Submission No 25

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

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18 September 2009

Blake Dawson Pro Bono Team Submission to the Standing Committee on Social Issues' Inquiry into substitute decision-making for people lacking capacity

Thank you for the opportunity to make submissions on the important issue of better providing for financial management and guardianship of people with impaired capacity.

Attached please find submissions from the Blake Dawson Pro Bono Team. The views in those submissions are those of the team and not necessarily those of the Firm or its clients.

Please do not hesitate to contact Anne Cregan on 9258 6179 or Sam Indyk on 9258 5942 if you have any questions.

Yours faithfully

Blake Dawson

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INTO SUBSTITUTE DECISION-MAKING
FOR PEOPLE LACKING CAPACITY

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The opinions expressed in these submissions are those of the Blake Dawson Pro Bono Team and not necessarily those of the Firm or its clients

1. EXECUTIVE SUMMARY

We welcome the opportunity to make submissions to the Standing Committee on Social Issues Inquiry.

The laws which govern a person's capacity to make legally binding decisions, and the appointment of substitute decision-makers, are important and timely topics for inquiry.

In New South Wales there are currently different definitions and tests to determine whether or not a person has capacity. The goal of achieving greater consistency in these laws was recognised by the Attorney-General in the second reading speech for the recently commenced *NSW Trustee and Guardian Act 2009* (NSW) (**TGA**).

We recommend that any legislative reform should generally focus on promoting consistency in the various approaches to determining a person's capacity and appointing a substitute decision-maker.

Reform of the law in this area should also support the general principles reflecting the rights and interests of people with intellectual disability or mental illness, as reflected in s 4 of the *Guardianship Act 1987* (NSW) (the **Guardianship Act**) and s 39 TGA and Australia's obligations under the *United Nations Convention on the Rights of Persons with Disabilities* (**UNCRPD**).

Our specific recommendations for reform are directed at six areas of the law applying to capacity and substitute decision-making:

(a) The inconsistencies within and between the Guardianship Act and the TGA (set out in **section 5**).

(b) The interpretation of the meaning of "need" under s 25G(b) of the Guardianship Act and the test whether or not a person is "capable of managing his or her own affairs" (set out in **section 6**).

(c) The definition of "capable of managing one's own affairs" in light of the test in *R v PJS* (set out in **section 7**).

(d) The need for an automatic periodic review of financial management orders to consider whether or not the order is still required and to review the performance of the financial manager (set out in **section 8**).

(e) The need for a statutory applicant to seek a financial management order when no other applicant is available (set out in **section 9**).

(f) The need for certainty in situations where a person is required to make decisions but there is no mechanism for the appointment of a substitute decision-maker (set out in **section 10**).

We summarise our recommendations in section 2.

2. SUMMARY OF RECOMMENDATIONS

Recommendation 1

We recommend that s 25E(2) of the Guardianship Act be amended to state:

> *The Tribunal may make an order for the management of the whole or part of the estate of a person.*

Recommendation 2

We recommend that the Guardianship Act and TGA be amended to fix the duration of financial management orders made by the Tribunal and the Court.

Recommendation 3

We recommend that the Guardianship Act and the TGA be amended to require automatic review of financial management orders made by the MHRT under ss 44 and 45 of the TGA on release of the person the subject of the order from the mental health facility.

Recommendation 4

We recommend that the TGA be amended to adopt the criteria for making a financial management order under s 25G of the Guardianship Act.

Recommendation 5

We recommend that the TGA and the Guardianship Act be amended to require the Tribunal, Court and MHRT to have regard to the views of:

(a) the person the subject of the application;

(b) their spouse if any, if the relationship is close and continuing; and

(c) their carer

when determining whether or not to make a financial management order.

Recommendation 6

We recommend that the Guardianship Act and the TGA be amended to expressly require the Tribunal, the Court and the MHRT to have regard to the practicability of managing a person's estate without the need for a financial management order when determining whether or not to make such an order.

Recommendation 7

We recommend that the Guardianship Act and the TGA be amended to provide that a person may apply for a financial management order over their own estate.

Recommendation 8

We recommend that the Guardianship Act and TGA be amended to require that the factors in s17(1) of the Guardianship Act must be considered by the Court, Tribunal and MHRT when determining who to appoint as financial manager.

Recommendation 9

We recommend that the TGA be amended to give the MHRT power to appoint a person other than the NSW Trustee as a financial manager.

Recommendation 10

We recommend that the Guardianship Act and the TGA be amended to state the functions of a financial manager (such functions to be subject to any order of the Court or Tribunal enhancing or limiting those functions).

Recommendation 11

We recommend that the Guardianship Act be amended to allow a person the subject of financial management to request a review of the appointment of the particular financial manager.

We further recommend that the TGA be amended to give the Court express power to review a financial management order and the appointment of a particular financial manager.

Recommendation 12

That the TGA and Guardianship Act be amended to adopt an inclusive definition of "capable of managing his or her affairs" which enables a limited financial management order to made in circumstances where a person can manage their day-to-day affairs but not a particular aspect of their estate.

Recommendation 13

We recommend that all financial management orders be reviewed every three years. The Court or Tribunal must consider in the review whether or not the person is capable of managing their own affairs, and, if the order is to be renewed, the performance of the financial manager.

3. INTRODUCTION

3.1 Terms of Reference

The terms of reference of the Standing Committee on Social Issues' Inquiry into substitute decision-making for people lacking capacity (**Inquiry**) are:

"*1. That the Standing Committee on Social Issues inquire into and report on the provisions for substitute decision-making for people lacking capacity in New South Wales, and in particular:*

(a) whether any NSW legislation requires amendment to make better provision for:

(i) the management of estates of people incapable of managing their affairs; and

(ii) the guardianship of people who have disabilities.

2. That the committee report by February 2010."

In the Attorney-General's request (by letter dated 30 June 2009 to the Hon Ian West MLC) that the Standing Committee on Social Issues conduct the Inquiry, the Attorney-General noted that:

As part of the reference the Committee could consider whether the following amendments should be made:

(i) Amend the NSW Trustee & Guardian Act 2009 to allow the relevant Court or Tribunal to exclude parts of an estate from financial management (similar to section 25E of the Guardianship Act 1987).

(ii) Amend the NSW Trustee & Guardianship Act 2009 to allow the Supreme Court or the Mental Health Review Tribunal (MHRT) to vary or revoke an order (even where the person remains incapable of managing their affairs) on the application of a person who, in the opinion of the Supreme Court or the MHRT, has a genuine concern for the welfare of the protected person.

(iii) Amend the NSW Trustee & Guardianship Act 2009 to allow the MHRT to appoint a private manager.

3.2 Blake Dawson's experience

Blake Dawson is a national (and international) law firm. For the last decade a focus of our pro bono program has been assisting people with mental illness and/or intellectual disability and their carers. In NSW that aspect of our practice includes:

- seconding a lawyer full-time to the Intellectual Disability Rights Service;
- acting for people with intellectual disability and/or mental illness in a range of matters including to defend applications for substitute decision-makers, to apply to revoke a substitute decision-maker, to make a Power of Attorney or Appointment of Enduring Guardian, on criminal charges, in apprehended violence order applications, tenancy, in *Family Provision Act* claims, in credit and debt matters, to apply for victims' compensation, in discrimination and employment claims and in negotiating with the Office of the Protective Commissioner (**OPC**);
- acting for parents and carers of people with intellectual disability and/or mental illness in a range of matters including applying for a substitute decision-maker for

the person they care for and in drafting wills with complex trusts to support the person they care for into the future;

- giving talks to parents, carers and caseworkers for people with intellectual disability and/or mental illness, primarily on substitute decision-making and estate planning but also on recognising legal issues and common areas of concern for people with impaired capacity; and

- liaising with and/or supporting a number of not-for-profit service providers and their clients including the Intellectual Disability Rights Service, the Disability Discrimination Legal Centre, People with Disability Australia, Ability First and Northcott.

