



Mental Health  
Coordinating Council

**Submission to the Guardianship Tribunal  
Discussion Paper  
Proposed Amendments to the Guardianship Act  
1987 (NSW)**

30 November 2006

**Mental Health Coordinating Council  
Rose Cottage. Callan Park.  
PO Box 668. Rozelle, NSW 2039**

**Tel: 02 9555 8388 Fax: 02 9810 8145  
Email: [info@mhcc.org.au](mailto:info@mhcc.org.au)  
Website: [www.mhcc.org.au](http://www.mhcc.org.au)**

**George Damalas  
Legal Officer  
Guardianship Tribunal  
Locked Bag 9  
Balmain  
NSW 2041**

MHCC is the state peak body for non-government organisations working for mental health throughout NSW. MHCC represents the views and interests of over 160 NGOs in the formation of policy, and acts as a liaison between the government and non-government sectors. Our member organisations specialise in the provision of services and support for people with a disability due to mental illness.

MHCC represents the interests of its members on a number of National and State boards, committees and reference groups including:

#### National Organisations

- Consumer Health Forum of Australia Governing Body
- Department of Health and Aged Care Suicide Prevention Strategy
- Mental Health Council of Australia (MHCA)

#### State Organisations (NSW)

- ACROD Management Committee
- FONGA (Forum of Non-Government Agencies) NCOSS
- Health Care Complaints Commission (HCCC) Consumer Consultative Committee
- Institute of Psychiatry, Consumer Advocate Training Consultative Committee
- Mental Health Association (MHA), Mental Health Promotion Advisory Committee
- NCOSS Health Policy Advisory Group (HPAG)
- Office of the Protective Commissioner Disability Group Interagency Committee
- PIAC Forensic and Mental Illness in Prison Network
- Quality Management Services (QMS) Human Service Organisation
- Standards Steering Committee

#### State Government Departments (NSW)

- Attorney General's Department, Law Reform Commission, Flexible Service Delivery Consultative Committee.
- Community Housing Disability Consultative Committee, Office of Community Housing
- Department of Education & Training, Disabilities Community Consultative Committee

- Department of Housing – Port Jackson Housing Advisory Committee
- Department of Housing – NGO Advisory Group
- Dual Diagnosis (MISA) TAFE Training Project / Steering Committee
- NSW Community Housing Disability Consultative Committee
- NSW Mental Health Review Systems Committee
- NSW Health Mental Health Taskforce
- NSW Health Mental Health Priority Taskforce
- NSW Health, Housing and Supported Accommodation Initiative (HASI)
  - Steering Committee
  - Advisory Committee
  - Evaluation Committee
- NSW Health NGO Advisory Group
- NSW Suicide Prevention Committee
- NGO Advisory Group Accreditation Sub-committee
- Justice Health Consumer and Community Group
- NSW Health, Centre for Mental Health, NGO Partnerships Forum
- Services Industry Reference Group. (Mental Health Course Development)
- The New Joint Guarantee of Service (JGOS)

MHCC welcome the opportunity to respond to the Proposed Amendments to the Guardianship Act 1997 (NSW): Discussion Paper. However, we suggest that wider exposure should have been initiated to advise interested stakeholders that this work was in progress, since this review discusses amendments with far-reaching and serious consequences on people with disability, impacting on their autonomy to make decisions affecting all aspects of their life.

When consulted, several important disability legal services and NGOs working in the field were unaware that the Act was under review. MHCC are of the opinion that widespread consultation across the sector would provide constructive and indispensable perspectives from those who work with people with disability and engage in the work of the Tribunal. We suggest that a review without such broad consultation fails to advance the Tribunal's integrity.

By an large, MHCC regard the proposed amendments as ambiguous in their intent despite comments to the contrary such as, " *The Tribunal is committed to the principles of the guardianship legislation, which provide that the welfare and interests of the person with a disability, must be the paramount concern of the Tribunal and everyone acting under the Guardianship Act 1987 (NSW).*"

We are of the opinion that the proposed amendments are primarily cost cutting measures, unlikely to foster the quality of the Tribunal to deliver services to people with disabilities, protecting and promoting their interests. We appreciate the pressure on the Tribunal to deliver more timely services, to meet the increased demand particularly in the light of growing age and disability in the community.

However, we firmly believe that these services should not be compromised in order to curb costs or stall the expansion of a service that of necessity must develop with the natural growth and changing demographic profile of the population.

### **Question 1: Composition of the Guardianship Tribunal**

- 1. Should the Guardianship Act 1987 (NSW) allow, at the President's discretion, fewer than three (3) members to hear reviews of guardianship and financial management orders and applications for major medical or dental treatment?*

MHCC understand that by definition, a tribunal may be made up of a person or body of persons. However, the legislation as it stands acknowledges the importance of a broad spectrum of legal, clinical and community expertise in making decisions that seriously impact on a person's autonomy. MHCC are of the opinion that this amendment is inappropriate, and that the community have the right to expect thorough deliberation and exploration of capacity when in question.

