



Our ref:FLC:PWks1304591

3 May 2017

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament house  
Canberra ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary,

### **Civil Law and Justice Legislation Amendment Bill 2017**

The Law Society of New South Wales appreciates the opportunity to provide comments in relation to the *Civil Law and Justice Legislation Amendment Bill* ("the Bill"). The Law Society of NSW provides the following comments in relation to proposed amendments to the *Family Law Act 1975* (Cth) ("the Family Law Act"), specifically with respect to guardians ad litem. Law Society's Family Law Committee contributed to this submission.

#### **1. Indemnity and statutory protections**

The Bill proposes the insertion of a new subsection 117(6) into the *Family Law Act* which would prohibit the Family Court and Federal Circuit Court from making a costs order against a guardian ad litem, unless the Court is satisfied that an act or omission of the guardian is unreasonable or has unreasonably delayed the proceedings. The term 'guardian ad litem' is intended to include case guardians as described in Part 6.3 of the *Family Law Rules 2004* (Cth) and litigation guardians as described in Division 11.2 of the *Federal Circuit Court Rules 2001* (Cth).

The Law Society supports the proposed amendment. We note that no statutory protections under Commonwealth laws are currently provided which may discourage suitable people from agreeing to undertake the role of guardian ad litem.

This is in contrast to statutory protections provided in NSW. Prior to 2010, some protection was provided at common law for guardians ad litem. However, guardians acting in good faith were required to cover the costs of their own defence, should legal proceedings be commenced against them.<sup>1</sup> In 2010, a statutory defence was introduced with the intention that the Crown Solicitor would act on behalf of a guardian ad litem who had acted in good faith, in the event that legal proceedings were commenced against them.<sup>2</sup> The statutory

<sup>1</sup> See second reading speech of the Hon John Hatzistergos, Attorney General, 9 December 2010, page 1, <https://www.parliament.nsw.gov.au/bills/DBAssets/bills/SecondReadSpeechLC/1855/LC%2013510.pdf> accessed on 28 April 2017.

<sup>2</sup> See *Courts and Crimes Legislation Further Amendment Act 2010* (NSW).

defence provides that anything done or omitted to be done by a guardian ad litem appointed by a Court or Tribunal to represent an incapacitated person in proceedings does not subject the guardian ad litem personally to any action, liability, claim or demand if the thing was done, or omitted to be done, in good faith for the purpose of representing the incapacitated person. Instead any such liability attaches to the Crown.<sup>3</sup>

The Law Society considers that statutory protections, similar to the statutory defence in NSW legislation, should be provided in the Family Law Act.

## **2. The role of guardians ad litem after Court proceedings are finalised**

The Law Society notes that once proceedings have been completed, a guardian ad litem no longer has standing to make decisions in respect of the implementation of orders made by the Court. For example, liaising with an agent and negotiating a sale price for property where the Court has made an order for the sale of the former matrimonial home. A guardian ad litem is not authorised to decide or agree upon a sale price, nor to sign a contract for sale or a transfer, without power of attorney or a guardianship order. While the issue of signing a transfer may be overcome by having an order made to provide for a Registrar of the Court to sign such a document to implement an order,<sup>4</sup> there is no scope to facilitate the decision-making surrounding the sale by way of a Court order. In NSW, the indemnities and statutory protections afforded to formally appointed guardians ad litem also cease.

The Law Society has observed a gap in services provided to a party who requires a guardian ad litem. In most cases a party who required the appointment of a guardian ad litem to conduct Court proceedings also requires support and assistance to implement the orders made by the Court. The party may also find it difficult to understand when proceedings have ceased and that the guardian ad litem is no longer able to assist the party. This means that the party is required to implement Court orders without assistance, which may be difficult to achieve.

The Law Society is of the view that legislative change is required to either:

- (a) Expand the role of a person who has been appointed as a guardian ad litem after proceedings are finalised. The role could be expanded to enable the guardian ad litem to assist with the implementation of Court orders; or
- (b) Create a new category of support person who will assist a party to implement Court orders after proceedings are finalised. A person who was appointed as a guardian ad litem could be appointed to a support person role after proceedings are finalised for the purpose of assisting a party to implement Court orders.

## **3. Nomination process for the appointment of guardians ad litem and funding for legal costs**

The Law Society notes that there are no arrangements in place with the Attorney-General's Department for the nomination of guardians ad litem in circumstances where a court accepts that a party does not have the capacity to conduct proceedings on their own behalf and no other independent person is available for appointment.

Where there is no guardian ad litem, the Court proceedings cannot progress and the Court may dismiss the proceedings or delay the proceedings indefinitely pending the appointment

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<sup>3</sup> See NSW Justice webpage - Statutory Protection for Guardian ad Litem Panel Members, <http://www.gal.justice.nsw.gov.au/Pages/Statutory-Protection-GAL.aspx>, accessed on 28 April 2017.

<sup>4</sup> Refer to s 106A of the *Family Law Act 1975* (Cth).

of a litigation representative. This clearly has very serious consequences for the parties involved; and particularly for any children involved in the proceedings.<sup>5</sup>

In addition, the Law Society notes that there is currently no funding available to meet the legal costs of guardians ad litem where they cannot be paid by the party themselves. Guardians ad litem are eligible to seek assistance from the Attorney-General's Department's disbursement support scheme, however, this scheme does not provide financial assistance for legal costs. The absence of a source of funds for the legal costs of guardians ad litem can result in significant delays in family law proceedings.

In 2009, the NSW Department of Justice established a panel of people eligible for appointment as a guardian ad litem in matters before the Children's Court of NSW.<sup>6</sup> The panel has been expanded and is now available to all NSW courts and tribunals.<sup>7</sup> The NSW Department of Justice administers the panel and the appointment of a guardian ad litem where a court has ordered it to do so. A guardian ad litem is appointed three working days after the Department receives a court order. Guardians are remunerated for their time and expenses according to a set fee schedule.

Members of the Law Society's Family Law Committee, who have represented clients in matters before the Children's Court of NSW where a guardian ad litem has been appointed, are of the view that the appointment process is efficient and cost effective and successfully provides access to justice for people with disabilities.

The Law Society recommends that urgent consideration be given to the implementation of a similar nomination process for the appointment of guardians ad litem and funding for their legal costs under the Family Law Act.

Please do not hesitate to contact Katrina Stouppos, Policy Lawyer for the Committee

Yours sincerely,

**Pauline Wright**  
**President**

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<sup>5</sup> See submission in Response to the Australian Law Reform Commission *Issues Paper 44: Equality, Capacity and Disability in Commonwealth Laws*, the Hon Diana Bryant AO, Chief Justice of the Family Court of Australia, 17 January 2014, p 9, available at: [http://www.alrc.gov.au/sites/default/files/subs/22\\_hon\\_diana\\_bryant\\_ao\\_submissionequalitycapacitydisability.pdf](http://www.alrc.gov.au/sites/default/files/subs/22_hon_diana_bryant_ao_submissionequalitycapacitydisability.pdf)

<sup>6</sup> *Guardian ad Litem Handbook*, NSW Department of Justice, 1 January 2012.

<sup>7</sup> As above, p 13.