In addition to the work outlined above, Blake Dawson conducts a legal clinic each week at Lou's Place (a day centre for women in crisis in Kings Cross) and the Exodus Foundation at Ashfield. More than half our clients at each clinic have an intellectual disability and/or a mental illness.

In addition to acting for people within our focus group, from time-to-time we also act for other people with cognitive impairment and their carers including people with dementia or acquired brain injury.

Conservatively, we have acted for more than 1,500 people with an intellectual disability and/or mental illness and their carers in the last 10 years. Our submissions are based on our experience in undertaking the work outlined above and on the general feedback we receive from our clients (both people with impaired capacity and their carers).

3.3 General approach to substitute decision-making

In this submission, we refer to the capacity of a person as the person's ability to make legally binding decisions. We note that there are different definitions and tests to determine whether or not a person has capacity in New South Wales. We recommend that legislative reform should generally focus on promoting consistency in the various approaches to determining a person's capacity and appointing a substitute decision-maker.

The desirability of this goal was acknowledged by the Attorney-General John Hatzistergos in the second reading speech for the recently commenced TGA:

> *"The powers in the Protected Estates Act and the Guardianship Act are not identical in every regard. Consistency is desirable to bring the same level of flexibility to the making of orders in each jurisdiction, to prevent forum shopping and to ensure that the least restrictive approach is encouraged in each court and tribunal. Ideally, the making of an order, or not, should not depend on the forum in which the application is brought."*[1]

Blake Dawson submits that any legislative reform of substitute decision-making should, where possible, be grounded in a "decision-specific" approach. Such an approach is consistent with Article 3A of the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**) as it is respectful of each person's ability and autonomy, acknowledging that people with impaired capacity may lack capacity to make some decisions but retain capacity to make other decisions.[2] A decision-specific approach is also consistent with a least restrictive approach which is one of the stated principles in the Guardianship Act (s 4(b)) and TGA (s39(b)).

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1 NSW Attorney-General, the Hon. John Hatzistergos MLC, Second Reading Speech, *NSW Trustee and Guardian Bill*, 23 June 2009.

2 Australia ratified the UNCRPD on 17 July 2008.

We do not support a "status" approach to decision-making which determines the need for a substitute decision-maker on the basis of the form or severity of a person's mental illness or intellectual disability. We consider that such an approach is incompatible with the least restrictive approach. Nor do we support an "outcomes" approach, which considers the result or quality of a decision rather than the person's capacity to make the decision.

Having noted these general principles, in our experience there are circumstances where a decision-specific approach may be counter-productive to the person with impaired capacity achieving their desired outcome or may otherwise be against that person's best interests. As lawyers, in our experience the clearest example of this situation is where a person lacks capacity to make most and/or major decisions in their legal proceedings. The time-sensitive nature of legal proceedings and the inter-related nature of the decisions required in the conduct of proceedings make it unworkable to take a decision-specific approach for each step in the process for some clients.

In such circumstances, Blake Dawson proposes that a "functional" approach should be adopted, which focuses on the function or purpose which the person is trying to achieve, rather than the individual decisions in that process.

While generally supportive of a presumption in favour of capacity we note that such a presumption can, in practice, conflict with the obligation on government to protect people with disabilities from exploitation as required by Article 16 of the UNCRPD. An example of where the presumption in favour of capacity was applied to the detriment of a person with impaired capacity is discussed in Case Study C at p20 below.

4. OVERVIEW OF AREAS IN WHICH WE CONSIDER LEGISLATIVE REFORM IS REQUIRED

We have confined our submissions to the management of estates as our experience with guardianship orders is limited.

Broadly, the areas we consider require legislative reform to make better provision for the management of estates of people incapable of managing their affairs are:

(a) the inconsistencies within and between the Guardianship Act and the TGA;

(b) the interpretation of the meaning of "need" under s 25G(b) of the Guardianship Act;

(c) the definition of "capable of managing one's own affairs" in light of the test in *R v PJS*;

(d) the need for an automatic periodic review of financial management orders to consider whether or not the order is still required and to review the performance of the financial manager;

(e) the need for a statutory applicant to seek a financial management order when no other applicant is available; and

(f) to create certainty in situations where a person is required to make decisions but there is no mechanism for the appointment of a substitute decision-maker.

Below we discuss each area in turn.

5. INCONSISTENCIES WITHIN AND BETWEEN THE GUARDIANSHIP ACT AND THE NSW TRUSTEE AND GUARDIAN ACT

We have summarised aspects of the legislative powers of the Guardianship Tribunal (the **Tribunal**), the Supreme Court (the **Court**) and the Mental Health Review Tribunal (the

MHRT) to make financial management orders in Annexure A. As can be seen from the table at Annexure A there are inconsistencies between the Court and Tribunals.

Set out below are our observations and recommendations in relation to those powers.

5.1 Scope of financial management orders

The letter from the Attorney-General of NSW to the Chair of the Committee asks whether the TGA should be amended to allow the relevant court or tribunal to exclude parts of an estate from financial management, similar to s 25E of the Guardianship Act.

The TGA currently provides under s 40 that an order may be made "for the management of the whole or part of the estate of a person".

Section 25E(2) of the Guardianship Act provides that an order "may exclude a specified part of the estate from the financial management order."

We agree that there should be consistency between the Guardianship Act and the TGA. However, we consider that rather than amending s 40 of the TGA, s 25E of the Guardianship Act should be amended to conform with the TGA.

Under s 25E of the Guardianship Act, the starting point is that the whole of the estate will be managed except the parts of the estate the Tribunal then excludes. In contrast, under s 40 of the TGA, the Court or Tribunal is required to decide which part or parts of a person's estate will be committed to management or whether the whole estate is to be so committed. Under s 25E the Tribunal is looking at what to *ex*clude from management but under s 40 the Court or Tribunal is looking at what to *in*clude. The approach under s 40 is more consistent with a presumption of capacity and with applying the least restrictive alternative than the approach under s 25E. It supports the general principles in the legislation at s 4 Guardianship Act and s 39 TGA, including that:

- the freedom of decision and freedom of action of persons should be restricted as little as possible; and
- persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs.

Recommendation 1

We recommend that s 25E(2) of the Guardianship Act be amended to state:

The Tribunal may make an order for the management of the whole or part of the estate of a person.

5.2 Duration of financial management orders

Guardianship orders made by the Tribunal can only be made for a maximum of 5 years (s18(1A)(b) Guardianship Act). Financial management orders, though, may be made for an indefinite period by the Tribunal, Court and the MHRT. We submit that a regime where the term of a guardianship order is limited but a financial management order may continue indefinitely is inconsistent and unjustified.

The indefinite appointment of financial managers conflicts with the general principles of the Guardianship Act and the TGA, and with the UNCRPD, particularly that the freedom of decision and freedom of action of persons should be restricted as little as possible and that the autonomy of a person should be respected.

Recommendation 2

We recommend that the Guardianship Act and TGA be amended to fix the duration of financial management orders made by the Tribunal and the Court.

If the MHRT decides a person should be detained in a mental health facility ss 44 and 45 of the TGA require that the MHRT consider whether or not the person is able to manage his or her affairs. If the MHRT is satisfied the person is not capable of managing his or her affairs, the MHRT must order that the person's estate be subject to management. Such an order (unless it is specified as an interim order under s 47 of the TGA) is of indefinite duration.

