PARLIAMENT OF NEW SOUTH WALES

Report of the
PUBLIC BODIES REVIEW COMMITTEE

Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner

October 2001

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Functions Of The Committee

To examine the annual reports of all public bodies and to enquire into and report on:

a. the adequacy and accuracy of all financial and operational information;

b. any matter arising from the annual report concerning the efficient and effective achievement of the agency's objectives;

c. any other matter referred to it by a minister or the Legislative Assembly.

Committee Membership

Mr Milton Orkopoulos MP
– Chairman -
Mr John Bartlett MP
Mr Alan Ashton MP
Mr Daryl Maguire MP
Mr Michael J. Richardson MP

Secretariat:

Ms Catherine Watson – Committee Manager
Ms. Jackie Ohlin – Project Officer
Mr Keith Ferguson – Committee Officer
Ms Glendora Magno – Asst. Committee Officer
Mr John Chan Sew - Financial Consultant

Terms of Reference of the Inquiry

The terms of reference of the inquiry are as follows:

That the Committee inquire into, and report back to Parliament on, the following issues:

(a) How the Office of The Protective Commissioner and the Office of the Public Guardian manage the financial affairs and lifestyle decisions of persons under their care;

(b) How the Office of The Protective Commissioner and the Office of Public Guardian consult with, and otherwise take into account, the interests of persons under their control and their relatives.

(c) How the Office of The Protective Commissioner and the Office of the Public Guardian ensure accountability and transparency in their operations to their client base;

(d) The effectiveness of complaint mechanisms currently in place within the Office of The Protective Commissioner and the Office of the Public Guardian;

(e) How effectively both Offices currently function as separate administrative entities with the same senior management;

(f) Responses by the Office of The Protective Commissioner and the Office of the Public Guardian to the recommendations of the Auditor General's Performance Audit Report no. 66;

(g) Any other related issues.

Chairman's Foreword

The work undertaken by the Office of The Protective Commissioner and the Office of the Public Guardian could indeed be described as 'Solomon's Legacy'. As decision-makers of *last resort*, the respective Offices manage the affairs of people incapable of managing their own affairs. In the case of the Public Guardian, it makes substitute decisions for individuals in relation to health care and lifestyle. The Protective Commissioner manages the financial affairs of individuals whose affairs have been formally committed to its management by order of the Supreme Court, the Guardianship Tribunal, the Mental Health Review Tribunal or a Magistrate.

Seeking Guardianship and/or a Protective Commission Management Order can often be a time of stress, anxiety, fear or conflict. For some clients, family members, carers or significant persons, their concerns may not diminish. Thus the substitute decision-maker (the Protective Commissioner or the Public Guardian), while charged with acting in the best interests of the client, may be seen by some as acting contrary to *their wishes* for the client.

Further, in a climate quite correctly constructed to protect the privacy of clients, the respective Offices can and do occasionally stand accused of operating within a cloak of secrecy.

These factors can lead to tensions, suspicion or accusations occurring between the respective Offices and clients, family members, carers or significant persons. The 'wisdom of Solomon' does indeed need to be invoked with each decision, along with great clarity of explanation and sensitivity to peoples' needs and circumstances.

None of this background, however, should excuse the Public Guardian or the Protective Commissioner from effective scrutiny to accepted standards of public accountability and responsibility to and for clients.

It should be noted that the financial management processes of the Protective Commissioner rely, for operational expenses upon fees for services to the protected persons and a contribution from the Common Fund. The Committee acknowledges the view of the Audit Office that reliance upon these mechanisms presents a potential for public mistrust in the Protective Commissioner. Accordingly, the Committee has recommended measures to improve financial accountability *and* additional funding arrangements.

The community expects on behalf of its most vulnerable citizens that the Public Guardian and the Protective Commissioner operate in a demonstrably ethical manner in terms of financial management and investment of assets, client relations, staff management, public relations – all supported by transparent management systems and clear reporting mechanisms.
The Committee has inquired into issues of concern which led to some failures in the effectiveness of accepted standards within the Offices of the Protective Commissioner and the Public Guardian up until 1999. A resulting Auditor-General's Performance

Audit Report on the Office of the Protective Commissioner recommended certain administrative and management changes, many of which have been implemented. This Report has investigated further, and recommends additional urgent changes to financial management practices, appeals mechanisms, avenues for client contact and for the 'public face' of the Protective Commissioner.

The Committee received 147 submissions in the course of the Inquiry, and spoke with 54 individuals and organisations in the course of hearings and briefings. The Committee wishes to thank all of the parties who made submissions to and expressed interest in the Inquiry and all the public officials who provided information and gave evidence.

It must also be acknowledged that, in part, this Report is a follow-up of the Performance Audit into OPC and OPG Complaints and Review Processes done by the New South Wales Audit Office in 1999. In that respect, I would like to thank Bob Sendt, Tom Jambrich and Stephen Horne for their assistance to the Committee in the course of the Inquiry.

I commend the Report for consideration and action.

Milton Orkopoulos MP
Chairman

Executive Summary

This Report addresses critical issues within both the Office of the Public Guardian and the Office of the Protective Commissioner and recommends numerous key organisational changes. Most of these changes are in the interests of better management, better transparency and a better client focus within the both organisations.

Financial Issues

Rates of return on investments and uncertainty concerning the sustainability of client finances have been ongoing issues throughout the course of the Committee's inquiry. Last year legislative changes allowed the Office of the Protective Commissioner to greatly diversify the range of areas in which clients' funds can be invested. These changes should promise much larger rates of return and better long term individual financial planning. Accordingly, changes have begun within the Office to enable restructuring of the Common Fund with the aim of better investment asset mix to meet clients' needs in both the short and long term.

However, the Committee has identified additional changes it considers essential for overall effective financial planning and investment. Much wider diversification of investments and corresponding preparation of financial plans will require the Office of the Protective Commissioner to perform a far more complex range of tasks than it has in the past. It was considered that management of such a large amount of money into so many diverse investments was a job best outsourced to NSW Treasury Corporation which has great expertise in this area.

