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Preliminary submission to the NSW Law Reform Commission's review of the Guardianship Act 1987

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1. Background

Our preliminary submission is informed by our extensive work in relation to people with disability and disability services over the past 13 years, and our consultations with the disability sector. Under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW), the responsibilities of our office include a range of functions targeted at improving the delivery of services to people with disability, including:

- receiving and resolving complaints about community services, and assisting people with disability to make complaints
- reviewing the pattern and causes of complaints about community services, and making recommendations to improve how services handle and resolve complaints
- monitoring and reviewing the delivery of community services, and making recommendations for improvement
- inquiring into matters affecting people with disability and community services, and reviewing the situation of people with disability in residential care
- reviewing the causes and patterns of the deaths of people with disability in residential care, and making recommendations to reduce preventable deaths, and
- coordinating the Official Community Visitor scheme.

On 3 December 2014, the NSW *Disability Inclusion Act 2014* came into effect. The new legislation amended the NSW *Ombudsman Act 1974* to include Part 3C 'Protection of people with disability' (the Disability Reportable Incidents scheme). Part 3C comprises a scheme for the reporting and oversight of the handling of serious incidents – including abuse and neglect – involving people with disability in supported group accommodation.

All of our functions apply to the National Disability Insurance Scheme (NDIS) sites in NSW.

In addition, under the Ombudsman Act, our office has responsibility for handling and resolving complaints about the administrative conduct of the Public Guardian and NSW Trustee and Guardian.

We welcome the opportunity to provide information to the NSW Law Reform Commission to inform its review of the *Guardianship Act 1987*. Noting that the Commission has called for preliminary submissions only at this stage, we have limited our comments to the key issues we believe need to be considered as part of the review. We would be pleased to provide more detailed comments as the review progresses.

2. Strengthening safeguards for vulnerable people

In our experience, the Public Guardian plays an important role in safeguarding vulnerable people who are being subjected to, or are at risk of, abuse or neglect – including making decisions to: prevent or restrict contact with the individuals who are the subject of allegation; ensure the person is provided with appropriate and necessary supports; and accommodate the person in a safe and supportive environment.

In certain situations, the Public Guardian is also able to investigate allegations that an adult is being abused, neglected or exploited, in order to ascertain whether the person requires guardianship or other protections and supports. However, in our view, there is a vital need to amend the Guardianship Act to expand the functions and powers of the

Public Guardian to strengthen the Public Guardian's ability to perform this critical role. The information below illustrates what we consider to be the current gaps in guardianship legislation in NSW in relation to allegations of abuse and neglect.

Arrangements for responding to concerns about abuse and neglect of people with disability in the community

Our office is increasingly contacted by people raising concerns about abuse and/or neglect of individuals with disability living in community settings (such as their family home). In response to existing gaps in the coordination and response to these matters, we are undertaking the following action.

Work with the National Disability Abuse and Neglect Hotline

Since early this year, we have had an agreement with the National Disability Abuse and Neglect Hotline that they will make 'warm referrals' to our office of matters involving allegations or concerns about abuse or neglect of people with disability in community settings (following provision of consent by the caller). In response to these matters, we typically undertake inquiries, check available intelligence, and identify further actions that may be required to resolve the concerns or to establish whether the person requires protection and/or supports.

Work with the Public Guardian

In some cases, we identify that further investigations are required to establish whether the person with disability is in need of guardianship or other protection/support. In such cases, we have an agreement with the Public Guardian to refer relevant information for his consideration. When appropriate, the Public Guardian may decide to submit a guardianship application.

In relation to these matters, common scenarios involve information that raises concerns about potential abuse and/or neglect of an adult with cognitive impairment in their family home. For example, that the person does not seem to have access to their own money; shows signs of neglect (such as untreated medical conditions; limited access to food; dirty and unkempt appearance); and has restricted access to the community and to services. There is generally limited information about what is happening to the person within the home, or the person's views about the current situation.

The Guardianship Act does not presently enable the Public Guardian to automatically investigate complaints or allegations that he receives, irrespective of their urgency. In order to respond to the information we provide, the Public Guardian has to submit an application to the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT), recommending a short-term order for the Public Guardian (or other suitable party) to investigate the person's current care and circumstances. That investigation could include meeting with the person who is reported to be at risk and ascertaining their wishes; and making relevant inquiries to determine whether the person requires guardianship or other protections or supports.

It is problematic that a guardianship order is the only mechanism currently available for the Public Guardian to conduct investigations in relation to vulnerable adults who are reported to be at risk in the community. It does not enable a swift response, and is not the least restrictive option. It also unnecessarily adds to the workload and hearing delays of the Tribunal.