The MHRT exists primarily to determine whether or not a person with a mental illness should be treated and/or detained without their consent. While it is appropriate and efficient for the MHRT to consider a person's ability to manage their financial affairs if the person is to be detained in a mental health facility, we submit that a financial management order made by the MHRT should be automatically reviewed by the Tribunal when the person the subject of the order is released from the mental health facility.

The Tribunal's expertise is in considering whether or not a person requires assistance managing their affairs. The MHRT's expertise is largely in considering whether or not a person requires medical treatment against their will. Given the difference in focus of the Tribunal and the MHRT it is appropriate that the Tribunal determine whether or not a person should be subject to financial management on an ongoing basis.

Financial management orders made by the MHRT should be automatically reviewed on the release of the person from the mental health facility given the episodic nature of many mental illnesses. Further, on release from the mental health facility the person should be better able to express their view on whether or not they are able to manage their affairs. The person should not be required to initiate a review of the order, but rather a review should occur as a matter of course. This is consistent with the least restrictive alternative in the given circumstances.

Recommendation 3

We recommend that the Guardianship Act and the TGA be amended to require automatic review of financial management orders made by the MHRT under ss 44 and 45 of the TGA on release of the person the subject of the order from the mental health facility.

5.3 Grounds for an order

There is inconsistency between the matters which must be proven before a financial management order may be made, on the one hand by the Tribunal, and on the other, by the Court and the MHRT.

Under s 25G of the Guardianship Act, the Tribunal must be satisfied that:

(a) the person is not capable of managing their affairs; and

(b) there is a need for another person to manage those affairs on the person's behalf; and

(c) it is in the person's best interests that the order be made.

The Court and the MHRT are only required to find that a person is not capable of managing their affairs.

We submit that the TGA should be amended to incorporate the additional criteria for making a financial management order in s 25G of the Guardianship Act. Such a reform

would promote consistency in determining whether or not a financial management order should be made. It would also give effect to the general principles in s 39 of the TGA which govern the making of such orders under the TGA, particularly that:

(a) the welfare and interests of the person the subject of the order should be given paramount consideration; and

(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible.

Recommendation 4

We recommend that the TGA be amended to adopt the criteria for making a financial management order under s 25G of the Guardianship Act.

5.4 Consideration of the views of the person

We note that when the Tribunal is determining whether or not to make a guardianship order it is required under s 14(2) Guardianship Act to consider the views of:

(a) the person;

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

(c) the person, if any, who has care of the person.

When making a financial management order the Tribunal, Court and the MHRT are not required to consider the views of these people.

We submit that the views of the person, their spouse and carer should be considered when determining whether or not to make a financial management order.

Recommendation 5

We recommend that the TGA and the Guardianship Act be amended to require the Tribunal, Court and MHRT to have regard to the views of:

(a) the person the subject of the application;

(b) their spouse if any, if the relationship is close and continuing; and

(c) their carer

when determining whether or not to make a financial management order.

5.5 Consideration of the availability and appropriateness of informal decision-making arrangements

When considering whether or not to make a guardianship order, the Tribunal is required to have regard to the practicability of services being provided to the person without the need for the making of such an order: s 14(2)(d).

We note that material published by the Tribunal suggests that when making a financial management order it will similarly consider whether informal decision-making is working for the person. However, the legislation does not require the Tribunal to consider informal decision-making.

We accept that while it may be practicable to provide services to a person who lacks capacity to make legally binding decisions without a guardianship order in place, it may be

less practicable to manage the financial affairs of a person who lacks capacity without a financial management order. However, notwithstanding this we submit that the practicability of informal assistance is relevant to the need for a financial management order and should at least be considered in determining whether or not to make such an order.

Recommendation 6

We recommend that the Guardianship Act and the TGA be amended to expressly require the Tribunal, the Court and the MHRT to have regard to the practicability of managing a person's estate without the need for a financial management order when determining whether or not to make such an order.

5.6 Who can apply for a financial management order

The TGA and Guardianship Act do not expressly allow a person to apply for a financial management order for themselves.

The legislation governing applications for financial management orders in the Tribunal, the Court and the MHRT states that a person with a "genuine concern" for the welfare of the person or a "sufficient interest" in the matter may make an application. While this may include the person themselves, we note s 9 of the Guardianship Act expressly states that an application for a guardianship order may be made by the person who would be subject to such an order.

Allowing a person to apply for a financial management order over their own estate supports the general principle in the legislation that the views of such persons should be taken into consideration. We submit that the legislation should expressly state a person can seek a financial management order on his or her own behalf.

Recommendation 7

We recommend that the Guardianship Act and the TGA be amended to state that a person may apply for a financial management order over their own estate.

5.7 Who may be appointed as a financial manager?

Factors to consider when appointing a financial manager other than the NSW Trustee

Where the Tribunal appoints a guardian it must be satisfied that:

(a) their personality is generally compatible with the person under guardianship;

(b) there is no undue conflict of interest, particularly financial interests; and

(c) the proposed guardian is willing and able to exercise their functions: Guardianship Act s 17(1).

Where a person other than the NSW Trustee is appointed by the Tribunal or the Court to be a person's financial manager the only requirement is that they are "suitable". This term is not defined in either the Guardianship Act or the TGA.

In the same way guardians are closely involved in the life of a person under guardianship, a financial manager will have frequent and direct contact with the person whose estate they manage and substantial control over their day-to-day lives. We submit therefore that the s 17(1) criteria should apply in the appointment of a financial manager.

Recommendation 8

We recommend that the Guardianship Act and TGA be amended to require the factors in s 17(1) of the Guardianship Act must be considered by the Court, Tribunal and MHRT when determining who to appoint as financial manager.

MHRT power to appoint a financial manager other than NSW Trustee

We note question (iii) in the Attorney-General's letter of 30 June 2009. We submit that the MHRT should have a power to appoint a person as a financial manager other than the NSW Trustee.

The legislative rationale for restricting the MHRT to appointing only the NSW Trustee as a financial manager is not clear from the current TGA, its second reading speech or the explanatory notes.

We have reviewed the precursor to the TGA, the now repealed *Protected Estates Act* 1983 (NSW). In that Act, section 23 provided:

> *"Where, pursuant to a direction or an order of a Magistrate or a prescribed authority, a protected person is detained in a mental health facility, the estate of the person is, without further authority than this section but subject to any special order of the Court, committed to the management of the Protective Commissioner."*

The requirement that the MHRT only appoint the NSW Trustee appears to be a hold-over from the out-dated and now repealed law that the estate of a person detained in a mental health facility was automatically subject to financial management.

Now that this presumption has been repealed, we submit the MHRT should be able to appoint a financial manager other than the NSW Trustee. However, we submit that the MHRT should have choice as to who it appoints as financial manager. The MHRT should consider whether or not the proposed manager's personality is compatible with that of the person the subject of financial management, any conflicts of interest and the person's willingness to act as discussed above at section 5.7.

Recommendation 9

We recommend that the TGA be amended to give the MHRT power to appoint a person other than the NSW Trustee as a financial manager.

5.8 Authorisation of financial manager

When a guardian is appointed by the Tribunal, the Guardianship Act sets out their authority:

> *"Subject to any conditions specified in the order, the guardian of a person the subject of a guardianship order (whether plenary or limited) has the power, to the exclusion of any other person, to make the decisions, take the actions and give the consents (in relation to the functions specified in the order) that could be made, taken or given by the person under guardianship if he or she had the requisite legal capacity."* (s 21(2A))

A similar general authorisation exists where the NSW Trustee is appointed as financial manager. Section 57(1) TGA provides:

> *"For the purposes of its protective capacities in respect of a protected person or patient, the NSW Trustee has, and may exercise, all the functions the person or patient has and can exercise or would have and could exercise if under no incapacity."*

The functions of a financial manager other than the NSW Trustee, though, are determined by the NSW Trustee (for managers appointed under the Guardianship Act) or the Court (for managers appointed by the Court). The Tribunal can therefore make an order for financial management but does not have the power to authorise the exercise of that power.

