardianship order when circumstances warrant.

Recommendation 11

That the NSW Government pursue an amendment of the *Guardianship Act 1987* to provide that the Tribunal, when determining the need for a financial management order, shall have regard to the following:

(a) the views (if any) of:

(i) the person, and

(ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and

(iii) the person, if any, who has care of the person,

(b) the importance of preserving the person's existing family relationships,

(c) the importance of preserving the person's particular cultural and linguistic environments, and

(d) the practicability of services being provided to the person without the need for the making of such an order.

ADHC review

The current legislative scheme requires the Tribunal to consider such matters – see s 25G and s4 of the Guardianship Act 1987. Guardianship Tribunal case law demonstrates the application of these principles.

In addition case law in this area supports a consideration of matters such as those referred to in Recommendation 11. See for example, *Holt & Anor v Protective Commissioner (1993) 31 NSWLR 227; Re GHI (a protected person) [2005] NSWSC 581; SH Protective Commissioner [2006] NSWADTAP 4.* See also *TP v NSW Trustee and Guardian [2010] NSWADTAP 65* where the ADT referred to the duty of the Guardianship Tribunal when exercising its functions to take the views of the person into account.

The need for the proposed amendment can be considered as part of ADHC's review of the guardianship legislation.

Recommendation 12

That the NSW Government pursue an amendment to the *Guardianship Act 1987* to explicitly require the Tribunal to consider the adequacy of existing informal arrangements when determining the need for a financial management order.

ADHC review

The need for the proposed amendment can be considered as part of ADHC's review of the guardianship legislation.

The current legislative scheme requires the Tribunal to consider whether the person's circumstances warrant the making of a financial management order. It has regard to all the circumstances of the case and gathers evidence about:

- the size and nature of the person's estate;
- whether a power of attorney is in effect, or there is an enduring power of attorney that can be activated;
- whether any informal management arrangements are in place (such as assistance from a family member or friend who is a signatory to a bank account, or a nominee with Centrelink or the Department of Veterans' Affairs).

Evidence of less formal arrangements working in the best interests of the person will displace the need for a formal management order. See for example, *LAD [2010] NSWGT 24*; *UAC [2008] NSWGT 22*.

Recommendation 13

That the NSW Government pursue an amendment to the *Guardianship Act 1987* to require that the Tribunal shall not be satisfied a prospective financial manager, other than the NSW Trustee and Guardian, is suitable unless it is satisfied that:

(a) the personality of the proposed financial manager is generally compatible with that of the person under the financial management order

(b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed financial manager and those of the person under the financial management order and

(c) the proposed financial manager is both willing and able to exercise the functions conferred or imposed by the proposed financial management order.

ADHC review

There is considerable case law relating to the suitability of a manager. See for example, *Holt & Anor v Protective Commissioner (1993) 31 NSWLR 227; Re GHI (a protected person) [2005] NSWSC 581; JJK and anor v APK (unreported), Supreme Court NSW, 11 July 1986; RAC v RPC unreported Supreme Court NSW, 7 December 1992; M v K (unreported), Supreme Court NSW, 24 April, 1989,* Re R [2000] NSWSC 886, Collis [2009] NSWSC 852, the application of J & K [2009] NSWSC 1453.

In *Holt & Anor v Protective Commissioner (1993) 31 NSWLR 227* Kirby P (as he then was) referred to the exercise of a broad discretion in determining an appropriate manager, which would take account of all circumstances relevant to the best interests of the person.

The proposed amendment may result in a loss of some elements now covered in case law. The need for the proposed amendment can be considered as part of ADHC's review of the guardianship legislation.

Recommendation 14

That the NSW Government pursue an amendment to the *Guardianship Act 1987* to clarify that the NSW Trustee and Guardian is to be considered the financial manager of last resort and appointed only after consideration of the availability and suitability of a private manager, whether that be a friend or family member or a commercial trustee corporation, has been made.

