**Submission No 59**

# INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

**Organisation**: NSW Council for Intellectual Disability

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NSW Council for Intellectual Disability
Level 1, 418A Elizabeth Street
Surry Hills NSW 2010
Phone: 02 9211 1611 Fax: 02 9211 2606
mail@nswcid.org.au
ABN 25 001 318 967

# Submission to inquiry into opportunities to consolidate tribunals in NSW

## New South Wales Council for Intellectual Disability (NSW CID)

NSW CID has been the peak advocacy group in NSW for people with intellectual disability and their families for over 50 years.

## Our experience with the Guardianship Tribunal and other courts and tribunals

An intellectual disability is second to dementia as the most common disability experienced by people subject of applications to the Guardianship Tribunal. People with intellectual disability are the largest client group of the Public Guardian.

For over 30 years, we have taken a very active interest in the accessibility of courts and tribunals to people with intellectual disability and their families. This has been informed by the experience of our members who have come before or been members of tribunals, the expertise of lawyers we have consulted, the experiences of our colleagues in other parts of Australia and reading of reports on the operation of courts and tribunals. One of our organisational members, the Intellectual Disability Rights Service, advises many people with intellectual disability in relation to guardianship matters and other court and tribunal proceedings.

We also have had a long and close involvement with guardianship law and were at the forefront of advocacy for the creation of accessible guardianship legislation in NSW. We were very actively represented on the working party established by then Health Minister Ron Mulock that developed the NSW Guardianship Act 1987 and the working party established by Minister Virginia Chadwick that implemented it.

There is a series of barriers preventing people with disabilities from accessing the mainstream legal system, including:

- accessibility of court premises and processes;
- issues of formality and the adversarial nature of judicial proceedings;
- the operation of the rules of evidence;

- negative perceptions of players in the justice system of people with disabilities;
- and the lack of people with disabilities who perform significant functions within the justice system

(Law and Justice Foundation of NSW, 2003, *Access to justice and legal needs: a project to identify legal needs, pathways and barriersfor disadvantaged people in NSW, vol. 1: public consultations*).

From the start of the development of the Guardianship Tribunal, we saw the need for something quite different to other courts and tribunals. There needed to be a legal structure and procedural fairness but the process needed to be one that people with disability and their families felt comfortable to fully participate in. As far as possible, there should be an informal, investigative and problem solving approach rather than an adversarial and legalistic one. Tribunal members needed to be well grounded in disability issues.

## The role and underlying principles of the Guardianship Tribunal

The primary role of the Guardianship Tribunal is to make decisions about appointment of guardians and financial managers for people whose disabilities impede their capacity to manage their own lives and financial affairs. If a person lacks capacity to make major life decisions and informal arrangements are insufficient to meet the person's needs, the Tribunal can appoint a guardian to make relevant decisions, about issues such as where the person lives, health care, services and sometimes about contact with other people. Similarly, the Tribunal can appoint a financial manager if a person lacks capacity to manage their own financial affairs and informal arrangements are insufficient to meet the person's needs.

Where a guardian or financial manager is needed, the Tribunal can appoint an individual such as a family member or can appoint the Independent Public Guardian as guardian and NSW Trustee as financial manager.

The Tribunal periodically reviews all guardianship orders and may review financial management orders on application or its own initiative. On reviews, the Tribunal addresses similar issues to those at original hearings.

The Tribunal has other secondary jurisdictions including to consent to medical treatments and review appointments of enduring guardians and enduring powers of attorney.

Much of the Tribunal's work involves issues about what is best for a person with a disability where there are very different views held by the person and others, between different family members, or between family members and service providers. There is also a substantial number of cases involving allegations of neglect, abuse or exploitation.

In all of its work, the Tribunal is required to observe the principles in section 4 of the Guardianship Act. These principles required the Tribunal to:

- intrude as little as possible on the person's freedom of decision and action
- take account of the views of the person
- recognise the importance of preserving family relationships and cultural and linguistic environments

- protect the person from neglect and abuse and exploitation and,
- ultimately, to give paramount consideration to be interests of the person.