We submit that the Guardianship Act and TGA should be amended such that the functions of the financial manager are stated in the Act subject to any variation by the Court or Tribunal.

Recommendation 10

We recommend that the Guardianship Act and the TGA be amended to state the functions of a financial manager (such functions to be subject to any order of the Court or Tribunal enhancing or limiting the functions).

5.9 Review of appointment of financial manager

In addition to the Tribunal's power to review a financial management order under ss 25P, 25R, it may also review its appointment of a manager: 25S Guardianship Act.

The review of the appointment of a financial manager may be on the Tribunal's own motion or at the request of the NSW Trustee or a person with a genuine concern for the welfare of the protected person.

Although the scope of this review is not detailed in the legislation, it appears directed towards considering the suitability of the financial manager appointed rather than the order committing the person's estate to management. The Tribunal may review its appointment of a financial manager even if the manager is the NSW Trustee.

We submit the person subject to management should be able to apply for a review of the manager, in the same way that they can apply for a review of the financial management order under ss 25P, 25R. The ability of a person with capacity issues to challenge the appointment of a particular manager is in accordance with the general principles governing the legislation, particularly that the views of such persons should be taken into consideration.

We further note that the Court currently has no express power to review a financial management order, or to review the appointment of a particular financial manager, once the order has been made. Such powers of the Court should be express and similar to the powers of the Tribunal under ss 25P, 25R and 25S.

Recommendation 11

We recommend that the Guardianship Act be amended to allow a person the subject of financial management to request a review of the appointment of the particular financial manager.

We further recommend that the TGA be amended to give the Court express power to review a financial management order and the appointment of a particular financial manager.

6. THE INTERPRETATION OF THE MEANING OF "NEED" IN S25G(B) OF THE GUARDIANSHIP ACT

Section 25G(b) of the Guardianship Act states that the Tribunal may make a financial management order only if the Tribunal is satisfied that, inter alia, there is a need for another person to manage the person's affairs on the person's behalf. "Need" is not defined in the Act nor in case law.

In *Re R* [2000] NSWSC 886 it was put on behalf of the plaintiff that if the existing informal arrangement between the incapable person and somebody else was satisfactory, then it

could not be said that there "[wa]s a need" for another person to manage those affairs. Young J in the Supreme Court of NSW doubted that proposition and noted at [31] that the way in which matters are often approached in the Protective List is that a person usually has a need for someone else to manage their affairs if he or she himself or herself cannot do it. This triggers the jurisdiction to make an order, though the personal arrangement may mean the Court in its discretion does not make the order.

The Tribunal, in our experience, interprets "need" as requiring that existing arrangements are not working, or, as it has been put by many carers and parents we have spoken with, that "the Tribunal will only get involved if there is a crisis". The Tribunal's website states that the Tribunal will not make an order if the person already has informal arrangements in place that are working in the best interests of the person. The questions it asks people considering making an application include "*Are there decisions that need to be made now that cannot be made by someone informally?*"

While we certainly support consideration by the Court, Tribunal and MHRT of whether or not decisions can be made informally (particularly when such consideration is combined with a consideration of the best interests of the person) we note:

(a) without the appointment of a financial manager there is often no independent oversight of the informal financial management. Given the vulnerability of people with impaired capacity to exploitation independent oversight is often desirable;

(b) it can be difficult to determine whether or not the person understood the decision made with assistance and whether or not the decision was an exercise of the person's free will; and

(c) informal decision-making depends on the consent of the person with impaired capacity and is often undertaken for a person who lacks ability to consent.

In the talks we do for parents and carers of people with impaired capacity on substitute decision-making and estate planning we meet many parents of people with impaired capacity who have very limited or no ability to manage their financial affairs and cannot consent to informal arrangements. The parents and carers are very concerned that they do not have any legal authority to manage the financial affairs of the person they care for and cannot obtain such authority unless there is a crisis.

While supporting the need to consider whether or not informal arrangement are working well in determining whether or not to make a financial management order we submit that where a person lacks capacity to manage their financial affairs on an ongoing basis and lacks capacity to give the consent required for informal arrangements, that should be sufficient to demonstrate the need for an order under s 25G(2) of the Guardianship Act.

7. THE TEST IN R V PJS

The test of whether or not a person is capable of managing their own affairs was laid down in *PY v RJS* [1982] 2NSWLR 700. The test is as follows:

> *"...a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:*
> *(a) that he or she appears incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and*
> *(b) that, by reason of that lack of competence there is shown to be a real risk that either he or she may be disadvantaged in the conduct of such affairs; or that such moneys or property which he or she may possess may be dissipated or lost*
> *...it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner."*

In our experience in acting for people with impaired capacity, the difficulty with the test is that some clients will have the ability to deal in a reasonably competent fashion with day-to-day matters, for example, managing their pension and paying their bills. They require assistance, though, to instruct in a complex legal matter which is not before a court (so a tutor cannot make decisions on the person's behalf) or to manage a larger sum of money received in settlement. Some examples of this are shown in Case Studies A and D. In such circumstances, the clients would not fall within the test in *PY v RJS*.

The test in *PY v RJS,* in effect, allows for a financial management order only where a person cannot deal with any of his or her financial affairs competently. This is inconsistent with both s 25E of the Guardianship Act and s 40 of the TGA which allow for financial management of part only of a person's estate.

We submit that a definition of "capable of managing his or her affairs" should be inserted in the Guardianship Act and the TGA which makes clear that a limited financial management order may be made in circumstances where, although the person can manage his or her day-to-day affairs in a reasonably competent fashion, they lack capacity to manage a specific aspect of their estate.

Recommendation 12

That the TGA and Guardianship Act be amended to include an inclusive definition of "capable of managing his or her affairs" which enables a limited financial management order to made in circumstances where a person can manage their day-to-day affairs but not a particular aspect of their estate.

8. THE NEED FOR AN AUTOMATIC PERIODIC REVIEW OF FINANCIAL MANAGEMENT ORDERS

We have had the opportunity to read the submissions of the Intellectual Disability Rights Service (**IDRS**) dated 21 August 2009. We acknowledge the difficult role and limited resources of the OPC (as it was until 1 July 2009), however, we support the concerns about the performance of the OPC listed in dot points at page 7 of IDRS's submissions. Our clients (in the in-house program, at our clinics at the Exodus Foundation and Lou's Place and the parents and carers we speak with at our seminars) consistently raise similar concerns.

We note two practical difficulties in seeking to have a financial management order revoked:

(a) for a financial management order to be revoked it must be proven that the person is capable of managing their own affairs. It is almost impossible for a person who has not managed their finances for the period of the order to prove they can manage their finances. Under s 71(2) of the TGA the Trustee may authorise a person to manage part of their estate but in the experience of our clients the OPC was cautious in providing such opportunities; and

(b) generally medical evidence of capacity is required. It is expensive to obtain medical reports and the person under management is often reliant on the manager whose appointment they are challenging to provide the funds to obtain the report.

Given the significance of taking from a person their power to manage their own financial affairs and the impact of such an order on the person's life we submit that financial management orders should be automatically reviewed at least every three years.

The review of the financial management order should consider:

(i) whether or not a financial management order is still necessary in light of:

(I) the person's ability to manage his or her own affairs;

(II) any support available to assist a person to make his or her own decisions; and

(ii) the performance of the financial manager against certain criteria.