ADHC review

Decisions of the Supreme Court and the Administrative Decisions Tribunal have already expressed the view that a 'natural hierarchy' applies when a body is considering the appointment of a private manager as opposed to a Public Official. The case law recommends the consideration of family members or other private persons before the appointment of a public financial manager. The Government supports preference being given to a friend or family member and this reflects the current law and practice applied by the Tribunal.

The recommendation would also amount to a proposal that commercial trustee corporations be preferred to the NSW Trustee and Guardian. This can result in

financial disadvantage if two sets of fees are charged to the person under management. The current legislative scheme allows the Tribunal to take issues of financial disadvantage into account when determining the suitability of a manager. The case law does not discriminate between a private individual and a commercial trustee company. Current practice based on case law allows the Tribunal to give consideration to which appointment is in the best interests of the person in all the circumstances and taking into account the 'natural hierarchy' concept.

The need for the proposed amendment can be considered as part of ADHC's review of the guardianship legislation.

Recommendation 15

That the NSW Government consider amending the *Guardianship Act 1987* to require the automatic review of financial management orders by the Guardianship Tribunal.

That the NSW Government consider in particular the additional burden such an amendment may place on the resources of the Guardianship Tribunal.

Not Supported

The Government supports in principle the concept of regular review of financial management orders made by the Guardianship Tribunal. However, there are many clients under financial management where there is a continuing need for an order and where the process of review would be costly and burdensome for no benefit. Given this, a legislative mandated automatic review process for all financial management orders is not supported.

The Government considers the existing provisions for the review of financial management orders sufficient. While some financial management orders made by the Guardianship Tribunal are not automatically reviewed, the Tribunal has the power to order a review of a financial management order if it is appropriate in a particular case. As acknowledged by the Committee, both the Guardianship Tribunal and the Supreme Court already have the power to make a reviewable or interim order, and people the subject of an order, or people with a genuine concern for the welfare of the person subject to an order, can request a review of an order. The Tribunal can also initiate an own motion review of a financial management order when circumstances warrant.

Unlike guardianship where there are a range of mechanisms for informal decision-making, there are often few alternatives to formal financial management for people who lack capacity to manage their affairs due to the stricter legal requirements associated with financial management. Therefore, for many people with a significant incapacity, there may be little prospect of a financial management order being removed because there are no viable alternative means for substitute decisions to be made about finances. In addition, some people may find attending annual review hearings a confusing or upsetting process, particularly if the order is not revoked on each occasion, despite their strong wishes to the contrary.

Recommendation 16

That the NSW Government pursue an amendment to section 25P of the *Guardianship Act 1987* to provide that the Tribunal may revoke a financial management order if it is satisfied there is no longer a need for a person to manage the affairs of the person subject to the order.

ADHC review

The need for the proposed amendment can be considered as part of ADHC's review of the guardianship legislation.

The proposed amendment may be unnecessary given the current legislative scheme. At present revocation can occur if the person has regained the capacity to manage their finances. This would mean that the need for a manager has ceased. Secondly revocation can occur if it is in the best interests of the person. Such an assessment entails consideration of the need for a manager.

Recommendation 17

That the NSW Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* so that the Mental Health Review Tribunal is not required to automatically consider a person's need for a financial management order when the Tribunal conducts a mental health inquiry following a person's detention in a mental health facility or conducts a review of a forensic patient's case, unless evidence of a need for such an order arises during the inquiry or review.

Supported

The Government supports the proposed amendment.

Recommendation 18

That the NSW Government pursue an amendment of the *NSW Trustee and Guardian Act 2009* to require bodies considering financial management orders in respect of a person under that Act be satisfied that there is a need for the order and that the making of an order is in the person's best interests, and that the amendment be consistent with the wording in section 25G of the *Guardianship Act 1987*.

Supported

The Government supports the proposed amendment.