The United Nations Convention on the Rights of Persons with Disabilities, which was ratified by Australia in 2008, reinforces principles in the Guardianship Act with its emphasis on:

- respect for the autonomy and individual choices of people with disabilities, preference for supported decision-making over substitute decision-making and guardianship and financial management mechanisms being minimal and subject to regular review (Articles 3(a) and 12 and the declaration made by Australia when ratifying the convention)
- equality before the law and procedural accommodations in order to facilitate the effective role of people with disabilities as participants in all legal proceedings (Articles 5, 12 and 13)

## The Tribunal's procedures

The Guardianship Tribunal fulfils a crucial and sensitive role in protecting the interests of people with disabilities. In doing so, it takes away fundamental rights and freedoms, and this process requires firm safeguards. Where courts take away rights and freedoms, they do so by a judge and sometimes a jury presiding over an often lengthy and adversarial process with cases presented by one or more legal representatives for each party. The Guardianship Tribunal does this work in a much more cost efficient way that also maximises the participation of the person with the disability and is sensitive to the family and social issues involved.

In designing its procedures, the Guardianship Tribunal had to address a range of **challenges**:

- To ensure that the person subject of an application is directly heard and participates as fully as possible in the hearing.
- To ensure that family members and others feel comfortable to participate.
- To allow the Tribunal to fully inform itself on key issues.
- To ensure that all parties receive a fair hearing whilst seeking to avoid counterproductive legalism and adversarial approaches.
- To maintain a clear focus on the rights and interests of the person with a disability in the face of sometimes bitter conflict between other people in the person's life.
- To avoid straying into issues of community protection. The interests of the person are paramount. Community protection is not a relevant factor as it is in the Mental Health Act.
- To seek out common ground between disputing parties so that a workable way forward can be found for the person with a disability, and not to unnecessarily inflame conflict around the person. Often, the parties to a dispute at the Guardianship Tribunal need to continue to interact in meeting the needs of the person with disability. It is desirable in the person's interests if the Tribunal processes can minimise ongoing conflict.

- To provide a clear explanation of the reasons for, and purpose of, its orders.

- Ultimately, to make decisions that achieve a balance between necessary protection and minimal intrusion on the life of the person with a disability.

So as to meet these challenges, the procedures of the Tribunal have a number of **key features:**

1. Hearings procedures that are:

    - Informal so as to maximise the participation of the person with disability and their family. The Tribunal members sit one side of a table and the other participants on the other side with the person with disability at the centre.

    - Investigative and problem solving in style so as to ensure the Tribunal obtains full and balanced information, the need for orders is minimised and counterproductive conflict is minimised.

2. All initial applications and complex reviews being heard by three members bringing a range of expertise and experience – a lawyer; a medical practitioner, psychologist or other relevant professional; and a member with broader disability experience such as person with disability or a parent of a person with disability. This mix of experience and expertise tends to ground Tribunal decisions in the realities of the disability sector and the life of the person with a disability. Members have been chosen by a merit selection process specifically focused on members' suitability for the particular work of the Guardianship Tribunal. (In recent years, more straightforward reviews of guardianship and financial management orders have been heard by only one member. It is very important that the Tribunal retains the legal and budgetary capacity to assign more complex reviews to three members.)

3. Legal representation requiring the leave of the Tribunal so that unnecessary cost, legalism and formality can be minimised and to avoid disadvantage to the predominant number of parties who are unrepresented.

4. Cases being prepared for hearing by staff who:

    - Assist the parties to be prepared for the hearing, specifically including talking with the person with disability and seeking out the person's views.

    - Gather other information the Tribunal will need

5. The Tribunal providing written reasons for its decisions. These are an essential justification for the taking away of rights, a tool for transparency and accountability, and a guide for those implementing and later reviewing the Tribunal's orders.