We note that the Act as it stands, already allows for decisions of less importance to be resolved by a one or two person Tribunal. We propose that serious decisions that pose an element of risk, affect reproductive and human rights may only be determined by a three member Tribunal. A decision is much more likely to be considered legitimate if made by three people, and this would to a large extent contain the necessity for appeals contesting determinations (through the Supreme Court or Administrative Decisions), which MHCC suggest would pose a barrier to most people with a disability.

- 2. What safeguards are needed in such a system?*

Since MHCC suggest that this amendment should not be enacted, we do not answer this question.

### **Question 2: Term of Appointment of Guardianship Tribunal members**

- 1. Should the possible maximum term of appointment for members of the Guardianship Tribunal be extended from three (3) years to five (5) years?*

MHCC do not follow the argument that security of tenure necessarily fosters impartiality or independence. We understand that this relates to members' concerns that a longer appointment period might foster more critical assessments than if they felt their position to be more tenuous. We suggest that 5 years may be appropriate to allow more resources to manage the increasing work of the Tribunal, but that re-appointment be only for a further three years to keep the Tribunal member composition fresh.

### **Question 3: Increased flexibility to make non- reviewable Guardianship Orders**

*1. Should the Guardianship Tribunal have increased flexibility to make non-reviewable guardianship orders where appropriate?*

MHCC is of the opinion that review of an order of specified or short duration may be unnecessary and may be allowed to lapse. However, we observe that Section 16 (2A) (a) & (b) appear to be appropriate in that they allow for review if required. This prevents possible ambiguity and inappropriate use of a determination. In view of a Principle of the Act (Section 4(b) that, *“the freedom of decision and freedom of action of such persons be restricted as little as possible,”* we suggest that any decision be reviewable so as to ensure the rights of the individual are preserved.

Whilst we support the concept of a *“least restrictive option,”* we suggest that engaging with the individual, their family and/or carer is an important part of ensuring that *“best interests”* are maintained on an ongoing basis, and that the rights of the individual are preserved.

### **Question 4: The Role of the Registrar**

*1. Should the Registrar of the Tribunal be able to exercise the procedural functions discussed in this Discussion Paper?*

MHCC supports the Registrar of the Tribunal exercising functions listed in bullet points 1 -5 in the Discussion Paper.

*2. Should the Registrar of the Tribunal have the authority to determine that no further action be taken in relation to applications as discussed in this Discussion Paper?*

MHCC strongly object to the Registrar exercising functions listed in bullet points 6 and 7. We understand that the Registrar of the Tribunal is not appointed using selection criteria that would ensure that they are appropriately qualified to assess applications to review guardianship orders, or make decisions regarding the validity of a requested review. We strongly advocate individuals have a right to have their requests considered by those most qualified to do so.

*3. Are additional safeguards required, and, if so, what should they be?*

In the event of the Registrar’s procedural functions being extended to include those listed in bullet points 6 and 7, we strongly advocate that additional safeguards are put in place to ensure appeal is available against the Registrar’s determination. We suggest that such amendments are unlikely to reduce the workflow to the Tribunal, and will compromise the rights of people with decision making disabilities.

## Conclusion

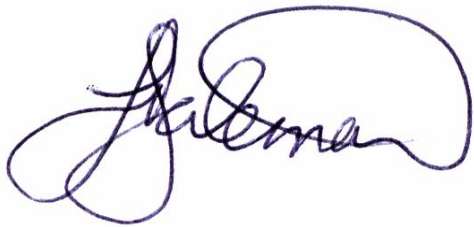
MHCC emphasise concerns regarding the process initiated in order that the Guardianship Tribunal access wide community perspectives on this Discussion Paper. We feel that the proposed amendments to the Act represent important changes that will impact substantively on those the Act sets out to protect, and would welcome further community consultation on these issues . We would like to see other representations submitted publicly available on the Guardianship Tribunal website.

Reiterating our initial comment that we perceive the primary purpose of these amendments as cost driven streamlining measures, our perspective is that the Tribunal must address the growing need of an ageing population to provide services that maintain the rights of people whose capacity is in question, the primary principle being the welfare and interests of the individual, protection from neglect, abuse and exploitation whilst preserving freedoms as much as possible.

MHCC thank the Guardianship Tribunal for their interest in the views of MHCC and its members. We are most willing to be involved in any future consultations.

Please address any further inquiries about this submission to:  
Corinne Henderson, Policy Officer  
[corinne@mhcc.org.au](mailto:corinne@mhcc.org.au) or telephone: 9555 8388 ext 101.

Yours sincerely,



Jenna Bateman  
Executive Officer