Recommendation 19

That the NSW Government pursue an amendment of section 25E (2) of the *Guardianship Act 1987* to mirror the provision in section 40 of the *NSW Trustee and Guardian Act 2009*, namely that 'the tribunal may make an order for the management of the whole or part of the estate of a person.'

Supported

The Government supports the proposed amendment.

Recommendation 20

That the Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* and the *Guardianship Act 1987* to enable the Mental Health Review Tribunal to refer to the Guardianship Tribunal for determination cases in which the appointment of a private manger is sought for the estate of a person the Mental Health Review Tribunal is satisfied is not capable of managing his or her affairs, or in cases where such a person's estate is complex.

For Further consideration

The Mental Health Review Tribunal (MHRT) has jurisdiction to make management orders. However the MHRT is able to appoint only the NSW Trustee and Guardian and not a private person as manager. Legislative change to allow the MHRT to appoint a private manager was supported in several submissions to the Committee. However, as the Report states, the MHRT does not have the expertise or resources to properly investigate applications for the appointment of a private financial manager and the typically short time frame in which it would be required to conduct such an investigation.

For the MHRT to satisfy itself that a person is not capable of managing their affairs or that their estate is complex and then refer for the Guardianship Tribunal to conduct a second enquiry into the same issues is, in the view of the Guardianship Tribunal, a duplication of government services and an unreasonable burden on the person with the mental illness who is the subject of the application. However, as the Report states, adequately resourcing the MHRT to properly investigate applications for the appointment of a private financial manager would unduly replicate the resources that already exist in the form of the Guardianship Tribunal's Coordination and Investigation Unit.

Ultimately, it is the view of the Government that it is not clear that referral from a mental health context to a guardianship context is appropriate given the specialised nature of the Mental Health Review Tribunal and the Guardianship Tribunal.

In the face of these concerns, further consideration needs to be given by the Government to the appropriate forum for determining financial management matters as changes to the current system would have significant resource implications.

Recommendation 21

That the NSW Government consider amending the relevant legislation to require that upon a person being discharged from a mental health facility or ceasing to be under guardianship, and if there is in place in relation to the person's estate a financial management order, that order be automatically reviewed by the Guardianship Tribunal.

That the NSW Government consider in particular the additional burden such an amendment may place on the resources of the Guardianship Tribunal.

Not Supported

A financial management order can be made by the Supreme Court of NSW, the Guardianship Tribunal or the MHRT.

If orders are to be reviewed or revoked by a judicial body then legal and practical considerations would point to the review being undertaken by the Court or Tribunal which first made the order in question.

In relation to orders made by the MHRT, the Guardianship Tribunal has no direct jurisdiction in relation to patients detained in mental health facilities. The Tribunal has no access to information about the discharge of such persons. If a body other than the NSW Trustee and Guardian is to make determinations about such people, it is more appropriate that the MHRT, which has jurisdiction in relation to mental health issues, consider the question especially as that Tribunal is likely to have made the original order.

Further, resource issues will arise as the workload of the Court and the two Tribunals will be affected. If the NSW Trustee and Guardian manages the review process by making appropriate applications and providing evidence to the Court and Tribunals there may also be no resource savings for that organisation.

In relation to orders made by the Guardianship Tribunal, the end of guardianship is rarely the result of a person regaining capacity. It is more likely to occur because the decisions which needed to be made to support the person have been made and there is no ongoing need for a guardian. Accordingly it is rarely the case that the end of guardianship implies that a person has regained the capacity to manage their finances. However, if this is the case then an application can be made for the review and revocation of the financial management order.

Recommendation 22

That the NSW Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* providing that whichever body is empowered to terminate a financial management order upon the person subject to the order being discharged from a mental health facility or ceasing to be under guardianship be permitted to terminate the order if it is satisfied there is no longer a need for another person to manage the person's affairs, or if it is satisfied it is in the person's best interests that the order be terminated even if the person has not regained the capacity to manage their affairs.