Some of these key features are not required by the Guardianship Act. To a very large degree, the development and implementation of these features has depended on the ongoing leadership of successive Presidents of the Tribunal, the specialist skills of Tribunal members and staff, and the provision to the Tribunal of an adequate and segregated budget.

## Why the Guardianship Tribunal should remain a separate tribunal

The role and the consequent procedures of the Guardianship Tribunal are very different to other tribunals in NSW.

Most tribunals adjudicate over disputes between parties as opposed to being responsible to protect the rights and interests of a person with impaired capacity. They are dealing with issues such as contractual or industrial disputes, compensation claims or professional discipline. They are not dealing with sensitive issues of human relationships like the Guardianship Tribunal. The mindsets of the leaders of these tribunals and the procedures of the tribunals will naturally relate to their very different work.

Whilst other tribunals may have similar legislative mandates as the Guardianship Tribunal to avoid formality and legal technicality, the way in which they apply that mandate tends to be very different. There is a different mindset and culture that flows from whether the starting point is law or whether it is expertise in the needs of people with disability.

We have no confidence that the Guardianship Tribunal would retain its key features if it was absorbed into a broader tribunal.

There may well be initial assurances that the features of the Guardianship Tribunal would be maintained with it being a separate division of the new tribunal. However, over time, the more adversarial, formal and legalistic approaches suited to other parts of such a tribunal's work would erode the procedures of the Guardianship Tribunal. Internal budgetary pressures would likely erode the use of three members for hearings and the pre hearing investigative staff.

Experience in other states is not positive about the impact on guardianship tribunals when they are absorbed into broader tribunals. See below.

There is some resemblance between the work of the Guardianship Tribunal and the Mental Health Review Tribunal but also various differences. In particular, the Mental Health Act gives the MHRT an explicit community protection focus as well as a focus on the rights and interests of the individual. Further, the MHRT has an explicit link to the criminal court and correctional systems in its roles in relation to people found unfit to be tried or not guilty on the basis of mental illness. These differences in focus make it very important to maintain a separation between the Guardianship Tribunal and MHRT.

Ongoing governmental support of a separate Guardianship Tribunal is all the more important in light of current developments in disability policy:

- The NSW Government's move towards person centred support of people with disabilities.
- The development of a National Disability Insurance Scheme.
- The emphasis in the UN Convention on the Rights of Persons with Disabilities on supported decision making being preferred to substitute decision making wherever possible.

Many guardianship and financial management cases will involve issues relevant to these policies, for example issues about whether a person has the capacity to make their own

decisions about supports and disagreements about what supports are appropriate for the person. A person centred Guardianship Tribunal with a strong disability culture and expertise will be important to these issues being properly determined.

## What has happened in other states?

In NSW, despite the ongoing pressures of increasing caseloads and budget pressures, the above key features have largely remained intact for the 22 year life of the Guardianship Tribunal. In other States, where the Guardianship Tribunal has been absorbed into a broader tribunal, the situation has been different.

Below, we look at what has happened in Victoria and Western Australia. We base this comparison on legislation, annual and inquiry reports, consultation with individuals with long term involvement with local guardianship systems and our own experience over time.

### *Victoria*

In Victoria, the guardianship tribunal (originally the Guardianship and Administration Board) originally sat as a three member multi-disciplinary tribunal. The original members developed a strong and positive culture based on the bringing together of individuals with a range of relevant professional and disability expertise and their sharing that through sitting together. Later, the legislation was amended and the tribunal moved to sitting predominantly as a single member.

In 1998, the tribunal was absorbed into the Victorian Civil and Administrative Tribunal (VCAT). While there continued to be a specific list for guardianship matters, the specialised membership of the tribunal diminished. Members who hear guardianship matters are the same people as hear a range of other matters, in particular residential tenancies and civil claims.

Over time, the tribunal's staffing to prepare matters for hearing also diminished. The Office of the Public Advocate (OPA) does investigate some applications but this is only a small minority. (In 2008-2009, VCAT heard 9698 guardianship matters but OPA's budget for investigations was only $825,000. See annual reports of VCAT and OPA.)