The Committee has recognised that the Office of the Protective Commissioner knows its clients' circumstances and ongoing needs best and therefore are the most appropriate body to prepare clients' financial plans, subject to a three yearly review. It is recommended that the existing financial planning capacity of the Office of the Protective Commissioner be supplemented with expert external financial planners, where necessary. The Committee would also like to see a panel of external financial planners established to provide advice on more complex planning issues. It has also been recommended that the Office of the Protective Commissioner concentrate on finishing all their clients' financial plans as soon as possible so the new investment options can be taken advantage of.

Greater Transparency and Accountability

Issues of transparency and accountability in relation to the levying of fees and the prevention of fraud within the Office of the Protective Commissioner were also an ongoing theme throughout the inquiry. The Committee analysed the fee structure of the Office of the Protective Commissioner and considered it to be probably comparable similar government bodies with other States and very favourable alongside its major private sector competitor. It applauds both the NSW Protective Commissioner and the Victorian State Trustee in the efforts to benchmark their fees.

In the interests of better transparency in relation to fee setting, the Committee has recommended that the Independent Pricing and Regulatory Tribunal should set the Office of the Protective Commissioner's standard fees and monitor these. Given past fraud activity at the Office of the Protective Commissioner and the concern raised about it, the Committee has also recommended that a fraud prevention procedures audit be undertaken by the New South Wales Audit Office and the results be publicly reported.

As part of the inquiry the Committee has also followed up on NSW Audit Office's 1999 Performance Audit on OPC and OPG complaints and review processes. The Committee found that the perception that the complaints handling system of the Public Guardian is more responsive than the Protective Commissioner, although they essentially offer the same service. The Committee reinforces the recommendations of the New South Wales Audit Office to improve complaints handling in both jurisdictions, in following established guidelines and standards for complaints handling and introducing specific monitoring and reporting on same.

Review of Decisions

Like the New South Wales Audit Office, the Committee believes that there is a definite need to make review of decisions easy and cheaper than the Supreme Court at first instance and therefore more easily accessed by all clients and their families. It therefore recommends that the Administrative Decisions Tribunal of New South Wales be the first point of external appeal from decisions of the Public Guardian and the Protective Commissioner. To achieve this the Public Guardian and the Protective Commissioner be removed as an officer of the Supreme Court of New South Wales.

It is proposed that systemic, or administrative issues could be addressed through giving clients and other interested parties recourse to the Ombudsman's office in line with other government agencies .

Client Relations

Evidence taken throughout the Inquiry raised much concern regarding client relations. The Committee notes that there are processes within the respective Offices to improve communications, but identifies the need for both vigilance and diligence in this regard. This view is predicated particularly on the express need for greater and more qualitative face-to-face contact between clients and Estate Managers in the Office of the Protective Commissioner – an area in which clients and related persons were constantly and demonstrably let down.

The Committee therefore proposes the use of a range of staff support mechanisms, including client awareness training, improved case management and methods of peer support, feedback and shared learning. While acknowledging that some of these mechanisms are now in place, the Committee has indicated the requirement for staff to have strong, effective and ongoing support for the vital social role they undertake for clients in the Office of the Public Guardian and the Office of the Protective Commissioner.

Other Jurisdictions

In *Chapter 7*, various other jurisdictions within Australia and overseas are examined, with a view to comparing administrative responsiveness, understanding issues faced by similar agencies; and learning from good practice. All Australian States and Territories are included, as well as the United Kingdom, France, The Netherlands, New Zealand, Canada and the United States of America.

Summary of Recommendations

A summary of the Report's recommendations is listed as follows:

Recommendation 1

That the amendments to the Protected Estates Act giving effect to diversified financial planning and management of the Common Fund on behalf of protected persons be commenced as soon as possible.

Recommendation 2

That further change management initiatives (such as conduct of workshops and seminars) be implemented to assist staff in better understanding and performing their roles under the new financial management regime.

Recommendation 3

That contract para-planners be employed, from time to time, to complement the existing financial planning resources.

Recommendation 4

That the existing financial planning process be further streamlined by, for example, maximising the use of standard templates for the financial plans and standard investment strategies within the computerised financial planning system.

Recommendation 5

That a panel of external financial planners be established to provide expert advice on the more complex financial planning issues.

Recommendation 6

That the existing investment products within the Common Fund be continued to be managed by the Protective Commissioner whilst the management of all other new forms of investment should be outsourced to NSW Treasury Corporation.

Recommendation 7

That a revised Implementation Strategy be developed to give effect to the proposed "mixed" investment management approach.

Recommendation 8

That a due diligence inquiry be conducted to clarify the investment management requirements, contractual arrangements and ongoing relationship with NSW Treasury Corporation as well as other legal and taxation issues.

Recommendation 9

That actions be taken to expedite the establishment of the Investment Advisory Committee and that all the external members of the Committee be selected on the basis of their expertise in the financial markets.

Recommendation 10

That the issue of whether the Protective Commissioner should continue to retain the financial planning function as well as the function relating to the management of the existing forms of investment within the Common Fund be re-examined in three years' time.

Recommendation 11

That the Independent Pricing and Regulatory Tribunal examine and establish standard fees for service offered by the Office of the Protective Commissioner, and review these fees on a regular basis.

Recommendation 12

That the New South Wales Audit Office be requested to undertake a fraud prevention procedures audit of the Office of the Protective Commissioner, paid for by the Office of the Protective Commissioner and that the report be made available publicly.

Recommendation 13

That ongoing monitoring of the internal complaints handling mechanisms by the Public Guardian and the Protective Commissioner, with particular regard to the Ombudsman's guidelines, AS 4269 – 1995 and refinements identified by this Committee and detailed in the report above be a feature of reporting by respective agencies.