Supported

The Government supports the proposed amendment, with the test to be applied to be consistent with section 25P of the *Guardianship Act 1987*.

Recommendation 23

That the NSW Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* to allow the Supreme Court or Mental Health Review Tribunal to vary or revoke an order (even where the person remains incapable of managing their affairs) on the application of the protected person, the NSW Trustee and Guardian, the manager of the estate or part of the estate of the protected person, or a person who, in the opinion of the Supreme Court or the Mental Health Review Tribunal, has a genuine concern for the welfare of the protected person, and that such provision has effect even if the person remains a patient in a hospital.

Supported

The Government supports the proposed amendment, on the basis that the Supreme court or the MHRT considers that it is in the best interests of the protected person that the order be varied or revoked.

Recommendation 24

That the NSW Government change the name of the NSW Trustee and Guardian, and in particular remove 'Guardian' from the title, to more clearly distinguish it from the Office of the Public Guardian.

Not supported

The Government acknowledges the concerns raised about the use of "NSW Trustee and Guardian" . However, this name was chosen in part to reflect the concerns of various stakeholders that the merger of the Public Trustee and the Office of the Protective Commissioner in 2009 not be a takeover of the Office of the Protective Commissioner (or the Office of the Public Guardian) by the Public Trustee. "NSW Trustee and Guardian" was chosen to properly reflect a new organisation with a new direction and to help allay some of the concerns of the then clients of the Office of the Protective Commissioner and the Public Guardian.

The name "NSW Trustee and Guardian" covers the trust relationship and fiduciary obligations of both the old Public Trustee and the old Protective Commissioner. Merely continuing with the use of "Public Trustee", or "NSW Trustee" as is being recommended now, would in a sense exclude the clients of the old Protective Commissioner and the need to enhance the provision of disability support services.

Recommendation 25

That the NSW Government consider amending the *NSW Trustee and Guardian Act 2009* to provide the NSW Trustee and Guardian with the discretion to decide how often private managers must lodge accounts for review and exempting it from any liability arising from the exercise of this discretion.

Supported

The Government supports the recommendation, subject to the establishment of a proper risk assessment mechanism. The Government is concerned to ensure that any decision by the NSW Trustee and Guardian to extend the timeframe for lodging accounts should only be possible after successful lodgment on more than one occasion and after a thorough risk assessment has been conducted. The risk assessment should, in a clear way, step through the risks to the client's welfare and safety, and take into consideration any concerns of the person under management. Key disability stakeholders should be consulted given concerns regarding safeguards for people with cognitive disabilities whose finances are managed by private managers.

Recommendation 26

That the NSW Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* to provide for the NSW Trustee and Guardian to assume management of the estate of a person under a financial management order upon the death of a private manager previously appointed and until a new manager is appointed by the relevant court or tribunal.

Supported

The Government supports the proposed amendment.

Recommendation 27

That the NSW Government consider the need for legislation in relation to the use of restrictive practices within the context of guardianship.

Referral to NSW LRC

The Government acknowledges the legal and ethical complexities relating to the use of restrictive practices within the context of guardianship. The Government is of the view that it is appropriate that the Guardianship Tribunal be able to authorise a guardian to consent to restrictive practices on behalf of a person under guardianship.

However, developing a legislative framework in relation to the use of restrictive practices raises a number of complex issues. Matters which will need to be addressed include:

- complex legal issues regarding the boundaries of a guardian's authority and the interplay with common and civil law actions for assault, false imprisonment and the extent of defences of necessity to those actions;
- balancing the need for safeguards and protections in a service system which authorises restrictive practices for vulnerable adults with the practical need to provide behaviour management services to people to enable them to live in the community in the least restrictive manner;
- the different types of restrictive practices that may be employed;
- different levels of consent required, depending on the type and seriousness of the restrictive practice used;
- the different circumstances in which restrictive practices may be used;
- who should consent to various restrictive practices and the role of family members as decision makers in this area; and
- implications of the UN Convention on the Rights of Persons with Disabilities.