We note that guardianship legislation in some other jurisdictions in Australia include provisions for investigation by the Public Guardian/ Adult Guardian/ Public Advocate. For example, Part 3 of the *Public Guardian Act 2014* (QLD) and section 16(1)(h) of the *Guardianship and Administration Act 1986* (Vic) include provisions for the Public Guardian and Public Advocate respectively to investigate a complaint or allegation regarding exploitation or abuse of an adult.

Consideration of potential investigation-related provisions in the Guardianship Act in NSW should take into account, and seek to avoid, the limitations of other jurisdictions' legislation. For example, we note the findings and recommendations of the Victorian Law Reform Commission's *Guardianship: Final Report 24* of January 2012 regarding the need to:

- broaden the circumstances in which the Public Advocate can investigate a complaint – including conducting an own motion investigation where the Public Advocate believes it is warranted in relation to (among other things) the abuse, neglect or exploitation of people with impaired decision-making ability due to disability, and
- clearly describe the range of powers open to the Public Advocate when conducting investigations – including powers to require people to provide documents, answer questions, attend compulsory conferences, and allow entry to premises with judicial permission in limited circumstances (when there are reasonable grounds for suspecting that a person with impaired decision-making ability due to disability, who has been neglected, exploited or abused, is on the premises).[1]

In our view, the inclusion of comprehensive investigation provisions and powers for the Public Guardian in the Guardianship Act would serve to complement, not duplicate, the investigative and community services-related functions of our office. It would enable us – and any national oversight body under the NDIS – to build on our existing cooperative relationship with the Public Guardian to safeguard vulnerable adults in the community.

More broadly, we believe there is a need for more comprehensive adult safeguarding mechanisms in NSW and nationally, including clear interagency mechanisms to identify and effectively respond to alleged abuse and neglect of adults with cognitive impairment across a range of settings. In this regard, our office will hold a forum on abuse and neglect of people with disability in the second half of 2016, with a focus on three areas:

a) abuse and neglect in disability service settings
b) abuse and neglect in other service settings (including universal services), and
c) abuse and neglect in community settings.

We have had positive preliminary discussions with the Disability Council of NSW and the NSW Police Force about both agencies co-sponsoring the forum with us.

3. Decision making models

In our view, the review of the Guardianship Act provides a valuable opportunity to change the legislation to:

- reflect the UN Convention on the Rights of Persons with Disabilities (UNCRPD), including the provision of appropriate measures to provide access by people with disability to the support they may require in exercising their legal capacity; and the

[1] Victorian Law Reform Commission, 2012, *Guardianship: Final Report 24*, Chapter 20.

shift to a model that is focused on the rights, will and preferences of the person rather than their 'best interests'

- more clearly outline the spectrum of decision making support options – including information provision and referral mechanisms; a range of more intensive supports to maximise the person's ability to make decisions; and substitute decision making, and
- align with key recommendations from the Australian Law Reform Commission's (ALRC) report on *Equality, Capacity and Disability in Commonwealth Laws* (August 2014), including application of the recommended National Decision-Making Principles.

We agree with the submission of the Disability Council of NSW that the Guardianship Act needs to incorporate more expansive, comprehensive and human-rights centred principles; and that the principles in Schedule 1 of the *Guardianship and Administration Act 2000* (QLD), and those recommended by the Victorian Law Reform Commission and the ALRC provide useful guides for the NSW Law Reform Commission.

In our view, it is critical that:

- the presumption is always that the person has capacity to make their own decisions
- where there is evidence to suggest that the person is currently unable to make an informed decision in relation to the matter at hand, the first response should be the provision of decision making support (in whatever form works best for the person)
- substitute decision making should be the last resort – and the appointed substitute decision maker should still be required to consult with and take into account the will and preferences of the person under guardianship.

In our experience, very limited decision making support is provided or offered to people with disability to maximise their ability to make (or, at a minimum, inform) decisions and exercise their rights, will and preferences. The range of possible supports includes the provision and use of communication supports; consideration of the best mechanisms for engaging and consulting with the person; and investment of the time required to appropriately maximise and support decision making. Decision making *capacity* in many cases is heavily dependent on the quality and adequacy of the decision making *support*. As a result, focusing on, or assessing, an individual's decision making capacity without providing appropriate decision making support presents an inaccurate picture of the person's ability; unnecessarily exposes them to guardianship orders that remove their legal agency; and is not consistent with the UNCRPD.