Recommendation 14

That staff training in complaints resolution and in the communication of difficult and complex decisions to clients and related persons be supported.

Recommendation 15

That the Protective Commissioner's Annual Report reports on how client compliments and complaints are monitored and used to inform service changes.

Recommendation 16

That the Public Guardian and the Protective Commissioner be removed as an officer of the Supreme Court of New South Wales.

Recommendation 17

That the Administrative Decisions Tribunal of New South Wales be the first point of external appeal from decisions of the Public Guardian and the Protective Commissioner.

Recommendation 18

That the Office of the Public Guardian and the Office of the Protective Commissioner be included in Schedule 1 of the *Ombudsman's Act,* 1974 (NSW) and therefore subject to scrutiny by the New South Wales Ombudsman.

Recommendation 19

That Protective Commissioner staff duties specifically address the quality of client contact (including face-to-face contact) and liaison with local and regional support services as may be used by the client. That current staff are provided with additional training in effective client contact, including communications, disability awareness training, cultural awareness training and caseload management.

Recommendation 20

That funding be sought to pilot the development of locally-based client contact services (including regional New South Wales) of the Protective Commissioner.

Recommendation 21

That the Protective Commissioner continue its program of outreach to clients and related persons through surveys and focus groups, to gain input on policy and service issues. Further, that the Protective Commissioner consider appropriate means of enhancement for this program, including feedback as to how client suggestions and recommendations are being considered and acted upon.

Recommendation 22

That the Protective Commissioner and the Public Guardian consider the potential for the establishment of separate Advisory Committees, including relevant stakeholder groups, to serve the respective organisations,.

Recommendation 23

That the Protective Commissioner and the Public Guardian consult with clients and relevant stakeholder groups about potential name changes for the respective

organisations, reflecting more appropriately the advocacy role of the public guardian and the financial management role of the Protective Commissioner.

Recommendation 24

That the training program for staff of the Public Guardian and the Protective Commissioner is augmented by in-service training on an ongoing basis to all staff to update skills and that additional opportunities are employed with linkages both in-house and externally to build on current good practice.

Chapter 1:

Roles of the Protective Commissioner and the Office of the Public Guardian

Introduction

The Office of The Protective Commissioner and the Office of the Public Guardian each operate as the "decision-maker of last resort" on behalf of people incapable of managing their own affairs. In New South Wales, unlike in most other jurisdictions, both Offices perform separate functions but are headed by the same person. By law, the Protective Commissioner is the Public Guardian and the Director of the Office of the Public Guardian is a member of the joint Executive that meets monthly. In his submission to this Inquiry, the Protective Commissioner also noted that the organisations "have to date shared corporate services, including human resources and payroll facilities, and this has helped to reduce costs."

The Office of the Public Guardian

The Office of the Public Guardian (hereafter referred to as "the Public Guardian") has the authority under the *Guardianship Act* 1987 (NSW) to make personal and lifestyle decisions for a person with a disability. These may include decisions about where a person should live or work, what kind of support services they should receive, and health care.

The extent of the Public Guardian's authority is specified in a guardianship order, which is made by the Guardianship Tribunal. Copies of the order are sent to the person, the applicant (for the order), the spouse (if any), the carer (if any), the Public Guardian and any other person the Guardianship Tribunal has involved as part of the hearing. Guardianship orders are time limited, and the period is also specified in the order.

The Public Guardian does not 'take over' the provision of services, support or care provided by other persons to the person under guardianship. Nor does it make decisions about a person's finances.

In its role as a guardian, the Public Guardian also acts as an advocate on behalf of the client – a role that may include highlighting a person's ongoing need for services, accommodation or other supports. In some instances, the Public Guardian advocates on behalf of groups in terms of seeking attention to an identified need.

The Public Guardian provides information to the community through the Public Guardian's Community Information Program and the Private Guardian Support Service.

The client caseload of the Public Guardian, as at 30 June 2000, was 1642 persons. Throughout the 2000-2001 financial year, there were 2021 people under the guardianship of the Public Guardian.

The Office of The Protective Commissioner

The Office of the Protective Commissioner (hereafter referred to as 'the Protective Commissioner") can be appointed by a Financial Management Order of the Supreme Court, Guardianship Tribunal, Mental Health Review Tribunal or a Magistrate to provide financial management services for a person who is unable to manage their own affairs. The Commissioner's powers largely derive from the *Protected Estates Act* 1983 (NSW).

The Protective Commissioner can also be required to direct, supervise and support individuals or trustee companies who have been appointed by an Order of the Supreme Court or Guardianship Tribunal to manage the finances of someone who is unable to manage their own financial affairs.

The Commissioner is required to make decisions that he/she believes are in the best overall interests of the client, and, in the instance of supervision of private financial managers, to ensure that the obligations of private managers are fulfilled and that the needs of the protected person are being met.

People whose financial affairs are placed under the care of the Protective Commissioner usually have a disability that affects their ability to make decisions. This may be caused by mental illness, brain injury, intellectual disability, psychiatric disability, age-related dementia, or other disorder.

The Protective Commissioner provides a range of legal, technical, financial, specialist disability and other expertise, on a fee-paying basis.

Financial Management Orders may be time-limited, but this appears not to be the case in practice, and was the source of much complaint to the Committee from clients and related persons. Orders can be revoked, but an application to do so needs to be made to the Supreme Court or the Guardianship Tribunal. The Court or Tribunal then needs to be satisfied that the person's health or capacity has improved, that there is someone willing and able to manage their affairs or that there is some other reason demonstrating that there is no further need for formal management. The Committee received evidence in submissions and from a number of witnesses that the process and cost of application or appeal against Financial Management Orders was considered both costly and daunting by potential applicants.