In light of these complex issues, further consultation, especially with disability and aged care stakeholders, is needed to fully explore the legal, policy and practical implications of the Recommendation. The Government therefore supports referring the issue to the LRC for an independent evaluation of the relevant issues.

Recommendation 28

That the NSW Government consider the proposed amendment to section 21A of the *Guardianship Act 1987* enabling the Guardianship Tribunal to specify in a

guardianship order that the persons referred to in that section may authorize members of the NSW police force to use all reasonable force where all other means have been exhausted and where the action is necessary to protect the wellbeing of the person or others.

ADHC review

The need for the proposed amendment will be considered as part of ADHC's review of the *Guardianship Act 1987*.

The proposed amendment may be unnecessary given the provisions of Sections 21, 21A, 21B and 21C of the Guardianship Act 1987. See, for example, *OHB [2009] NSWGT 14.*

Recommendation 29

That the NSW Government prioritise assessment of the Public Guardian's proposed community guardianship program and in particular examine the extent to which the proposed community guardianship program could meet the expected increase in demand for guardianship services in the coming decades, the cost effectiveness of the program, and the adequacy of safeguards for the person under guardianship in terms of the recruitment, screening, training and supervision of community guardians.

Supported - for further consideration

A community guardianship program could provide benefits to people under guardianship provided proper and effective safeguards are incorporated into the program. The Government will consider the Public Guardian's proposed community guardianship program, including the extent to which the proposed community guardianship program could meet the expected increase in demand for guardianship services in the coming decades, the cost effectiveness of the program, and the adequacy of safeguards for the person under guardianship in terms of the recruitment, screening, training and supervision of community guardians. The Government will ensure that stakeholders are consulted in relation to any proposed program.

Recommendation 30

That the NSW Government consider the Public Guardian's proposal that it be given the authority to proactively investigate the need for guardianship where it has received a complaint or allegation.

That the NSW Government consider the need for the Public Guardian to have the authority to visit institutions or such places where persons potentially in need of guardianship may reside to determine the need for guardianship even when no complaint or allegation has been received.

Supported in principle

The Government supports the proposed amendment, in principle, subject to an adequate analysis of the financial implications and whether the proposal would duplicate the functions of the Guardianship Tribunal, and noting that any such power

should also be given consideration in relation to the proposal to establish an Office of the Public Advocate.

Recommendation 31

That the NSW Government pursue an amendment of section 77 of the *Guardianship Act 1987* to enable the Public Guardian to assist people lacking decision-making capacity without a guardianship order.

Supported in principle

The Government supports the proposed amendment, in principle, subject to an adequate analysis of the financial implications, and noting that any such power should also be given consideration in relation to the proposal to establish an Office of the Public Advocate.

Recommendation 32

That the NSW Government consult with the relevant stakeholders and develop a proposal for the establishment of an Office of the Public Advocate and that the issues addressed in the proposal include but not be limited to:

- the involvement of a Public Advocate in court and tribunal proceedings involving persons with disabilities, in terms of providing representation, advice and mediation
- the authority of a Public Advocate to investigate and scrutinise service providers and government bodies and instigate legal action on behalf of persons with disabilities
- how the role a Public Advocate would cover both systemic and individual advocacy
- the impact an Office of the Public Advocate would have on the number of people under guardianship in NSW
- whether the Office of the Public Advocate and the Office of the Public Guardian should be merged or exist separately.

Supported - For further consideration

The Government considers that careful analysis and extensive consultation should be undertaken in relation to this recommendation. Consultation should be undertaken by the Department of Justice and Attorney General (DJAG) and ADHC jointly.

Consultation should involve DJAG, ADHC, the Guardianship Tribunal, the Public Guardian, the Ombudsman, non government organisations, community groups and people with disabilities and their families and carers.

A report which includes a summary of that consultation and costing information for further consideration should be prepared.