Such a review is consistent with an ongoing consideration of the least restrictive alternative, gives people who believe they can manage their finances the opportunity to argue to retain their autonomy from time-to-time and provides an opportunity for the person to raise concerns about the conduct of their financial manager and the impact of that conduct on their lives in an open and independent forum.

Recommendation 13

We recommend that all financial management orders be reviewed every three years. The Court or Tribunal must consider in the review whether or not the person is capable of managing their own affairs and, if the order is to be renewed, the performance of the financial manager.

9. THE NEED FOR A STATUTORY APPLICANT TO SEEK A FINANCIAL MANAGEMENT ORDER WHEN NO OTHER APPLICANT IS AVAILABLE

Where a client with impaired capacity:

(a) has a legal issue which needs to be addressed;

(b) there are no court proceedings;

(c) the client lacks capacity to instruct;

(d) there is no substitute decision-maker;

(e) the client does not consent to the appointment of a financial manager; and

(f) the client has no-one willing or able to make an application for a financial management order

the client can be at significant financial risk.

In these circumstances, there is no appropriate mechanism for an application to be made to the Tribunal for the appointment of a financial manager to advance the client's legal issues.

We have been told by officers at the Office of Protective Commission (as it then was) that although they have the power to commence an application, as a matter of policy they do not do so as they perceive a conflict in them applying for such an order when they will likely be appointed the financial manager.

Case study A

Blake Dawson acted for a 51 year old man with a chronic mental illness in a claim on his mother's estate. A beneficial and generous settlement offer was made, however, our client would or could not decide whether or not to accept the offer. The client vacillated daily and made a series of significantly different counter offers, a number of which were unable to be achieved as a matter of law.

The offer was more beneficial than we considered a court was likely to award. As proceedings had not been commenced, a tutor could not be appointed to instruct Blake Dawson on behalf of the client and enter into settlement on his behalf.

It was undesirable to commence proceedings both given the offer and as costs come from the estate, reducing the amount available to claimants including our client.

The client did not have a financial manager and did not require a financial manager to manage his pension. There was no one in the client's life who could make an application for a financial manager to instruct in the matter and the appointment of a manager was against the client's wishes.

As solicitors Blake Dawson could apply to the Guardianship Tribunal for the appointment of a financial manager as a last resort, however, this would have destroyed the relationship between Blake Dawson and the client (who suffered paranoia) and would require us to act directly contrary to the client's wishes. There was no service prepared to apply for an alternative decision-maker to be appointed.

In our experience, the above scenario is relatively common, particularly for clients with a chronic, episodic mental illness. Most of Blake Dawson's clients with intellectual disability attend with a caseworker or a family member. If an issue arises as to capacity which cannot be resolved by support for the client to make their own decisions, there is someone able to make an application to appoint a substitute decision-maker.

Clients with episodic mental illness (particularly schizophrenia but also bi-polar disorder or clinical depression) often seek help themselves when they are relatively well. They often do not have a regular caseworker nor a family member in support. If they have legal merit in their case (and there is no other source of legal assistance reasonably available to them) we will act for them through our pro bono program. We do not generally obtain medical reports on our clients while they are able to instruct us.

When the client becomes unwell and loses capacity to make decisions in their matter or does not provide adequate or ongoing instructions, we are in a position where:

- we are unaware of anyone with a genuine interest in the client's welfare who is willing and able to apply for a substitute decision-maker; and
- we have no medical evidence on which to ground an application even were we prepared to make such an application.

There are legal and practical reasons why a lawyer should not make an application for a financial management order unless instructed.

To apply for a financial management order a lawyer would be obliged to reveal confidential information about their client. A lawyer is obliged to keep the information gained in acting for a client confidential. Rule 2 of the *Revised Professional Conduct and Practice Rules* 1995 (NSW) creates an obligation to maintain the confidentiality of the client's affairs. There is also an implied term in the contract of retainer between the lawyer and client that the lawyer will preserve the confidentiality of all communications between practitioner and client. The same duty is inherent in the fiduciary relationship between the practitioner and the client arising from the retainer. Unauthorised disclosure of confidential information could lead to a disciplinary action against the practitioner or a civil action by the client, particularly if the disclosure causes financial loss to the client. Depending on the size and nature of the practice a lawyer may also be legally required to keep the client's information confidential under privacy law.

The courts have stated that lawyers may breach their duty of confidentiality where they disclose medical or other information about their client in good faith:

> *"[T]he solicitor's concern for the interest of the client, so long as it is reasonably based and so long as it results in no greater disclosure of confidential information than absolutely necessary, can justify the bringing of proceedings and such*

disclosure of confidential information as is absolutely necessary for the purpose of such proceedings": R v P (2001) 53 NSWLR 664 per Hodgson JA.

The Law Society of New South Wales has observed that this judicial statement provides "an important qualification to the duty of confidentiality owed by solicitors to clients".[3]

The Law Society of New South Wales has recognised the competing concerns of lawyers in these situations. Where the capacity of a client is in question, the Law Society discourages the lawyer from making an application for the appointment of a guardian or a financial manager. For example, it states:

> "*There may be ethical issues involved when a solicitor makes an application for a financial manager or a guardian to be appointed for their client. The Supreme Court has commented that it is extremely undesirable for a solicitor to make such an application in relation to their client as the making of a financial management order effectively deprives a person of authority to make decisions about their finances, property and legal rights. It is therefore preferable, if possible, if a family member or health care professional makes the application.*
>
> *Issues of client confidentiality may also arise when a solicitor is considering whether to provide information to a court or tribunal about a client's lack of capacity.*"[4]

There is judicial authority discouraging solicitors from applying for a financial management order for their client. For example, in *R v P* (2001) 53 NSWLR 664 (the case cited above), Hodgson JA also said in relation to applications by a solicitor for the appointment of a financial manager for a client:

> "*The bringing of such actions is extremely undesirable because it involves the solicitor in a conflict between the duty to do what the solicitor considers best for the client and the duty to act in accordance with the client's instructions; and also because of a possible conflict between the solicitor's duty to the client and the solicitor's interest in continuing to act in the proceedings in question and to receive fees for this.*"

That lawyers may make applications on behalf of their client as a "last resort" was acknowledged by Barrett J in the more recent case of P v R [2003] NSWSC 819 at [81].

As a practical matter, if the lawyer does apply for a financial management order against the client's wishes, that may destroy the client's trust in the lawyer. The consequences of that include that it would be difficulty to obtain information the client on the subject matter of the legal issue and it would be difficult to involve the client in decision-making to the degree the client could be involved.

Case study B

Blake Dawson acted for a client, Susan, who suffered from severe depression and paranoia. She owns a house which is falling down around her. She cannot afford to fix it. Susan no longer feels safe where she lives, has poor relationships with her neighbours, is bothered by aircraft noise and wants to sell up and move.

To date Susan has put her home on the market 23 times then taken it off again for one reason or another, usually because she believes the real estate agent is in league with her ex-husband and

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3 Law Society of New South Wales, Client Capacity Issues Sub-Committee, "Client Capacity Guidelines: Civil and Family Law Matters" (2003) 41(8) LSJ 50.

4 Law Society of New South Wales, *A Practical Guide for Solicitors – When a client's capacity is in doubt*, March 2009.

the solicitor who acted for her in a compensation claim 15 years ago. None of the local real estate agents will act for her any longer.

Susan is quite desperate to sell her house. She has letters from her doctors (GP and psychiatrist) saying she needs to move. Susan will not let us have a copy of those letters nor any other documents and has expressly forbidden us from speaking with her doctors.

Susan recognises she needs help selling the house.

We have discussed various possibilities with her including appointing an attorney to sell the house or applying for the appointment of a financial manager for that purpose. Susan can never quite get to the point of taking action or allowing action to be taken on her behalf. She will not provide an authority for us to obtain medical records to prove her disability, nor are we aware of anyone who would apply for a financial management order on her behalf.