Cash assets from all of the estates under the direct management of The Protective Commissioner are held in the Common Fund. The total value of the Common Fund as at June 2001 was $1.132 billion. Among non cash assets, clients' real estate is estimated to be in the order of $400m; other assets such as jewellery, furniture and personal effects have not been valued. The total number of client accounts directly managed by the Protective Commissioner is around 8,400, with an additional 1,734 estates managed by private financial managers. In its submission to this Inquiry, the Protective

Commissioner notes that just under 700 of the Common Fund accounts have balances in excess of $250,000. The Protective Commissioner notes that "several thousand accounts" have balances less than $20,000.

Issues Raised by Clients/Related Persons

Issues raised by clients and related persons in submissions and public hearings during this Inquiry included:

- inadequate information provided to families about guardianship
- delays in allocating a permanent guardian
- concern that the Public Guardian could not adequately advocate for clients
- concern that Guardianship Tribunal decisions are not being enacted
- alleged mismanagement of clients' funds by the Office of the Protective Commissioner
- concern about time taken in processing accounts in the Office of the Protective Commissioner
- unfairness of fees charged by the Office of the Protective Commissioner
- difficulties in obtaining financial statements from the Office of the Protective Commissioner
- concern at erosion of invested funds for protected persons in the Common Fund
- non-responsiveness or rudeness from staff of the Office of the Protective Commissioner
- insufficient client contact or knowledge by staff of the Office of the Protective Commissioner.

The Committee notes that, in broad terms, the implications of these issues for clients and related persons are addressed in the body of the report. It was not, however, within the Committee's role to investigate or examine complaints or issues on a case by case basis. The Committee received advice that even where it may have had concerns about aspects of individual cases, the privacy provisions of the *Protected Estates Act*, 1983 (NSW) and the *Guardianship Act*, 1987 (NSW) would prohibit such investigations. Overall, the Committee believes that these issues raised are indicative of systemic issues to be addressed in the programs of reforms proposed for the respective agencies.

Changing a Culture

The Public Guardian and the Protective Commissioner have each worked towards changing systems and processes within the organisations. The Committee does not underestimate the importance of the required changes within the respective structures. The genuine efforts of staff to improve client services are acknowledged. These necessary changes have occurred in response to the Audit Office Review and to internal organisational reviews.

The Committee believes, however, that in order to deliver ongoing service improvements with a client focus, *organisational culture* must also change. This need is particularly apparent in the Office of the Protective Commissioner. In making this observation, the Committee does not wish to denigrate the service role of individual staff. Indeed, seeking to maintain a service delivery focus while being unable to respond

to critics can be debilitating. However, a client focus, complete with consultation and involvement by clients and related persons need to be a central feature of the organisation.

Organisational change will need to embrace the organisation's system of governance. Its operating principles need to be re-examined and inculcated; and, effective outcomes for clients will need to be more systematically sought.

The Committee believes that it is important that staff are supported in developing commitment at all levels to the change process. There needs to be a process of shared vision developed among staff. Clear and defined organisational objectives need to be established and signed on to. Pride in a service focus and service outcomes is critically important, and staff need to have access to good quality and ongoing training to help them achieved desired objectives.

Sharing good practice with related organisations, both in terms of process and outcomes, will help to build not just a responsive organisation, but a learning organisation. Within this, a commitment to periodic evaluation/review should become part of a systemic approach to continuous improvement.

Separate Entities with One Head?

The Protective Commissioner and the Public Guardian, while undertaking separate functions, share the one Commissioner. The two organisations have, to date, shared the same corporate services, including human resources and payroll facilities. The Committee heard views supporting this as an opportunity for an overview by the Commissioner in dealing with similar policy issues. Also, as most individuals who come under guardianship of the Public Guardian are generally also clients of the Protective Commissioner conflicts can occur about the expenditure of money in support of lifestyle decisions. A shared Commissioner can act as a final arbiter in these circumstances.
The alternate view is that with the same official serving both roles, there exists the potential for a conflict of interest and a complete separation of roles would enable a stronger focus on client needs in terms of the respective functions of the two Offices. The primary reason indicated for a potential conflict of interest is that the public guardian may make a lifestyle decision for a client that cannot be carried out because the person's estate manager will not agree to release funds (for example, submission from New South Wales Council for Intellectual Disability, page 4).

In a submission to this Inquiry, the Protective Commissioner notes that in a community consultation conducted last year by the Attorney-General's Department, substantial support was received amongst the 60 agencies consulted for separation of the Protective Commissioner and the Public Guardian, and for the Public Guardian to table a separate annual report in Parliament.

The Commissioner further notes the view expressed by the Commissioner's Advisory Council that "should separation occur, there will be a need for suitable protocols between the Protective Commissioner and the Public Guardian to ensure effective cooperation" (page 20).

Many respondents to the Inquiry further suggested that separate roles for the Public Guardian and the Protective Commissioner would allow the Public Guardian to take a stronger advocacy role (for example, the Community Services Commission, Disability Council of New South Wales, Intellectual Disability Rights Service, Alzheimer's Association of New South Wakes). In its submission to the Inquiry, the Intellectual Rights Disability Service commented that separation of the two Offices might help improve public confidence in the role of the Public Guardian, and help to hasten reform in the Office of the Protective Commissioner. The Service also, however, identified the need for improved and systemic communication between the two Offices, to improve dialogue between what was seen as an "inherently conservative' Office of the Protective Commissioner, and a "more proactive" Public Guardian.

The Committee formed the view that maintaining separate entities under the one head is reasonable, given the range of reforms being proposed, and the opportunities for organisational learning across the respective bodies. It believes, however, that separate Advisory Committees would be appropriate, and this matter is addressed in Chapter 5.

Chapter 2:

Financial Planning and Management of the Common Fund

Introduction

In the last three years, the Protective Commissioner has undertaken a major review of its operations and organisational structure and a number of significant changes have been implemented. The changes were, in part, designed to provide a new operational framework to support the revised approach to the provision of financial management services to Protective Commissioner's clients. The new financial management regime is underpinned by the need for the Protective Commissioner now to follow the so-called "Prudent Person Principle" when investing funds held on behalf of protected persons and to develop financial plans for those persons. This new mandate was introduced following amendments to the Trustee Act and consequential amendments to the Protected Estates Act.

