

NSW DISABILITY NETWORK FORUM

Review of the *Guardianship Act 1987*:

Response to Question Paper 4

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Contact the **NSW Disability Network Forum** through the NCOSS secretariat
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About the NSW Disability Network Forum

The NSW Disability Network Forum comprises non-government, non-provider peak representative, advocacy and information groups whose primary purpose is to promote the interests of people with disability. The aim of the DNF is to build capacity so that the interests of people with disability are advanced through policy and systemic advocacy.

NSW Disability Network Forum Member Organisations:

- Being Mental Health and Wellbeing Consumer Advisory Group
- Blind Citizens NSW
- Deaf Australia NSW
- DeafBlind Association NSW
- Deafness Council (NSW)
- First Peoples Disability Network
- Information on Disability and Education Awareness Services (IDEAS) NSW
- Institute for Family Advocacy
- Intellectual Disability Rights Service
- Multicultural Disability Advocacy Association of NSW
- NSW Council for Intellectual Disability
- NSW Council of Social Service (NCOSS)
- NSW Disability Advocacy Network
- People with Disability Australia
- Physical Disability Council of NSW
- Positive Life NSW
- Side by Side Advocacy Incorporated
- Self Advocacy Sydney
- Synapse (Brain Injury Association NSW)

This submission was developed by NCOSS in consultation with the DNF members and approved by NCOSS Deputy CEO.

Introduction

The DNF welcomes the opportunity to respond to the fourth Question Paper of the review of *Guardianship Act 1987 (Guardianship Act)*, dealing with procedures and safeguards. This submission:

- argues that NSW Civil And Administrative Tribunal's powers in relation to the making, review, and revocation of guardianship and financial management orders should be consistent, and in line with Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). In particular, the UNCRPD stipulates that the orders should apply for the shortest time possible.
- recommends safeguards for supported decision-making which do not undermine trust between the supporter and the person they support;
- highlights the importance of Tribunal processes maintaining safeguards and maximising the participation of the person with disability; and
- supports an expanded Public Guardian or a new Office of the Public Advocate being resourced to carry out advocacy and investigative functions. However, the DNF argues strongly that advocacy functions need to compliment those of community based advocacy, and that the continued funding of community based advocacy in NSW is a higher priority than resourcing the Public Guardian or Public Advocate to undertake advocacy functions.

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Question 2.3: Reviewing an enduring guardianship appointment

(1) Are the powers of NSW Civil and Administrative Tribunal to review an enduring guardian appointment sufficient?

The DNF supports the view of its member, the NSW Council of Intellectual Disability that the revised *Guardianship Act* should broaden the powers of NCAT to review an enduring guardianship appointment. This would align the Tribunal's review powers with respect to power of attorney and enduring guardianship orders.

A broadened power of review would strengthen the safeguards provided to people under enduring guardianship and ensure compliance with the UNCRPD.

Question 3.2: Time limits for orders

(1) Are the time limits that apply to guardianship orders appropriate?

The DNF considers that to be consistent with the UNCRPD:

- the 30 day time limit for temporary orders and 12 month time limit for continuing orders can be maintained;
- the criteria for longer orders should be reframed to refer to:
 - “permanent decision-making impairment” instead of disability,
 - “unlikely to be able to make the make the decision with support” instead of “unlikely to become capable of managing his or her person”,

The DNF considers that criteria for longer orders should be that the Tribunal is satisfied that until the end of the longer order, the person will not be able to make relevant decisions with support and the other conditions for making the order are satisfied.

(2) Should time limits apply to financial management orders?

It is important that the revised *Guardianship Act* include time limits for financial management orders, in accordance with the principle of least restriction under the UNCRPD. To ensure consistency, it would be appropriate if the time limit for financial management orders aligned with those for guardianship orders.

Question 3.3: Limits to the scope of financial management orders

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

The DNF believes that the revised *Guardianship Act* should allow the Tribunal to consider which parts of a person's estate should be managed, and this would accord with the principles of proportionality and least restriction in the UNCRPD. Proportionality could be achieved if the *Guardianship Act* used the expression in the *NSW Trustee and Guardian Act 2009*, so that the

Tribunal was permitted to make financial management orders for “the whole or part of the estate of a person”.¹

Question 3.4: When orders can be reviewed

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

The DNF believes that all financial management orders should be periodically reviewed in recognition that the order deprives the person of fundamental rights and the financial manager exercises responsibilities of great consequence.