As part of the review of the Guardianship Act, it would be useful to more broadly consider the role of the Public Guardian in delivering and facilitating supported decision making. For example, there would be merit in considering the potential role the agency could play in training and assisting decision supporters, building on the valuable advice and support the Public Guardian provides to private guardians through its Private Guardian Support Unit. It would also be useful to consider the merits of establishing a pool of volunteer decision supporters who could be matched with individuals who need more intensive decision making support, with the Public Guardian (or other appropriate body) providing training and support, and maintaining a register of supporters. In this regard, it is important to recognise that many people who require decision making support do not have access to family or other informal supports, or may prefer to gain the support from independent parties.

We strongly agree with the views of the Disability Council of NSW that the review of the Guardianship Act, and consideration of an amended decision making framework, must directly involve people with disability. In our view, consultations as part of this review should also facilitate input from people under guardianship and/or financial management.

4. Review of financial management orders

The requirements of Article 12 of the UNCRPD include that:

- all appropriate and effective measures should be taken to ensure the equal right of people with disability to control their own financial affairs, and
- measures relating to the exercise of legal capacity should be proportional and tailored to the person's circumstances, apply for the shortest time possible, and be subject to regular review by a competent, independent and impartial authority and judicial body.

At present in NSW, there are significant differences in the safeguards that apply to a) guardianship orders, and b) financial management orders. While guardianship orders are time-limited and subject to regular review, most financial management orders are not automatically reviewed. In order to have a financial management order reviewed or revoked, an application needs to be lodged with NCAT. In our view, and consistent with the UNCRPD, financial management orders should be time-limited and subject to regular review.

We note that, under section 25P(2) of the Guardianship Act, the Tribunal can revoke a financial management order *only* if it is satisfied that: a) the person is now capable of managing their financial affairs, or b) it is in their best interests that the order be revoked (even if the Tribunal is not satisfied that the person is capable of managing their affairs). The review of the Act needs to include examination of the changes required to align the revocation requirements with the UNCRPD – including shifting from consideration of an individual's 'best interests' to consideration as to the supports provided or necessary to assist the person to manage (or develop capacity to manage) their financial affairs. In this regard, we welcome the current supported decision making project of the NSW Trustee and Guardian (NSWTAG) and Public Guardian, which includes a focus on building the financial decision making ability of people under the financial management of NSWTAG.

5. Intersection with national developments, including the NDIS

In the context of the NDIS and other national reforms, and in line with the ALRC's recommendations, it is vital that a key consideration in the review of the NSW Guardianship Act is the objective of national consistency. Any proposed changes to state and territory legislation relating to people with disability need to be viewed through a national lens and consider mechanisms for facilitating consistency across borders.

In our view, to enable consistent safeguards for vulnerable adults the review should include consideration of the provisions that will be necessary to maximise cross-jurisdictional recognition of arrangements, and to support appropriate sharing of information. In our submission on the proposed NDIS Quality and Safeguarding framework, we emphasised the importance of addressing cross-border information exchange challenges in the context of the development of national disability complaints

and reportable incidents schemes. In relation to the Guardianship Act, information exchange provisions should be focused on ensuring the safety of people with cognitive impairment – including consideration of:

- mechanisms for the Public Guardian (or equivalent) in each jurisdiction to refer complaints or allegations of abuse and neglect to each other for investigation or other appropriate action in response to alleged victims and/or subjects of allegation moving across borders, and
- provisions for the Public Guardian, NSWTAG and/or NCAT to exchange information with relevant state and national bodies (including our office, the National Disability Insurance Agency (NDIA) and/or national oversight body) on matters affecting the safety of a participant or other person with disability – such as information relating to the inappropriate use of restrictive practices, and allegations of abuse and neglect.

On a separate but related note, the review of the Guardianship Act should include consideration of the intersection with Part 5 of the *National Disability Insurance Scheme Act 2013* relating to the appointment, functions and responsibilities of nominees. We note that decisions by an NDIS participant or the NDIA CEO about the appointment of a plan nominee are not necessarily at odds with decisions of state and territory guardianship tribunals regarding who will be appointed as a substitute decision maker for the participant and with what functions. However, the intersection and potential clash in the appointment of NDIS nominees and state and territory guardians/ financial managers will require consideration of effective information exchange provisions or other mechanisms to ensure that state/territory guardianship bodies and the NDIA are making fully informed decisions regarding appointments and are not working at cross purposes. This includes, for example, where information provided to one body raises concerns about the conduct of a person who may be considered by another body as a nominee, guardian or financial manager.