Similar difficulties arise where a client with impaired capacity becomes uncontactable for long periods of time.

Case study C

Wayne is a 45 year old man living in outback NSW. We believe from his behaviour that Wayne has schizophrenia although we have no medical evidence and he denies it.

Wayne entered into a contract to sell his property then refused to complete the sale. During the 6 weeks from the time contracts were exchanged Wayne's behaviour became increasingly bizarre. Eventually the purchaser took Wayne to court to enforce the contract. Wayne did not defend the proceedings and a tutor was not appointed for him. The Court relied on the presumption of capacity despite evidence of Wayne's behaviour and proceeded ex parte. The sale was enforced, the purchaser awarded costs and the purchase price was paid into court. The purchaser is claiming an adjustment on the purchase price for their loss. We were asked to assist after the money had been paid into Court.

Wayne saw us once only and will no longer communicate with us except to send a letter saying we should "do as we like" with the matter. He lives by himself in a caravan 3 hours from the nearest town. He no longer has the phone on and won't respond to letters.

The purchaser's solicitors have made an application to have their costs paid from the funds held by the court. Those costs have been taxed and are likely to be paid out.

On the information we received in our one meeting with Wayne and from the Court documents we consider Wayne has strong merit in an argument that the loss to the purchaser for the delayed sale is at least $36,000 less than claimed.

Wayne has not tried to sack us as his solicitors and appears to want us to act. He just does not provide instructions. We believe we could readily negotiate with the purchaser's solicitor so that the adjustment would be reduced by $36,000 and agreement could be reached so that the balance of the purchase price could be paid out to Wayne. However, we have no instructions to do so. We are not on the record in the Supreme Court and have no instructions to appear. Wayne is at significant risk of losing $36,000.

As far as we know, there is no one else in Wayne's life who could or would make an application for a financial management order or provide evidence in support of the appointment of a tutor.

Case study D

Helen is a client of a legal service we provide at a day centre for women who are homeless or otherwise in crisis. Helen is on a disability support pension. She tells us she is on the disability

support pension for her back. Helen denies having a mental illness but is extremely chaotic, thought-disordered, paranoid and disorganised.

Helen uses a number of services sporadically but does not attend any one service regularly and says she has no caseworker. Helen instructs us she is estranged from her family.

Helen has a number of legal issues. She is unlikely to succeed or does not have a legal remedy in two cases but she does not accept that advice and is pursuing those matters herself. However, Helen has a good case for compensation arising from a car accident and a discrimination action and/or an action in the Administrative Appeals Tribunal against the Department of Housing for their refusal to accommodate her and their refusal to put her on the priority housing list. Helen is homeless and legal action would significantly increase the likelihood and speed with which Helen is housed.

We cannot get instructions from Helen which would enable us to assist her. We consider that Helen lacks capacity. Helen mostly misses appointments, will not sign authorities to allow us to obtain medical reports in support of her matters, will often refuse to discuss the matters we can assist on and will only discuss the matters where we consider she has no legal remedy. Helen is frequently sidetracked, changes her instructions in fundamental ways and does not understand the nature of the proposed actions and what can and cannot be achieved for her in those actions.

We cannot make an application for a financial management order for Helen as:

- lawyers are discouraged from applying for their clients except as an absolute last resort;
- Helen would no longer trust us and provide us with the information we need to run the matter (to the degree she is able to provide such information) if we were to apply for an order. She is also likely to cease attending the service; and
- we have no medical reports to prove Helen's disability.

As far as we know, there is no one else in Helen's life who could or would make the application, and as the matters are not before a court a tutor cannot be appointed.

Helen is therefore in a situation where she cannot enforce her legal rights.

We consider that there is a pressing need to include in the functions of a government agency an obligation to apply for a financial management order if they believe such application has merit in circumstances where no other applicant is reasonably available.

A solicitor could ask the agency to consider whether or not a financial management order should be made. The law should be changed to clarify that a solicitor may disclose such information as is necessary to enable the agency to determine whether or not they consider a financial manager is needed.[5] Such disclosure would not amount to a waiver of client-legal privilege nor a breach of relevant confidentiality and privacy obligations.

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[5] We note, for example, the legislation creating the ACT Public Advocate contains the following clause:

"15 Giving of information protected

(1) This section applies if any information is given honestly and without recklessness to the public advocate.

(2) The giving of the information is not—

(a) a breach of confidence; or

(b) a breach of professional etiquette or ethics; or

(c) a breach of a rule of professional conduct.

(3) Civil or criminal liability is not incurred only because of the giving of the information."

The agency should be restricted by law such that they can only use the information to determine whether or not to apply for an order and in any application for an order. If the agency believes an application should be made for an order, the agency could apply for the order and should be given the power to gather information as necessary in support of the application. The information gathered could only be used for the application. The application would then be heard by the Court or Tribunal in the usual way.

10. CLARITY IN CIRCUMSTANCES WHERE THERE IS NO MECHANISM FOR THE APPOINTMENT OF AN SUBSTITUTE DECISION-MAKER

Apprehended Violence Orders

Blake Dawson has acted in a number of matters in which apprehended violence orders (**AVOs**) were sought against people with serious intellectual disability or mental illness. Circumstances have included applications by neighbours, an application by a doctor at a hospital, applications by carers in supported accommodation and applications by other residents in supported accommodation.

In each of those matters we have been required to appear amicus curiae as we could not obtain instructions and there is no mechanism for the appointment of a substitute decision-maker given the nature of the proceedings.

An amicus is a 'friend of the court'. An amicus may bring information to the court's attention to assist the court but may not advocate on behalf of a party. Defendants who lack the capacity to instruct in AVOs therefore go unrepresented.

AVO proceedings exist somewhere between the criminal and civil jurisdictions.

In civil law proceedings, if a client cannot instruct his or her lawyer a tutor may be appointed to act on the client's behalf. AVO proceedings do not fall within the relevant definitions to allow the appointment of a tutor.

In criminal law proceedings, if the person cannot instruct his or her lawyer, the *Mental Health (Forensic Provisions) Act* 1990 (NSW) provides for diversionary measures for clients with impaired capacity in Local Court matters. AVO proceedings are not criminal proceedings under the Act.[6]

If an AVO order is made against a person, in effect it criminalises behaviour which is not otherwise criminal as the breach of an order is a criminal offence. Often the behaviour which has prompted the complainant in the AVO to seek the order is a result of the client's disability or illness. A particularly vulnerable client is left at risk therefore of being set up to fail and be enmeshed in the criminal justice system and cannot be represented in the proceedings.

Given the nature of AVOs it may be inappropriate that a substitute decision-maker is appointed. It is arguable that where a person lacks capacity to instruct it would be unfair to continue proceedings to impose an AVO against them, even if a tutor or *guardian ad litem* could be appointed. A person who lacks capacity to instruct may not be able to understand or comply with an AVO if it was imposed on them. An AVO may not prevent or change the person's conduct and would merely set them up for further encounters with the criminal justice system. It is inappropriate that a person can consent on behalf of another to criminalise behaviour that would not otherwise be criminal.

We submit that in circumstances where a court finds a defendant in an AVO lacks capacity to instruct, the law should be amended to state that proceedings are stayed.

[6] We can provide further detailed legal submissions on the issue raised in section 11 if required.

Summary criminal proceedings

Where a person is charged with a summary offence, lacks capacity to instruct but is not diverted under s 32 of the *Mental Health (Forensic Provisions) Act*, there is no mechanism for the appointment of a substitute decision-maker in the hearing of the charge.