Regular reviews of financial management orders are necessary to comply with the UNCRPD and would align the processes for reviewing guardianship and financial management orders. In addition, regular reviews would:

- ensure that the order is still required, and that no other less restricted options are available;
- help prevent (or address) abuse and exploitation; and
- remove the onus of seeking a review from the person whose estate is under financial management.

Regular reviews are particularly important where the NSW Trustee is the financial manager since it is a bureaucracy which is not supervised in its role as manager in the way that the Trustee itself supervises private financial managers.

As well as determining whether the financial management order should be revoked or changed, the DNF believes that the Tribunal should also review the management of the person’s estate by the manager. This would recognise that a person’s impaired financial capacity makes it inherently difficult for them to know whether their estate has been properly managed.

Question 3.5: Reviewing a guardianship order

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

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

To accord with the presumption of capacity, the DNF believes the Tribunal should consider the same factors when reviewing a guardianship order as when making it.

We note that this approach is taken in Queensland. The Queensland Civil and Administrative Tribunal must revoke an order following a review unless satisfied that it would appoint a guardian or administrator if a new application was made.²

¹ *NSW Trustee and Guardian Act 2009* (NSW) s 40.

² *Guardianship and Administration Act 2000* (Qld) s 31(2).

Question 3.6: Grounds for revoking a financial management order

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

The DNF believes that grounds of revocation of an order should mirror the grounds of making and reviewing an order.

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

The current “best interests” criteria for revocation of a guardianship order does not align with the UNCRPD.

The DNF endorses the position of the NSW Ombudsman that the Tribunal should instead consider whether the person has necessary supports to manage (or develop capacity to manage) their financial affairs³ or whether there is no longer a need for a financial management order.

Question 5.1: A statement of duties and responsibilities

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

The DNF considers that the *Guardianship Act* or *Regulations* should contain a statement of duties and responsibilities to apply to guardians and financial managers. Such a statement could enhance the party’s understanding of their obligations, and help to ensure these obligations are fulfilled.

- (2) If so:

- a. What duties and responsibilities should be listed in this statement?

The DNF endorses many of the duties and responsibilities identified in the Question Paper⁴. We believe that guardians and financial managers should be required to:

- exercise their powers honestly and with reasonable diligence;
- be familiar with the personal circumstances of the person who is the subject of a guardianship order;
- communicate with the represented person throughout the decision-making process and explain, as far as possible, decisions being made on their behalf;
- obtain instructions from the represented person where practical;
- treat the person with dignity and respect; and
- identify and respond to situations where the substitute decision maker’s interests conflict with those of the represented person, ensure the represented person’s interests are always the paramount consideration, and seek external advice where necessary.

³ NSW Ombudsman, *Preliminary Submission PGA41*, 6.

⁴ Question Paper [5.9]-[5.13].

In addition, the DNF endorses the rule proposed by the Victorian Law Reform Commission and the Australian Law Reform Commission that guardians and financial managers should be prevented from entering unauthorised transactions involving conflict of interest.⁵

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

The DNF supports the proposal that guardians and administrators sign an undertaking to comply with their responsibilities.⁶ This personal accountability may lead guardians and financial managers to have a greater interest in understanding their roles and responsibilities.

It is crucial that guardians and financial managers are provided with training about their roles and responsibilities both prior to commencing the role and on a regular basis while they are serving in their position.

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

The DNF believes that the statement of duties and responsibilities could provide a standard against which the actions of substitute decision makers can be measured where necessary, for example, when the Tribunal is considering their reappointment. In the majority of cases, we consider that financial penalties are inappropriate given that guardians and financial managers assume their positions as a result of a personal relationship with the supported person and are unpaid. However, the Tribunal should have discretion to impose penalties in cases of serious misconduct.

⁵ Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 120–123.

⁶ Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 295, rec 296; Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 6-2.

Question 6.1: Safeguards for a supported decision-making model

(1) If NSW introduces a formal supportive decision making model, what safeguards should this model have?

The DNF endorses the safeguards for supported decision-makers outlined in the Question Paper.