Impact of Legislative Changes

In November 1997, the Trustee Amendment (Discretionary Investments) Bill was enacted by the NSW Parliament and it came into operation in March 1998. The Act has fundamentally altered the way in which Trustees invest funds held on behalf of others. Essentially, the Amendment Act has replaced certain sections of the Trustee Act particularly section 14 - the "authorised trustee investments" provisions. Previously, the investment options available to Trustees were quite limited and were confined mainly to low-risk, income-producing investment products such as interest bearing deposits, short term money market investments, bills of exchange and government securities.

Instead, the amended Trustee Act now provides that Trustees can invest trust funds in any form of investment but, in doing so, the Trustee must have regard to the "Prudent Person Principle." This particular principle requires Trustees to diversify funds into a wide range of investments (including fixed interest securities and equities) to provide for both income and capital growth.

The Protective Commissioner's role is to ensure that people with decision-making disabilities receive the best possible financial management services and their rights and interests are protected. The Commissioner, when exercising powers on behalf of a protected person, is a Statutory Manager rather than a Trustee. However, the Commissioner is a Trustee of the funds held in the Common Fund and to that extent is subject to the provisions of the Trustee Act. As well, section 28 of the Protected Estates Act imports the provisions of the Trustee Act to the function of investment of funds held on behalf of individual protected persons. Section 28(1)(g) provides that money

comprising the whole or part of the estate of a protected person may be invested by the Commissioner in any of the securities authorised by the Trustee Act.
The main impacts of the amendments to the Trustee Act and the Protected Estates Act on the Protective Commissioner are that it must now:

- Exercise the care, diligence and skill of a prudent person engaged in a professional trustee capacity;
- Give regard to such matters as the circumstances of beneficiaries and the desirability of diversifying investments when exercising the power of investment;
- At least annually review the performance of investments under management both at the client level and in relation to the Common Fund as a whole; and
- Take independent advice with respect to its investment functions.

The legislative intent is that the "Prudent Person Principle" is not to be related directly to investment performance per se but to the process through which investment strategies are developed, adopted, implemented and monitored. The implications for the Protective Commissioner are that the Common Fund would need to be restructured so as to provide a diversified range of investment options to clients. This in turn would require a re-engineering of the investment process that underpins the management of the Common Fund. In addition, the new requirement to take into account the "circumstances of the beneficiaries" when exercising investment powers and to review annually review the performance of the investment of each client means that the Protective Commissioner would now have to prepare financial plans for the protected person each year. This is to ensure that the investment asset mix correctly reflects client needs both in the short and long term.

Consequential amendments have been made to the Protected Estates Act to enable the Protective Commissioner to comply with the provisions of the amended Trustee Act and to proceed with the diversification of the investment options available. The amendments were assented to in May 2000 but they have not yet been commenced at this stage.

In the case of the Protective Commissioner, the legislative changes have a direct impact on many areas of its operations as well as on some 11,000 clients under management. The investments held in the Common Fund on behalf of clients had a total value of $1,132 million as at 30 June 2001.

Implementation Project

To facilitate the introduction of the "Prudent Person Principle" investment methodologies, a Project Implementation Plan was approved by the Attorney-General in January 1999, based on the recommendation of an Interdepartmental Focus Group. At that time, the Plan was prepared on the basis that the investment functions relating to the restructured Common Fund were to be performed entirely by internal staff. The work of the Project Team was oversighted by the Focus Group which had representatives from the Protective Commissioner, the Attorney-General's Department and Treasury. The project to date has involved a review of:-

- Existing investment holdings and determining the break-up of funds into diversified portfolio structures;
- Existing information technology operations and other related support systems; and
- The Protective Commissioner's compliance and risk management systems.

The total budget approved by the Attorney-General for the Implementation Project was $1.215 million. As at 30 June 2001, a total of $813,630 had been expended with the major items being as follows:-

	$
Salary costs – internal staff	308,762
Training materials & equipment	40,965
IT-related contractors	399,795

Additional IT software costs of $1.251 million have been incurred but they were included in the Administration Fund budget. Approval to purchase the required software was given by the State Contracts Control Board and was subject to the Government's tendering guidelines.

The Implementation Project (according to the original plan) has now been substantially completed. The only major outstanding matter is the finalisation of the establishment of an Investment Advisory Committee.

The Committee has been advised that the Interdepartmental Focus Group's earlier recommendation back in January 1999 to retain the investment functions in-house was made after a comparative analysis of the costs associated with internal management with the costs (based on industry averages) that would be incurred if the management of fund were to be outsourced to either a Wholesale Fund Manager or a Retail Fund Manager.

The analysis was performed using the NSW Government's Service Competition Guidelines. The conclusion of the Focus Group was that it was more cost-advantageous for the Protective Commissioner to retain the management of the Common Fund in-house. In conducting the analysis, it was assumed by the Focus Group that identical investment performance could be achieved irrespective of whether the Common Fund was managed in-house or by either a Wholesale or Retail Fund Manager.

The Committee is of the view that the process of the analysis was fundamentally flawed as it concentrated only on the cost aspect of the performance and did not include a comparison of the relative investment returns expected to be achieved. The final decision on whether to outsource or not should have been based on the relative net investment returns expected to be obtained under the three different scenarios (with the net returns being calculated by deducting the total management costs from the gross returns).

Further, the Committee takes the view that it is erroneous for the Focus Group to make the assumption that the Office of the Protective Commissioner would be able to achieve the same investment returns as other private sector fund managers as, at the time of the

analysis, the Office did not have any past experience and performance record in relation to the management of equities and international fixed interest securities.