The Victorian Law Reform Commission is currently finalising a review of adult guardianship laws in that State. This has involved an extensive process of consultation and submissions.

In the Commission's consultation paper on reform proposals, Chapter 21 deals with the role of VCAT. The Commission reports that submissions and consultations revealed a range of concerns with how VCAT deals with guardianship and financial management matters, namely that:

- VCAT has inadequate procedures prior to hearings, particularly in relation to investigation of matters, notification of parties, and informing parties of what to expect at the hearing.

- Inadequate evidence is sometimes used at VCAT hearings. Since VCAT does not have an investigative arm, it relies considerably on material presented by the applicant.

- 'Less restrictive' alternatives to guardianship and administration are rarely adopted.

- Guardianship List hearings are increasingly formal and legalistic. The Public Advocate and others saw a "creeping legalism" that had been developing. For example, the presence of lawyers for parties other than the person with disability had a negative influence on hearings. Hearings sometimes occur in court rooms and some members then choose to sit behind the bench rather than across the table from the parties.

- There is inadequate attendance and a lack of representation for people who are the subject of applications. In most cases, the person does not attend.

- Some members have insufficient knowledge of disabilities and the disability sector.

- One member sitting alone hears most matters.

- Usually, only oral reasons for decision are given.

The Commission raised whether features of the NSW Guardianship Tribunal should be adopted in Victoria:

- Active coordination and investigation of cases prior to hearings.

- Multi member panels with three members from a range of backgrounds.

- Avoiding the use of court rooms for regional hearings.

See
www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Current+Projects/Guardianship/LAWREFORM+-+Guardianship+-+Consultation+Paper

### *Western Australia*

In Western Australia, the guardianship tribunal (the Guardianship and Administration Board) was a separate tribunal until about 2005 when it was absorbed into the State Administrative Tribunal (SAT). This was after a parliamentary inquiry in which all relevant submissions either opposed this course or expressed concerns about it.
www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/8E15F0ACAC12A61148256F3A0007E6CC/$file/ln.sat.041027.rpf.024.xx.a.pdf , Chapter 14.

The inquiry heard that, until that time, the tribunal's membership included senior lawyers as president and deputy president, with the balance of membership being,

> ...multi-disciplinary, drawn from a wide variety of backgrounds with a variety of expertise appointed during the tenure of different governments over the past decade with a common and deep commitment to the rights and interests of persons with disability.

The Chief Justice opposed the tribunal being merged into SAT, pointing out that the guardianship jurisdiction had been part of the Supreme Court's inherent jurisdiction but its sensitive nature had made it appropriate to excise the jurisdiction into a specialist tribunal.

The inquiry received submissions that absorption into SAT would impede physical and social access for people with disabilities.

The inquiry considered recommending that absorption not proceed. But, by then, the guardianship tribunal had already been physically moved to the SAT premises and the inquiry did not see it as feasible for this to be reversed.

After the absorption into SAT, we understand that the role of non-legal members has diminished and that hearings are more formal and court like making them less open to the full participation of people with disabilities.

In 2009, a parliamentary inquiry considered the administration of the SAT. The Disability Services Commission raised a range of concerns about how the guardianship jurisdiction was operating. While the inquiry accepted the SAT's reassurances on some issues, it found that the tribunal was deficient in the extent to which it addressed power imbalances facing people with disabilities, in access to its premises for people with disabilities, in availability of disabled parking and in space and privacy in waiting areas..
www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/A0BA5F7E0AD6041EC82575BC002027CD/$file/ls.str.090520.rpf.014.xx.a.pdf

The SAT heard 3157 guardianship matters in 2008-2009 but only 721 were investigated prior to the hearing. (See annual reports of the SAT and Office of the Public Advocate.)

## Conclusion

A separate and independent Guardianship Tribunal is an essential safeguard on the rights and interests of people with disability in NSW.

We recommend that the Committee find that it would be inappropriate to amalgamate the Guardianship Tribunal with any other tribunal.

We are happy to provide further information or to appear before the Committee.