Notwithstanding that a person falls within s 32 a magistrate has a discretion whether or not to deal with the person under the section. If the magistrate does not deal with the person under s 32 there is no mechanism for considering the person's fitness to plead.

We submit that if a person lacks capacity to understand the proceedings or instruct their solicitor, to proceed on the charge would be inherently unfair. The Courts have always regarded the ability of a defendant to understand and participate in criminal proceedings as fundamental to the due process of the law. See for example *Pioch v Lauder* [1976] 27 F.L.R. 79, *Ebatarinja v Deland* (1998) 194 CLR 444 and *R v Berry* [1876] 1 QB 447.

It is not appropriate for a substitute decision-maker to be appointed to instruct on a criminal charge. This was noted in *Public Guardian v Guardianship Board* [No11 of 1997] 42 NSWLR 201 in which Hodgson J said:

> "*It has never been a feature of criminal procedure that decisions should be taken out of the hands of an accused person to be execsied on their behalf by others.*"

In the absence of a decision of a court of record we submit the law should be changed to make clear that in circumstances where a person lacks capacity to instruct in a charge in the Local Court and has not been diverted under s 32 the proceedings must be stayed.

11. THE PARLIAMENTARY INQUIRY

Thank you for the opportunity to make submissions to this Inquiry. If there is any aspect of this submission that you would like to discuss further with Blake Dawson, please contact Anne Cregan on (02) 9258 6179.

Blake Dawson Pro Bono Team

APPENDIX A: SUMMARY OF ASPECTS OF THE LEGISLATIVE POWERS OF THE GUARDIANSHIP TRIBUNAL, SUPREME COURT AND MENTAL HEALTH REVIEW TRIBUNAL TO MAKE FINANCIAL MANAGEMENT ORDERS

Note: The powers of the Guardianship Tribunal to make guardianship orders have been included in the first column by way of comparison.

Appointment of Guardian by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	**Appointment of Financial Manager by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)**	**Appointment of Financial Manager by Supreme Court under the NSW *Trustee and Guardian Act* 2009**	**Appointment of Financial Manager by Mental Health Review Tribunal under NSW *Trustee and Guardian Act* 2009**
Extent to which order applies to a person's estate			
The Tribunal may make a guardianship order that is ... (b) plenary or limited; and (c) subject to such conditions as the Tribunal considers appropriate (s 16(1)). A plenary guardianship order shall not be made in circumstances in which a limited guardianship order would suffice (s 15(4)). A limited guardianship order shall specify the extent (if any) to which the guardian shall have custody of the person (s 16(2)).	The Tribunal may exclude a specified part of the estate from the order (s 25E).	An order may be made for management of the whole or part of an estate of a person (s 40).	An order may be made for management of the whole or part of an estate of a person (s 40).
Grounds for making an order			
If the Tribunal is satisfied that the person is a person in need of a guardian, it may make a guardianship order in respect of the person (s 14(1)). In considering whether or not to make the order, the Tribunal shall have regard to: (a) the views (if any) of: (i) the person, and	The Tribunal must have considered the person's capability to manage his or her own affairs and be satisfied that: (a) the person is not capable of managing their affairs; and (b) there is a need for another person to manage those affairs on the person's behalf; and	The Supreme Court must be satisfied that the person is incapable of managing his or her affairs (s 41(1)).	If the MHRT, after conducting a mental health inquiry or reviewing a person's case under Part 5 of the Mental Health (Forensic Provisions) Act 1990 orders that a person be detained in a mental health facility, it must: (a) consider whether the person is capable of managing their own affairs; and

Appointment of Guardian by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	**Appointment of Financial Manager by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)**	**Appointment of Financial Manager by Supreme Court under the NSW *Trustee and Guardian Act* 2009**	**Appointment of Financial Manager by Mental Health Review Tribunal under NSW *Trustee and Guardian Act* 2009**
(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 (s 14(2)).	(c) it is in the person's best interests that the order be made (s 25G).		(b) if satisfied that they are not capable of managing their own affairs, order that their estate be subject to management under this Act (s 44).
Who can apply for an order?			
An application may be made to the Tribunal by: (a) the person; (b) the Public Guardian; or (c) any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person (s 9).	An application may be made by: (a) the NSW Trustee; or (b) any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person who is the subject of the application (s 25I(1)).	The Supreme Court may make an order on its own motion or on the application of anyone with a sufficient interest in the matter (s 41(2)).	The MHRT must consider the person's capacity where it orders that a person be detained in a mental health facility (s 44). The MHRT may also on application consider a person's capability to manage their own affairs and, if satisfied that the person is not capable of managing their own affairs, and make an order for management of their estate. The application may be by anyone who, in the opinion of the MHRT, has a sufficient interest in the matter (s 46).

Appointment of Guardian by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	Appointment of Financial Manager by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	Appointment of Financial Manager by Supreme Court under the NSW *Trustee and Guardian Act* 2009	Appointment of Financial Manager by Mental Health Review Tribunal under NSW *Trustee and Guardian Act* 2009
Requirements of the application			
The application must specify the grounds on which it is alleged that the person is a person in need of a guardian (s 9(3)). The application must be served on each party to the proceedings (s 10(1)).	The application must specify the grounds on which it is claimed the person is not capable of managing his or her own affairs. The application must be served on each party to the proceedings (s 25I(2),(3)).	The requirements for an application to the Court are not stated. Evidence of a person's capability to manage their own affairs may be given to the Court in any form and in accordance with any procedures that the Court thinks fit. The Court may examine a person whose capability is in question or dispense with any such examination. The Court may otherwise inform itself as to the person's capability as it thinks fit (s 41(3)).	The requirements for an application to the MHRT under section 46 are not stated.
Duration of the order			
A guardianship order shall specify whether the order is continuing or temporary (s16(1)(b)) and may be made subject to such conditions as the Tribunal considers appropriate to specify in the order (s16(1)(d)). Initial continuing guardianship orders have effect for such period (not exceeding 1 year from the date when it was made) as the Tribunal may specify in the order. Renewed continuing orders have effect for such period (not exceeding 3 years from the date when it was renewed) as the Tribunal may specify in the order (s 18(1)).	While the orders may be reviewed or revoked, there is no maximum duration of an order. However, the Tribunal may order that a financial management order be reviewed within a specified time (s 25N(1)).	There is no maximum duration of an order.	There is no maximum duration of an order.

Appointment of Guardian by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	**Appointment of Financial Manager by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)**	**Appointment of Financial Manager by Supreme Court under the NSW *Trustee and Guardian Act* 2009**	**Appointment of Financial Manager by Mental Health Review Tribunal under NSW *Trustee and Guardian Act* 2009**
However the Tribunal may specify, an initial continuing order has effect for a period not exceeding 3 years and, a renewed continuing order for 5 years from the date on which it was made (s18(1A)) if the conditions in s18 (1B) are met.			
Who may be appointed guardian or financial manager?			
A guardian may be the Public Guardian or another person ordered by the Guardianship Tribunal (ss 15-17). The power to appoint the Public Guardian or another person depends on whether the order is temporary or continuing (s15(2)-(3)). Where another person is appointed guardian, the Tribunal must be satisfied that: (a) their personality is generally compatible with that of the person under guardianship; (b) there is no undue conflict of interest (particularly in financial interests); (c) the proposed guardian is willing and able to exercise their functions (s 17(1)).	The Tribunal may appoint a suitable person as manager of the person's estate or commit the management to the NSW Trustee (s 25M(1)). "Suitable" is not defined.	The Supreme Court may appoint a suitable person as manager of the person's estate or commit the management to the NSW Trustee (s41(1)). "Suitable" is not defined.	The estate of a person subject to an order by the MHRT is committed to the management of the NSW Trustee, subject to any special order by the Supreme Court (s 52).