Change Management Process

The Committee understands that, in the last three years, there have been some significant changes made to the operational framework and organisation structure of the Office of the Protective Commissioner to reflect the new financial management approach as well as streamlining and improving service delivery across all areas generally.

As part of the change management process, a series of internal seminars have been conducted for staff including a seminar titled "Diversified Investing – A New Way for OPC." The Committee believes that more work still needs to be done to consolidate and build on the organisational and cultural changes that have been introduced. Further workshops and seminars focussing on targeted groups and issues would, in the Committee's view, greatly assist the transformation of the Office to the new regime.

It is important that the affected staff members within the organisation fully understand and accept the need for change and the new roles that they will play in achieving the planned service outcomes under the new regime.

Financial Planning

One of the amendments to the Trustee Act requires an individual financial plan to be prepared for each client and reviewed annually. In May 2000, a new Financial Planning Unit was established within the Office of the Protective Commissioner. This Unit has seven (7) permanent positions managed by an Assistant Director (A & C Grade 11-12) recruited from the private sector. A total of about 8500 financial plans have to be completed by the Unit. The plans are currently being prepared in consultation with the Estate Managers and also in conjunction with the Client Service Plan. The main aim is to ensure that all income and expenditure and client budgetary targets are incorporated into the financial plans to enable client needs to be met in both the short and long term. This "bottom up" approach involves an analysis of clients' investment objectives, risk profiles and cash flow needs.

The planning process has been assisted by the use of an investment planning system software (Assirt Desktop Software). To-date, financial plans have been completed for all clients with more than $3 million held in the Common Fund. Plans are now being completed for clients with funds held in the Common Fund that range between $1 million to $3 million. The Committee has been advised that it will probably take up to another 18 months before all the plans can be completed. This is, in part, due to the fact that the planning process is being conducted concurrently with another project to convert the existing clients' files to a computerised client information system.

The Protective Commissioner has provided the Committee with the following main reasons for its decision to retain the financial planning function in-house rather than outsourcing it to a private sector organisation:

> "The private sector has limited awareness of disability issues. An internal Financial Planning Branch would be able to specialise in plans for people with disabilities to

better address their needs. Planners within the Branch would have ready access to OPC's disability advisers and other specialists to assist their understanding of disability issues. The complexity of the relationship between the Office of the Protective Commissioner, its clients and client families/carers should not be underestimated. In the Protective Commissioner's view, the private sector is not geared to deal with such issues.

The private sector focuses on plans to meet wealth creation and retirement needs. The Protective Commissioner's clients need plans to meet their ongoing financial needs. Financial plans for the Commissioner's clients need to be based upon a life expectation greater than plans that focus upon financial support during retirement. Financial plans for those clients also need to incorporate a degree of flexibility that is not necessary for the general community. Changes may occur in client circumstances at a greater rate than for other members of the community and access to funds once placed can be an issue of importance. Fees and commissions in respect of the development of financial plans would be more transparent, in accordance with the recommendations of the Audit Office. It is usual within the private sector for financial planners to receive what are called "trailing commissions" from investments made in accordance with their recommendations".

The Committee has accepted the general merit of the Protective Commissioner's decision to retain the financial planning function in-house at the present time. It is noted that, for example, both the New South Wales and the Victorian Public Trustee Offices also carry out their financial planning using internal resources. However, the Committee believes that the issue of the continuing retention of that function should be re-examined by an independent outside expert in 3 years' time taking into account the Office's operating performance and industry standards as well as feedback from clients. Such a post-implementation review will help to confirm the appropriateness of the existing arrangements as well as identifying areas for further improvement.

To complement the Office's existing planning capacity, the Committee recommends that consideration be given to the use of contract para-planners from time to time. The additional resources should help to expedite the completion of those initial plans that are yet to be done and also to avoid any unnecessary delays in the subsequent review of the plans.

The Committee considers it unacceptable that there will be a further delay of at least another 18 months before the financial plans can be totally completed. In the Committee's view, the Office should try to further streamline the existing planning process by, for example, maximising the use of standard templates for the financial plans (subject to minor modifications) as well as standard investment strategies that are linked to specific sets of risk profiles for different client groups. According to the Office, this particular strategy can be accommodated within the existing Assirt Desktop Software.

The Committee also considers it appropriate for the Office to establish a panel of external financial planners to provide an additional source of expert advice on the more complex planning issues. It is envisaged that the Protective Commissioner will seek the advice of one or more of the planners on the panel (on a fee-for-service basis) as and when the need arises.

Management of the Common Fund

The total value of the Common Fund as at 30 June 2001 was $1,132 million. The Common Fund represents funds owned by protected persons whose financial affairs are directly managed by the Protective Commissioner (about 8,400 clients), as well as funds owned by protected persons whose affairs are managed by private managers (about 1,700 clients). The goal of the Protective Commissioner is to optimise the return on funds invested through the Common Fund, whilst observing the need to protect the estates of its clients.

To date, the money within the Common Fund has only been invested in simple, low risk financial products because of the constraints of the previous provisions of the Trustee Act which have now been amended. Examples of the investments are short term deposits, fixed/floating rate deposits, transferable deposits, government loans, debentures and mortgages. The management of these forms of investment normally would not require a high level of financial market expertise.

The performance of the Common Fund had been monitored against two indices up until November 2000: They were the NSW Treasury Corporation (Tcorp) Hour-Glass Fixed Interest Facility and the UBS Warburg Composite (0-5 years) index. Since November 2000, both indices have been replaced by the UBS Warburg Bank Bill Index as it is considered to be more reflective of the duration of the current investments within the Common Fund.

The following table shows the rates of return achieved by the Common Fund during the 5 year period between 1996 and 2001 as compared to the relevant benchmark indices. This information has been provided to the Committee by the Protective Commissioner. The Commissioner has also established certain internal benchmarks for the purpose of monitoring the ongoing performance of the Common Fund.

