Queensland Law Society

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Office of the President

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Mr Michael Tidball
Chief Executive Officer
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GPO Box 1989
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By email: [redacted]

Our ref: VK/ELC

Dear Mr Tidball

Multiplicity of decision makers in guardianship matters

An ongoing discussion of the Queensland Law Society's Elder Law Committee relates to the multiplicity of substitute decision-makers and decision-making supports in guardianship matters.

Currently, it is possible for multiple substitute decision-makers and persons supporting decision-making to exist in relation to the dealings of the same adult, arising pursuant to a number of separate acts and subsidiary legislation. For example, the Centrelink regime and the National Disability Insurance Scheme (**NDIS**) both give rise to a number of substitute decision-makers and persons supporting decision-making. Some examples of the types of decision-makers which may be established in relation to the same adult are as follows:

1. Informal decision makers, decisions of whom may be ratified by a State's Civil and Administrative Tribunal.
2. Enduring powers of attorney for financial, personal and health decisions.
3. Guardians pursuant to the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), and also established pursuant to equivalent legislation in other States and Territories.
4. Administrators formally appointed by a court or tribunal to make financial, and some legal decisions.
5. Statutory Health Attorneys.
6. The Public Guardian.
7. The Public Trustee.
8. 'Allied person' under the *Forensic Disability Act 2011* (Qld).
9. 'Nominated person' under the *Mental Health Act 2016* (Qld).
10. Litigation guardians in civil law.

11. Litigation guardians in family law.
12. Nominees under the NDIS.
13. Nominees under the *Social Security Act 1991* and *Social Security (Administration) Act 1999.*
14. Nominees under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018.*
15. Authorised signatories on bank accounts.
16. A 'representative' as described separately under section 96-5 of the *Aged Care Act 1997* (the **Aged Care Act**), under section 5 of the Quality of Care Principles (made under section 96-1 of the Aged Care Act), and an 'appropriate person', which is not defined, under section 44.8A of the Aged Care Act. In relation to a 'representative' under section 96-5, we also note its distinction from a 'legal representative', which appears to be intended as a higher bar of representation in relation to making of binding contracts, as compared to authorisation given by a 'representative' for the purpose of informal correspondence.
17. Nominated representatives and authorised representatives under the *Personally Controlled Electronic Health Records Act 2012.*
18. Persons authorised under the *Privacy Act 1988.*

The majority of these decision-makers are created under Commonwealth legislation but, as demonstrated above, there are several overlaps between state and federal laws, which creates confusion.

The potential tension created by this cavalcade is demonstrated in the following New South Wales Civil and Administrative Tribunal decisions involving the NDIS:

- *Re KTT* (2014) NSWCATGD 6
- *Re NZO* (2014) NSWCATGD 9
- *Re KCG* (2014) NSWCATGD 7

A summary of these matters is **enclosed**.

Further issues reported to QLS include:

1. Purported statutory health attorneys making decisions about health care for adults with impaired capacity where guardianship orders are in place and the proper decision-maker for health matters is the formally appointed guardian.
2. The role of 'allied persons' selected by an adult under the *Forensic Disability Act 2011* (Qld) or 'nominated support person' under the *Mental Health Act 2016* (Qld) can conflict with that of the formally appointed guardian.
3. The different ways in which substituted decision-makers are appointed pursuant to state guardianship and administration laws (by the person or by a court or tribunal) compared to Commonwealth schemes (appointed by a government functionary).
4. The different duties incumbent upon decision-makers pursuant to state guardianship and administration laws (to observe the respective legislation and the General Principles) compared to Commonwealth schemes (where the requirements vary significantly from scheme to scheme).

5. The variability in whether decision makers are subject to oversight by any independent body, with decision-makers appointed under Commonwealth law often not being subject to oversight.

The complexities of understanding the hierarchy of the different substitute decision-makers was highlighted in the matter of *Doleman v Doleman* [2017] QSC 113 where a private lawyer for an adult purported to act as a Litigation Guardian for the adult in circumstances where the Public Trustee, as the Financial Administrator for all financial matters for the adult, had taken the view that the litigation being conducted by the Litigation Guardian was not appropriate. The Court found that the person who is appointed as the Financial Administrator is prima facie entitled to be the Litigation Guardian of the adult. The Litigation Guardian was removed by the Supreme Court and the proceedings commenced by the Litigation Guardian were dismissed.

QLS is aware of efforts, including the discussion paper circulated by the Australian Guardianship and Administration Council, to review and possibly align State and Territory legislation in relation to enduring powers of attorney. Whilst this would be a significant and welcome reform, it is our view that it does not go far enough and a comprehensive review is needed to capture the full range of overlapping and perhaps conflicting substitute and supporting decision-making roles that have been created, with a view to creating a framework for legislative reform that is intended to simplify the system and remove duplication of powers.