We agree with the view communicated in a range of other submissions to the Commission regarding the importance of the review taking into account the NDIS Quality and Safeguarding framework (the next stage of which is expected in May 2016). In particular, there will be a need for the review to consider the intersection of NSW guardianship systems with key national safeguards, including a mandatory scheme for reporting and responding to allegations of abuse and neglect; and arrangements for the oversight and regulation of restrictive practices.

6. Restrictive practices

Our work points to the need for consistent legislative requirements to be introduced relating to the use of restrictive practices. In particular, our reviews of the deaths of people with disability in residential care have highlighted systemic problems with the use, and regulation, of restrictive practices across residential services, including:

- failure to follow policy in relation to the use of psychotropic medication for some people in disability services, and
- the frequent use of psychotropic medication as a primary behaviour management strategy.[2]

[2] NSW Ombudsman, 2011, *Report of Reviewable Deaths in 2008 & 2009, Volume 2: Deaths of people with disabilities in care*, pp21-22; and NSW Ombudsman, 2013, *Report of Reviewable Deaths in 2010 and 2011, Volume 2: Deaths of people with disabilities in care*.

Our work across a range of functions (including the Disability Reportable Incident scheme; complaints; reviewable deaths; and the Official Community Visitor scheme) has highlighted the inappropriate use of restrictive practices as a behaviour management strategy in the absence of, among other things, positive behaviour support strategies and clear plans for reducing and eliminating their use. The reasons for the person's presenting 'behaviours of concern' are not always explored; and alternative, less restrictive, strategies are infrequently considered. In addition, restrictive practices that are implemented in a residential care environment to reduce risks for one person often restrict the freedom and choices of other residents.

While noting that there is an agreed national framework for reducing and eliminating the use of restrictive practices in the disability services sector, our work has underscored the need for requirements in this area to have legislative force. We consider that there is a need for a nationally consistent legislated approach relating to the use of restrictive practices to increase accountability and transparency, and to ensure that the rights of people with disability are upheld.

We agree with the ALRC that current national work – including development of the NDIS Quality and Safeguarding framework and the National Seclusion and Restraint Project – present a timely opportunity to consider a national approach to reform of restrictive practices. We also support the view of the ALRC that, in order to be effective, 'the regulation of restrictive practices needs to cover the use of restrictive practices in a range of settings',[3] noting that people with disability can be – and are – subjected to restrictive practices in a variety of contexts, including disability, mental health, education, and aged care settings. Given that the NDIS Quality and Safeguarding framework only applies to participants and providers under the NDIS, there is additional work to be done to enable consistent requirements across the NDIS and non-NDIS disability settings, and other support settings.

Importantly, national reforms and the review of the Guardianship Act in NSW provide a valuable opportunity to ensure that the person who is proposed to be subject to the restrictive practice(s) is involved in any decisions regarding its use. In our experience, the person with disability is too often missing from the discussion and decisions in relation to restrictive practices, despite the significant and direct impact of such practices on the individual's rights and autonomy. It is critical that there are legislative requirements regarding the direct involvement of the person and the provision of support to maximise the person's ability to exercise their rights, will and preferences.

As part of our submission on the proposal for an NDIS Quality and Safeguarding framework, we indicated support for the inclusion of the 'independent person' role as part of the restrictive practices authorisation and consent process, and emphasised that, in addition to family or friends, there is a need to have independent individuals who could be appointed to fulfil this role. In this regard, there would be benefit in exploring the potential to have a pool of individuals who could be drawn on for this purpose (in addition to providing other assistance, such as broader decision making support). Our submission also stressed the need for:

- mandatory reporting on the use of restrictive practices, and building on existing online reporting systems in Victoria and NSW to establish a mandatory national reporting system
- effective monitoring and oversight of the use of restrictive practices, including

[3] Australian Law Reform Commission, 2014, *Equality, Capacity and Disability in Commonwealth Laws*, p202.

review of the data and information by an independent body with appropriate expertise (such as a Senior Practitioner role), with legislative requirements and powers regarding visits and inspections; auditing and monitoring the use of restrictive practices; ability to direct a service to discontinue or alter a restrictive practice; public reporting; development of guidelines and standards, and provision of education, training, information and advice

- consideration of the potential role of an industry regulator in relation to restrictive practices (with the related need for the independent oversight body to have jurisdiction over the industry regulator and Senior Practitioner), and
- a range of mechanisms to monitor the use of restrictive practices and report inappropriate use – including Community Visitors, Local Area Coordinators, and advocates.

Following discussion with FACS and the National Mental Health Commission, we have offered to hold a half-day forum with key stakeholders to explore positive practice in relation to the use of restrictive interventions across the disability and mental health sectors – and consider opportunities to advance consistent practice in line with the National Framework.

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