	1996/ 1997 %	**1997/ 1998 %**	**1998/ 1999 %**	**1999/ 2000 %**	**July-November 2000 %**	**December 2000-June 2001 %**
OPC Common Fund	15.86	9.69	4.33	5.76	3.20	7.24
NSW TCorp Fixed Interest Hour-Glass Facility	12.53	7.24	3.55	6.00	3.32	-
UBS Warburg Composite (0-5 year)	12.91	7.23	4.57	5.58	3.19	-
UBS Warburg Bank Bill Index	-	-	-	-	-	6.08

Proceeding on the basis that the management of the Common Fund was to be undertaken internally (as previously approved by the Attorney-General), the Protective Commissioner has, since January 1999, allocated a considerable amount of resources to the development of a new Investment Strategy. The intention is to offer a choice of three investment products to clients - Conservative, Balanced and Growth Funds. Each Managed Fund reflects a different level of acceptable risk (low, medium and high) that

is based on the investment mix within those Funds. The composition of each of the Fund is expected to be as follows:-

- Conservative Fund – 70% income, 30% growth – low risk.
- Balanced Fund – 50% income, 50% growth – medium risk.
- Growth Fund – 30% income, 70% growth – high risk.

There will be seven Investment Pools offering a wide range of investment facilities i.e. Cash, Cash Plus, Australian Fixed Interest, Australian Listed Property, Australian Shares, International Fixed Interest and International Shares. The Managed Fund products will derive their value from the Investment Pools, which represent wholesale funds management.

The total number of staff presently responsible for Funds Management is four (4) of whom two (2) have been permanently appointed. They are the Assistant Director, Funds Management (A & C Grade 11-12) and the Portfolio Manager, Fixed Interest and Cash (A&C Grade 9-10). A new governance structure has been set up by the Protective Commissioner for the revised investment approach. This includes the establishment of an Investment Advisory Committee. The line of accountability between the fund management staff and the Executive is direct through the Assistant Director, Funds Management to the Director, Finance and Investment. The Assistant Director also has direct contact with the Protective Commissioner as required.

The Investment Pools and Managed Funds will each have a total investment process that stipulates the operating parameters. These processes will be ratified by the Investment Advisory Committee (when it is established) and are subject to at least annual review. Any change to an investment process will require the agreement of the Protective Commissioner based on advice from the Investment Advisory Committee.

The specific items covered by the investment processes include:-

- Profile – definition of the Investment Pool
- Investment Objective – definition of type of pool and level of risk
- Summary of major features of each Investment Pool
- Reporting frequency
- Asset allocation and ranges
- Authorised investment for the pool
- Investment guidelines – including credit rating, and required action if a change occurs to the credit rating of a security
- Compliance parameters
- Derivative usage
- Valuation methodology
- Deposits and withdrawals
- Performance Measurement – definition of benchmarks and methodology used for measuring performance, attribution and comparative external Funds.

A full compliance program to monitor the total fund management activity will be incorporated into the processes, and the Compliance Manager will report to the Investment Advisory Committee, as well as to the Director, Finance and Investment and

(as may periodically be required) to the Commissioner. A Code of Conduct is already in place for the fund management staff. This will be complemented by a compliance requirement that all fund management personnel must annually review and certify the investment processes.

Partial Outsourcing of Fund Management

The Committee is of the view that, in the circumstances, a "mixed" approach should be adopted by the Protective Commissioner for the future management of the restructured Common Fund. This will involve giving the responsibility for the management of the existing forms of investment within the Common Fund to the Office of the Protective Commissioner but contracting out the management of all other forms of investment (including equities and some fixed interest securities) to NSW Treasury Corporation.

The Committee's view is consistent with the current government policy on the management of investible funds by agencies as stated in the "Treasury Management Policy" document issued by the NSW Treasury in July 1997. Under this policy, all agencies are encouraged to fully explore the contracting out of their investment functions to NSW Treasury Corporation or a private sector fund manager. It is the Committee's understanding that all agencies that have a sizable investible fund have in fact already contracted out their fund management functions to the NSW Treasury Corporation.

The government policy is predicated on the view that agencies generally do not have the level of expertise required for the effective management of complex financial market transactions. In any case, it is considered inappropriate to replicate the required expertise within each of the agencies that has a sizable amount of investible fund. Further, significant economies of scale can be obtained by centralising the investment functions of agencies within NSW Treasury Corporation. For example, major cost savings can be achieved in having a single administrative and support structure for all the investment functions within the NSW Public Sector. As well, by pooling the individual investment funds of agencies, NSW Treasury Corporation has been able to negotiate a set of management fees with the contracting fund managers that are generally regarded as highly competitive.

NSW Treasury Corporation has outsourced the management of its investment facilities to a number of specialist fund managers in the private sector thus ensuring a diversification of management styles. Within NSW Treasury Corporation, there is a dedicated team of investment professionals focussing on building and maintaining the right combination of investment styles and managers. Each fund manager is subject to a rigorous selection process and ongoing monitoring and review.

The outsourcing of the investment functions relating to fixed interest securities and equities to NSW Treasury Corporation should provide the Protective Commissioner with:

- A high level of expertise in investment management (which would be difficult to replicate in-house);

- An extensive knowledge of government policy requirements as well as emerging issues within the NSW Public Sector investment environment; and
- A well-established infrastructure and economy of scale in relation to the administration of the newly restructured Common Fund.

Another advantage of outsourcing to NSW Treasury Corporation is that there is an assurance of the continuing availability of expertise. A risk faced by all agencies, if the investment functions were to be retained in-house, is that should a vacancy occur in the manager position, it may be difficult to fill given the competitive pressures in the market place.