Recommendation 33

That the NSW Government consider the merits of transferring responsibility for administering the *Guardianship Act 1987* from the Minister for Disability Services to the Attorney General.

Not supported

The Government does not support this recommendation. Since its enactment in 1987, the Guardianship Act has been administered by the Minister for Disability Services. This has proved to be an arrangement which has worked to the benefit of all concerned and most particularly, adults living with cognitive disabilities in NSW. Being part of a disability services portfolio enables the Guardianship Tribunal to create and maintain effective networks in the disability sector. It also enables the Tribunal to pursue its brief to be non-legalistic and as informal and "user friendly" as possible.

Although the Public Guardian's office is created by the *Guardianship Act 1987*, the Public Guardian himself is within the Attorney General's portfolio, and is administratively responsible to the Department of Justice and Attorney General, the funding source of the Public Guardian.

It is important that the Public Guardian is seen to be independent of the Guardianship Tribunal as the Tribunal appoints the Public Guardian as guardian of last resort. Transferring responsibility for administering the *Guardianship Act 1987* to the Attorney General would compound this problem as both agencies would be in the same portfolio. The independence of the two organisations is supported by the existing arrangements.

Recommendation 34

That the NSW Government consider the need for amendments to the *Mental Health Act 2007* and the *Guardianship Act 1987* in relation to the authority of medical officers to authorise medical treatment for a person detained in a mental health facility and the manner in which substitute consent for the termination of pregnancy is determined.

That the NSW Government consult broadly on the need for such amendments, including with NSW Health, medical officers, the Mental Health Review Tribunal, non-government organisations, community groups and families of people detained under the *Mental Health Act 2007*.

Supported

The Government supports this recommendation. NSW Health is developing a Discussion Paper, incorporating the results of consultation with ADHC, to look at the issue of providing medical (ie non-mental health) treatment to patients who fall under the ambit of the *Mental Health Act 2007*.

Recommendation 35

That the NSW Government consider the need for an inquiry focusing specifically on the provisions for end-of-life decision-making and advance care directives in NSW and consider referring such an inquiry to the NSW Law Reform Commission.

Not Supported

The Government does not consider it necessary or desirable for the NSW Law Reform Commission to look at end-of-life decision making generally with a view to possible legislation, for the following reasons:

1. Recent developments in the common law provide guidance and protection for all practitioners who follow an advance care directive, and demonstrate how effectively the common law can sometimes advance policy in line with community thinking. The common law allows flexibility in decision-making for practitioners who are faced with the difficult task of determining whether an advance care directive is valid in an emergency situation which may not be the case if use of an advance care directive is prescribed in legislation. It is particularly noted that recent developments in case law (for example *Hunter and New England Area Health Service v A* [2009] NSWSC 761) reinforce the value of the common law approach in clarifying this area.

2. End-of-life decision making is not a black and white area, and legislation can be incapable of allowing for cases to be considered on an individual basis. A legislative form of advance care directive may not be as effective as envisaged as people wish to express their decision in different ways.

3. Legislation of advance care directives has occurred in several other states and there is currently no evidence to suggest there has been an increase in the use of advance care directives or a marked difference in practice at the frontline level in the community in those places, as opposed to NSW.

4. In NSW there is a range of information available both in case law and policy which adequately provides for the use of advance care directives in NSW.

5. The Australian Health Ministers' Advisory Council (AHMAC) is currently in the process of drafting a National Framework for advance care directives with one of the objectives of the framework being to promote 'harmonisation' in law and policy in regards to advance care directives. One of the core standards listed is that legislation should preserve common law standards such that advance care directives should still be recognised under common law, regardless of which form they are written on. The framework does not bring an imperative for introducing uniform advance care directive legislation in all states, only that where legislation exists, it be made more consistent. This has meant that states which have legislation and have legislatively proscribed advance care directive forms may now need to review that legislation to make it more consistent and compatible with national standards.