Appointment of Guardian by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	Appointment of Financial Manager by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	Appointment of Financial Manager by Supreme Court under the NSW *Trustee and Guardian Act* 2009	Appointment of Financial Manager by Mental Health Review Tribunal under NSW *Trustee and Guardian Act* 2009
Authority of guardian or manager			
General authorisation Subject to any conditions specified in the order, a guardian (whether plenary or limited) has the power, to the exclusion of any other person, to make the decisions, take the actions and give the consents (in relation to the functions specified in the order) that could be made, taken or given by the person under guardianship if he or she had the requisite legal capacity (s 21(2A)). Plenary guardianship Subject to any conditions specified in the order, a plenary guardian: (a) has custody of the person to the exclusion of any other person, and (b) has all the functions of a guardian of that person that a guardian has at law or in equity (s 21(1)). Limited guardianship Subject to any conditions specified in the order, a limited guardian: (a) has custody of the person, to the exclusion of any other person, to such extent (if any) as the order provides, and	A manager cannot act in relation to the estate unless directions have been obtained from the Supreme Court or the NSW Trustee has authorised the person to exercise functions in respect of the estate (s 25M(2)).	Where the manager is the NSW Trustee The NSW Trustee has and may exercise all functions necessary and incidental to its management and care of the estate of a managed person, and such other functions as the Supreme Court may direct or authorise (s 56) The NSW Trustee may exercise all powers the protected person or patient would have had if under no incapacity (s 57) The NSW Trustee may execute and sign any document on behalf of a managed person for the purpose of exercising a function in its protective capacity (s 58) The NSW Trustee may apply money from the person's estate for: (a) payment of debts; (b) funeral expenses; (c) spouse and child maintenance; (d) proper costs related to the estate; (e) taking up of share rights; or (f) the care of the person (s 59). The NSW Trustee has and may exercise in respect of the estate of a managed person all functions necessary and incidental to its management and care (s 56(1)).	The powers of the NSW Trustee are specified in the adjacent column.

Appointment of Guardian by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	**Appointment of Financial Manager by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)**	**Appointment of Financial Manager by Supreme Court under the NSW *Trustee and Guardian Act* 2009**	**Appointment of Financial Manager by Mental Health Review Tribunal under NSW *Trustee and Guardian Act* 2009**
(b) has such of the functions of a guardian of that person's person, to the exclusion of any other person, as the order provides (s 21(2)). A limited guardianship order shall specify: (a) the extent (if any) to which the guardian shall have custody of the person under guardianship, and (b) which of the functions of a guardian the guardian shall have in respect of the person under guardianship (s 16(2)).		For the purposes of its protective capacities in respect of a protected person or patient, the NSW Trustee has and may exercise all the functions that the person would have if under no incapacity (s 57). Where the manager is another person The Supreme Court or NSW Trustee may make such orders as it thinks fit in relation to the administration of the estate and the functions of the manager (s 64(1),(2)). This includes orders authorising, directing or enforcing the functions of managers or for the supervision those functions. The NSW Trustee may also authorise a manager to have any specified functions and direct the manager in relation to those functions (s 66). A manager may in accordance with a direction of the Supreme Court, NSW Trustee or Guardianship Tribunal execute and sign any document in the name of the managed person (s 67).	
Who can apply to review, vary or revoke order?			
The persons entitled to request a review are: (a) the guardian, (b) the person under guardianship, (c) the Public Guardian,	The protected person, NSW Trustee, estate manager or any other person with a genuine concern for the welfare of the protected person may apply for an order revoking or varying a financial management order (s 25R).	The Supreme Court may, on application by a protected person, revoke an order if it satisfied that the person is capable of managing their own affairs (s 86).	A person subject to an order may appeal to the Supreme Court. The Court may revoke or confirm the order (s 49). An appeal by the person subject to the order or any other party to the proceedings may also be made to the ADT (s 50).

Appointment of Guardian by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	**Appointment of Financial Manager by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)**	**Appointment of Financial Manager by Supreme Court under the NSW *Trustee and Guardian Act* 2009**	**Appointment of Financial Manager by Mental Health Review Tribunal under NSW *Trustee and Guardian Act* 2009**
(d) any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person under guardianship (s 25B). The Tribunal may also review on its own motion (s 25(i)). The Tribunal must review the order on expiration of the period in which the order has effect (s 25(2)) (except as per s 16(2A)). The Tribunal may refuse a request to review an order if, in the opinion of the Tribunal, the request does not disclose grounds that warrant review or the Tribunal has previously received the order (s 25A).	The Tribunal also ahs a discretion to review a financial management order (s 25N). The Tribunal may refuse to review an order if the application does not disclose grounds that warrant review (s 25O).	The NSW Trustee may also certify that management is terminated if a protected person ceases to be under guardianship or be a patient and the NSW Trustee is satisfied that the person is capable of managing their affairs. The NSW Trustee may refer the question of whether a person is capable of managing their affairs to the Supreme Court (s 89).	The MHRT, on application by a protected person who was, but has ceased to be, a patient may revoke the management order if it is satisfied that the person is capable of managing their affairs (s 88).
Power to review, vary or revoke of order			
On reviewing an order on its own motion or at the request of a person, the Tribunal may vary, suspend, revoke or confirm the order (s 25C(1)). On reviewing an order at the expiration of its term, the Tribunal may renew, renew and vary, or determine that the order is to lapse (s 25C(2)).	Following a review the Tribunal may vary, revoke or confirm the order (s 25N). The matters to be considered in the review are not specified. The Tribunal has a discretion whether or not to vary or revoke the order. The Tribunal can only revoke the order if: (a) it is satisfied that the protected person is capable of managing his or her affairs; or	The power to review an order by the Supreme Court is not stated. There is no express power to vary an order.	The MHRT may review an interim order (s 48). The power to review a final order is not stated. There is no express power to vary an order.

Appointment of Guardian by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	Appointment of Financial Manager by Guardianship Tribunal under the *Guardianship Act* 1987 (NSW)	Appointment of Financial Manager by Supreme Court under the NSW *Trustee and Guardian Act* 2009	Appointment of Financial Manager by Mental Health Review Tribunal under NSW *Trustee and Guardian Act* 2009
	(b) it considers that it is in the protected person's best interests that the order be revoked, even though the Tribunal is not satisfied that the protected person is capable of managing his or her affairs (s 25P).		
Review of appointment of guardian or manager			
There is no express provision to review the appointment of a guardian by the Tribunal. Section 17(1) provides that a person shall not be appointed as a guardian unless the Tribunal is satisfied that: (a) the personality of the proposed guardian is generally compatible with that of the person under guardianship; (b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship; and (c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order. These requirements do not apply to the appointment of the Public Guardian as a guardian (s 17(2)).	The Tribunal on its own motion, the NSW Trustee or any other person the Tribunal considers has a genuine concern for the welfare of the protected person may seek a review of the appointment of the manager of the protected person's estate. The protected person cannot seek such a review (s 25S). The Act does not set out what is to be considered in the review. Following the review the Tribunal may revoke or confirm the appointment. The Tribunal may also revoke the appointment if: (a) the person appointed seeks the revocation; or (b) the Tribunal is satisfied the revocation is in the best interests of the protected person; or (c) the financial management order in respect of the estate is revoked (s 25U).	There is no express provision for review of the appointment of a manager. However application may be made to the ADT for a review of a decision by the NSW Trustee in relation to the functions of a person appointed as a manager, but not if the decision was made in accordance with a direction by the Supreme Court. Application may be made by the manager or any other person with a genuine interest in the matter to which the decision relates (s 70).	The manager appointed is to be the NSW Trustee under section 52. There is no express provision for review of the appointment of the NSW Trustee as manager.