Statement of duties and responsibilities

Supporters should have the following duties:

Positive duties	Negative duties
<ul style="list-style-type: none">▪ to assist the supported person to weigh the information, evaluate the options and come to a decision▪ to assist the supported person to obtain information and to explain the information in a way the person can understand⁷▪ to notify the Tribunal or a government body if they believe the supported person no longer consents to their arrangement⁸	<ul style="list-style-type: none">▪ not to coerce, intimidate or unduly influence the supported person into taking a particular course of action⁹▪ not to make a decision on behalf of the supported person¹⁰▪ not to act without the supported person's knowledge and consent¹¹

In undertaking their positive duties, supporters should draw upon the knowledge and understanding of others in the person's life, in order to develop a full understanding of the person's will and preference.

Monitors

The DNF believes monitors could act as an effective safeguard, providing guidance to supporters.

We endorse the powers and duties of a monitor in British Columbia, namely;

- visiting and speaking with the represented person at any reasonable time;
- requiring the representative to produce accounts and other records, or to prepare a report on a specific matter if there is reason to believe they are not complying with their duties ; and

⁷ *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(1)(a)–(b), s 19(1)(a), (c); Guardianship and Administration Bill 2014 (Vic) cl 103(1)(e) (lapsed).

⁸ Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 56, rec 87.

⁹ Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 48, rec 77; Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) proposal 5-6.

¹⁰ *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(2); Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.107], rec 45, rec 74.

¹¹ Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.107], rec 45, rec 74.

- informing the Public Trustee and Guardian if the monitor still has reason to believe the representative is not complying with their duties.¹²

Public Advocate setting standard for support decision-making

The Public Guardian or Public Advocate could play a role in setting standards for supported decision-makers, as well as reviewing complaints about them.

Reporting and record-keeping

The DNF endorses the Victorian Law Reform Commission recommendation that the Tribunal require co-decision makers who have the power to assist a person to make formal decisions to lodge annual accounts.¹³

Revocation

The DNF supports the following recommendations of the Victorian Law Reform Commission regarding the revocation of supported decision-making arrangements.

- a person should be able to review their supported decision-making arrangement at any time; and
- supporters and co-decision makers should notify the Tribunal if the supported person no longer consents to the arrangement or no longer has the capacity to make a decision with support.¹⁴

Review mechanisms

Regular reviews of supported decision-making arrangements are an important element of ensuring compliance with the UNCRPD.

The DNF endorses the Victorian Law Reform Commission recommendations for:

1. An ability for any person with an interest in the affairs of either party to a co-decision-making arrangement to apply for a review if:
 - the supported person no longer consents to the order;
 - the supported person or the co-decision-maker no longer has capacity to participate in co-decision-making;
 - the co-decision-maker is acting in breach of their responsibilities;
 - the order is no longer appropriate to the needs of the [supported] person; and
 - the order is contrary to the personal and social wellbeing of the supported person.¹⁵

¹². *Representation Agreement Act 1996* (British Columbia) s 20.

¹³. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 84.

¹⁴. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 56.

¹⁵ Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 81–82.

2. An automatic review of supported decision making arrangements in the first twelve months.¹⁶ Subsequently, we recommended that supported decision-making arrangements be reviewed every two years, like other orders.

Following a review, the tribunal should be able to continue, amend or revoke is supported decision-making arrangement, with the person's consent.

Question 7.1: Assisting people without guardianship orders

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

The DNF supports the Public Guardian or Public Advocate being empowered to assist people with disability who are not under guardianship. This would help to ensure that substitute decision-making was implemented as a last resort, in accordance with the UNCRPD.

Particular roles for the Public Guardian or Public Advocate could include:

- monitoring and reviewing service delivery to people with decision-making impairment;
- setting standards and guidelines for supported decision-makers, as well as reviewing complaints; and
- conducting education about guardianship and guardianship processes

However, we emphasise that maintaining community based advocacy would enhance these functions. Community based advocacy faces an uncertainty funding future from June 2018 because the whole of the NSW Government disability budget will be transferred to the Commonwealth to fund the NDIS. It should be higher government priority to fund community-based advocacy is because it is more grounded in the lived experience of people with disability than the Public Guardian or Public Advocate can be.