We would be grateful if the Law Council would consider coordinating advocacy in this space.

If you would like to discuss the contents of this letter please contact Senior Policy Solicitor Vanessa Krulin at [redacted] or on [redacted]

Kind regards

[redacted]

Luke Murphy
President

Summary of New South Wales Civil and Administrative Tribunal matters

Re KTT (2014) NSWCATGD 6

Mr KTT was an adolescent with autism spectrum disorder, a moderate intellectual disability, impaired communication and behavioural difficulties. He had recently turned 18 and his mother made an application to the NSW Civil and Administrative Tribunal for a guardianship order.

In the latter part of 2013, Mr KTT had come under the National Disability Insurance Scheme. Under the *National Disability Insurance Scheme Act*, Mr KTT's mother had authority to deal with the NDIA on his behalf while he was a child – until December 2013 – but not after that date unless and until she was appointed his plan nominee.

The Tribunal noted that it was cautious about pre-empting the NDIA processes by making a guardianship order so she would be more likely to be appointed nominee. It also considered that, in the unlikely event the NDIA were to appoint a different person as nominee, then administrative review processes were available to her.

The Tribunal considered that, assuming Mr KTT's mother became her son's plan nominee, it was this role and not that of guardian that would allow her to act on her son's behalf in dealings with the NDIA. It was also practicable that services would continue to be provided to Mr KTT without the need for a guardianship order.

Though Mr KTT's mother had also raised the difficulty of opening a bank account for her son and registering as Centrelink nominee once he became an adult, the Tribunal noted that these were financial management issues rather than guardianship issues. No guardianship order was granted.

Re KCG [2014] NSWCATGD 7

In this matter, the NSW Civil and Administrative Tribunal appointed the Public Guardian as Miss KCG's guardian for a period of 12 months to make decisions about her accommodation, advocacy and services.

The NSW Trustee and Guardian (NSWTG) had, in effect, been guardian of her financial affairs since 1995. The Public Guardian had a limited guardianship order between 1995 and 2012 for her major personal, health and lifestyle decisions.

At the time of making the order, Miss KCG was a 64 year old single woman living in a group home managed by NSW Department of Family and Community Services. The application for appointment of a guardian was brought by the team leader at the group home for two reasons: the home was about to be transitioned to the NDIS; and Miss KCG had been subject to bullying and physical assaults by other residents of the group home.

The Tribunal was satisfied that a decision about Miss KCG's accommodation could not be made on an informal basis and that there was a need for a guardianship order with an accommodation and services function.

The Public Guardian submitted that whilst the powers and responsibilities of the NSWTG as Miss KCG's financial manager are relevant to the duties of a nominee as contemplated in s 88(4) of the NDIS Act, some of the duties of a nominee would be more consistent with the role of a guardian. If there was to be funding provided directly to Miss KCG, then the NSWTG should be jointly appointed as nominee

with the guardian. If the funding was to be provided to service providers, the NSWTG does not need to be appointed as a joint nominee.

On the other hand, where a participant does not have the capacity to make decisions and has no authorised representative, the NDIA would consider the wishes of the participant, identify any informal supports available to prospective participant and then make a decision itself.

The Tribunal noted that the nominee scheme in the NDIS operates independently of the state-based guardianship and financial management regime. However, any substitute decision making regime must include appropriate safeguards to ensure that the rights of the person with the disability are not infringed and that the arrangements are regularly reviewed. Thus, the Tribunal recognised possible limitations to Miss KCG's NDIS plan being managed by the NDIA without independent scrutiny.

Given Miss KCG's need for accommodation and services decisions regardless of her involvement in the NDIS, and the fact that she had no person involved in her life who could advocate on her behalf, it was not possible for these decisions to be made without a guardianship order.

***Re NZO* [2014] NSWCATGD 9**

In this case, Miss NZO was a 68-year-old woman who lived in a privately rented house shared with three other women with intellectual disabilities. The women were all supported by an In-Home Support Service of ADHC. An application for a guardianship order was made by the team leader primarily due to the implementation of the NDIS and the transition from state-based services to nationally-based. The home where she lived was a "launch-site" for NDIS services and two of the residents were to become NDIS participants.

Miss NZO was over 65 years of age and therefore was not able to become a participant of the NDIS. The ADHC did not have a clear policy for people who weren't entitled to become NDIS participants, other than an agreement with the NDIA during the launch period when residents over 65 lived in a launch site were able to apply to the NDIS, not for eligibility as a participant, but purely for a continuity of support arrangement. What was to happen after the launch period was uncertain.

Miss NZO had no independent person available to her to assist her, or otherwise advocate for her, in relation to any changes in service provision and any resultant accommodation changes. Accordingly, the Tribunal appointed the Public Guardian as Miss NZO's guardian for a period of 12 months to make decisions about her accommodation, about what services which she should receive and to advocate generally.