

**Responses to Questions on Notice  
Standing Committee on Law and Justice  
Inquiry into Opportunities to Consolidate Tribunals**

**NSW Trustee and Guardian & Public Guardian Response**

***Q 1 CHAIR: You said they showed an interest. Is it a model they followed?***

Hong Kong supports a Guardianship Board, a tribunal based on the NSW Guardianship Tribunal. Delegates from the Hong Kong visited Australian guardianship agencies in the 1990s and chose to follow the NSW model. In April 1999 training for tribunal members and doctors and social workers from the Social Welfare Department was provided by Nick O'Neill, then President NSW Guardianship Tribunal and John Le Breton, then Director, NSW Office of the Public Guardian.

The Hong Kong Guardianship Board closely followed NSW guardianship legislation with these key features:

- Three member tribunal
- Pre-hearing investigation and information
- Informal atmosphere
- Inclusion of the person subject to the application
- Written reasons for decisions for all matters

I am aware that the Hong Kong Law reform Commission concluded a report in 2001 into Enduring Powers of Attorney: Personal Care. It is my understanding that the Hong Kong Guardianship Board's jurisdiction it to be expanded to include review of these powers. The Board is in contact with the Guardianship Tribunal of NSW and it would appear that they may follow, in all or in part, the processes used in NSW.

The Singapore government visited NSW in 1999. The Singapore government has recently introduced legislation based on the UK Mental Capacity Act model based on supported decision making and they promote 'Lasting Power of Attorney' (similar to NSW 'Enduring Guardianship' and 'Enduring Power of Attorney'). Their model of substitute decision making appears to be more restrictive than Australian models.

***Q 2 The Hon. PETER PRIMROSE: One of my experiences here is that particularly subnational governments often overlook the international obligations which they are also parties to. I was impressed by the fact that you made reference in your initial address to those and our international treaty obligations. Without being restricted to our international obligations, could you talk about what in your view are the overarching principles and obligations that should underpin our considerations of our terms of reference?***

Australia has ratified UN Convention on the Rights of Persons with Disabilities (the Convention) and demonstrated its commitment to the rights of people with disabilities by signing the Optional Protocol to the Convention. The UN Committee on the Rights of Persons with Disabilities can therefore receive complaints from individuals alleging violation of the Convention by Australia and inquire into complaints of grave or systemic violations of the Conventions. NSW Government agencies may be required to contribute to Commonwealth responses to the Committee if a complaint is made about matters that fall within its responsibility.

The articles of the Convention affirm that people with disabilities have the right to equality before the law. Of specific relevance to guardianship:

- Article 12: states are obliged to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.'
- Article 12 sets out safeguards to limit restrictions places on a person's decision-making capacity.
- Article 13: states must ensure effective access to justice including as participants and in preliminary stages of legal proceedings.
- Article 14: sets put the rights to liberty and security
- Article 17 protects the physical and mental integrity of the person.
- Article 19 sets out the right to live independently and be included in the community

NSW guardianship legislation meets the requirements of the Convention and is advanced in the area of dealing with capacity. The NSW Guardianship Tribunal has expertise and is an international leader in protecting the rights of people subject to substitute decision making. Protection and inclusion are offered through such mechanisms as:

- the statement of principles in section 4 of the Guardianship Act and s39 of the NSW Trustee and Guardian Act
- the three-member, multi-skilled tribunal with expertise in varied disability issues and in conducting hearings with vulnerable people with limited capacity
- prehearing investigation and services aimed at diverting applications to less restrictive alternatives and increasing the involvement of the person subject to the application
- informal and inclusive legal processes – in style and environment
- limited orders
- appeal rights
- written reasons for decisions in every matter

The Principles of the Guardianship Act (section 4) and NSW Trustee and Guardian Act (section 39) state:

- (a) the welfare and interests of such persons 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 of such persons should be recognised
- (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) Guardianship Act only) the community should be encouraged to apply and promote these principles

As different to other tribunals, the Guardianship Tribunal is not involved in dispute resolution. The Tribunal deals with dispute and conflict but its role is to make extremely personal, intimate decisions in a person's best interests and about their human rights. The most comparable tribunal, the Mental Health Review Tribunal, makes decisions about a person's best interests (need for treatment) but also considers the interests of the community (need for protection). The Guardianship Tribunal focuses solely on the needs and interests of the person with disability and incapacity.

People subject to applications before the Guardianship Tribunal have not brought the applications themselves and do not operate on a level playing field that solely requires adjudication between individuals or individuals and organisations. The Guardianship Tribunal is accessible to people with disabilities at a physical level but also at emotional and cognitive levels. The skills to gain a person's view and enable their participation in the hearing require experience and expertise. Not all skills are held by one person; a successful hearing requires the skills of a panel.

The current Guardianship Tribunal structure is consistent with the NSW Government's commitment to a person centred approach for people with disabilities, within the second phase of *Stronger Together* (Ageing Disability and Home Care). This approach places the person with disability at the person with a disability at the centre of decision making about the supports and services they use.

Human rights are achieved only partially by law - the rest is up to the way in which the law is enacted. Different tribunals are set up for different purposes and need different types of judicial decision making. Allowing a Tribunal that supports the human rights of people with disabilities to its work continue work, represents a commitment to the enforcement of rights rather than simple statement.