Question 7.2: Potential new systemic advocacy functions

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

The DNF believes the Public Guardian or Public Advocate should be explicitly empowered to advocate with government agencies, service providers and others on issues where its guardianship of individuals showed a need for systemic solutions either for those specific individuals or for people with disability in general. This could include recommending new programs, or improvements to existing programs, to meet the needs of people with disability, as in the case in South Australia.¹⁷

We emphasise advocacy functions of the Public Guardian or Public Advocate do not replace the crucial work done by individual and systemic advocacy in the community. Advocacy funded by Government and non-government organisations can make complementary contributions to

¹⁶ Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 49, rec 80. See also *Guardianship and Administration Bill 2014 (Vic)* cl 180(1) (lapsed).

¹⁷ *Guardianship and Administration Act 1993 (SA)* s 21(1)(b).

protecting the rights of people with disability. As highlighted in the response to Question 7.1, we strongly believe that funding community-based advocacy should be a higher priority than empowering the Public Guardian or Public Advocate to perform systemic advocacy functions.

Question 7.3: Investigating the need for a guardian

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

The DNF believes it is more appropriate for Tribunal staff to carry out this function as the Public Guardian has a conflict of interest in that the results of its investigation will influence its own caseload.

Question 7.4: Investigating suspected abuse, exploitation or neglect

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

The DNF considers it is important that the Public Guardian or Public Advocate be empowered to investigate the suspected cases of abuse, exploitation or neglect.

The Public Guardian or Public Advocate should also be empowered to investigate the conduct of guardians or substitute decision-makers.

Question 7.5: Investigations upon complaint or “own motion”

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

The DNF emphasises the importance of the Public Guardian or Public Advocate having the power to initiate inquiries on its own motion, as well as respond to inquiries referred by the Minister. Own motion inquiries would allow the Public Guardian to act as an early warning system, proactively investigating issues of concern to prevent crisis. Additionally, inquiries initiated by the Public Guardian or Public Advocate could allow it to raise awareness of issues affecting people with impaired capacity.

Question 7.6: Powers to compel information during investigations

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

The DNF agrees with the Victorian Law Reform Commission that the Public Guardian or Public Advocate should be able to require someone to provide:

- specified documents or other materials relevant to an investigation, and
- written answers to questions or answer questions in person.¹⁸

¹⁸. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 330.

Question 7.7: Powers of search and entry

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

We agree with the NSW Legislative Council Standing Committee and the Australian Law Reform Commission that the Public Guardian or Public Advocate, should have powers to investigate cases of abuse, neglect and exploitation of ‘vulnerable adults’.¹⁹ This would allow the Guardian or Advocate to play a role in the prevention of elder abuse and the abuse of people with disability, regardless of age.

Question 8.1: Composition of the Guardianship Division and Appeal Panels

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

The DNF believes it is important for the revised *Guardianship Act* to maintain a requirement for guardianship applications and reviews to be heard by three member panels. Given the gravity of matters being considered, it is appropriate that the experience and expertise of three people be utilised when hearing an application or review.

We do not believe the *Guardianship Act* should allow discretion in relation to the size of panels. DNF members with experience in guardianship advise that where discretion had been allowed in other jurisdictions, budget restrictions have driven the tribunal to the predominant use of single member panels.

Question 8.3: The requirement for a hearing

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

The DNF believes it is critical that the revised Guardianship Act maintain the requirement for a hearing in all substantive matters. Guardianship matters are dealing with fundamental human rights, and the UNCRPD requires that the person with disability has maximum opportunity to participate in the determination of their rights. We stress that the majority of people subject to guardianship proceedings would struggle to participate in the process via written submissions.

The DNF is concerned that once the discretion to relax a requirement for a hearing is allowed, budget restrictions will lead to the discretion being waived in a high proportion of cases.

¹⁹ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 2016) Elder Abuse in New South Wales ([8.79–8.80], rec 11 ; Australian Law Reform Commission (2016) Elder Abuse Discussion Paper, Proposals 3-1-3-3.

Question 8.7: Representation of a client with impaired capacity

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

The DNF believes the Guardianship Act should contain a provision similar to the Mental Health Act 2007 so that a person's decision-making impairment is presumed not to prevent them from being represented. Alternatively, capacity to instruct could be defined at a minimal level. It is critical that people facing actual or potential restrictions in liberty have their interests independently represented.