The Committee believes that the partial outsourcing strategy, as outlined above, will allow the Protective Commissioner to focus on its core business of protected estate management while meeting the Commissioner's Trustee investment obligations to clients. The NSW Public Trustee Office has recently outsourced the management of fixed interest securities and equities within its Common Fund to NSW Treasury Corporation. The Committee understands that there are other instances of similar outsourcing arrangements entered into by both public and private sector trustee organisations. For example, it was reported in the press that Permanent Trustee Company Ltd made a decision last year to outsource most of its fund management to ABN Amro. The Victorian Public Trustee Office some years ago contracted out its investment functions.

Since its launch in 1988, NSW Treasury Corporation's Hour-Glass Facilities have been the key investment vehicle for the NSW Public Sector. The facilities operate like unit trusts and offer a choice of very short-term through to very long-term investment profiles. Key features of the Hour-Glass Facilities are as follows:-

Five core pooled funds:

- Cash
- Cash Plus
- Bond Market
- Medium Term Growth
- Long Term Growth

These core funds have been designed to meet the investment needs of most clients by providing optimum returns for a given level of investment risk.

Six sector specialist funds:

- Australian Fixed Interest
- International Fixed Interest
- Australian Shares (Actively Managed)
- Australian Shares (Indexed)
- International Shares
- Listed Property

These sector specialist fund form the basis of the investments held by the Bond Market, Medium Term Growth and Long Term Growth Facilities. In certain circumstances, where a client is a sufficiently large investor with specific requirements for exposure to certain asset sectors, NSW Treasury Corporation can normally work with the client to structure an appropriate investment mix across the specialist sectors.

NSW Treasury Corporation has outsourced the fund management of these facilities to a number of sector specialist fund managers. NSW Treasury Corporation's role in the Hour-Glass Investment Facilities is threefold, comprising management, administration and advisory services.

Finalisation of the Implementation Strategy

The Committee recommends that the Protective Commissioner should expedite the finalisation of the implementation strategy to give effect to the adoption of a "mixed" approach for fund management as outlined above. A due diligence inquiry may be necessary to clarify the investment management requirements, contractual arrangements and on-going relationship with NSW Treasury Corporation as well as other legal and taxation issues.

The implementation strategy should cover a range of matters including:-

- ensuring the Protective Commissioner's management philosophy is included in any contractual arrangement with NSW Treasury Corporation;
- identifying funds available for outsourcing and the means by which this should occur;
- determining terms regarding the timing and frequency of fund movements; and
- establishing performance, valuation and unit price reporting.

Further, agreement would be required to be reached with NSW Treasury Corporation on matters such as:

- Income distribution frequency;
- Reporting cycles and standards;
- Benchmarks to monitor performance;
- Settlement methodology to mitigate any risk in transfer of funds;
- Availability of unit prices and timeliness of providing these;
- Choice of fund managers and fees charged by the managers and NSW Treasury Corporation;
- Entry and exist arrangements and fees; and
- Front office operations, settlements and compliance issues.

Consideration would also need to be given to the impact of the outsourcing arrangement on the Office of the Protective Commissioner's accounting systems, financial statements and audit. The Office is already well underway in completing the interface between the various internal systems i.e. the Sun Accounting System, the Portfolio Management System and the Client Information System. There will be

a need to link some of these systems to the NSW Treasury Corporation infrastructure.

The Committee suggests that the Office should also look at the software programs and system modifications that were developed as part of the original Implementation Project with a view to adopting as many of them as possible for the "mixed" investment management approach. Those information technology changes were developed on the assumption that the Protective Commissioner was to be given full responsibility for the management of the restructured Common Fund.

The Committee is aware that there are a number of other implementation issues that would have to be addressed in conjunction with NSW Treasury Corporation. One of the issues is that NSW Treasury Corporation at present only makes an income distribution once a year whereas the Protective Commissioner is committed to providing 3 and 6 monthly distributions (depending on the Investment Pool) and reporting. The withdrawal of funds is another issue. NSW Treasury Corporation requires a 5 business day notification for withdrawals for all funds excluding Cash and Cash Plus, whereas the Protective Commissioner at present could provide funds to clients with 24 hours.

The Committee is of the view that the issue of the continuing retention of the management of the existing forms of investment within the Common Fund should be re-examined by an independent outside expert in 3 years' time. To assist the review, the Protective Commissioner should now put in place appropriate benchmarks and measures (to be endorsed by the Investment Advisory Committee) so that they can be used for valid comparison of performance with NSW Treasury Corporation.

Investment Advisory Committee

Section 14C(2) of the amended Trustee Act places emphasis on the obtaining of external advice by Trustees in the following terms:-

"(2) A trustee may, having regard to the size and nature of the trust, do either or both of the following:-

(a) obtain and consider independent and impartial advice reasonably required for the investment of trust funds or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice.

(b) pay out of the trust funds the reasonable costs of obtaining the advice."

In order to give effect to the intent of section 14C(2), the Protective Commissioner is currently in the process of establishing an Investment Advisory Committee. The Committee will advise the Commissioner on issues associated with the investment of client funds in accordance with the Protected Estates Act, including:

- structure of investment types, asset classes and pooled investment vehicles
- investment strategy to be adopted for each investment vehicle

- performance management and determination of appropriate benchmarks
- process and operating parameters for each investment vehicle
- compliance requirements
- management of distributions and reporting mechanisms.

The Committee will be made up of:-

- The Commissioner
- The Protective Commissioner's Director, Finance & Investment
- A representative of the Attorney-General
- A representative of the Treasurer
- Two Independent Members.

Given the highly technical nature of the functions of the Advisory Committee, the Committee believes that it is important that the persons nominated by the Attorney-General and the Treasurer as well as the two independent members should be selected on the basis of their expertise in the financial markets.

Conclusion

The Protective Commissioner has, up to the present, been operating on the understanding that it was to be given full responsibility for the administration of the restructured Common Fund using internal resources. However, for the reasons stated above, the Committee is of the view that the Protective Commissioner should only have responsibility for the management of the existing investment products within the Common Fund whilst the management of all new forms of investment should be outsourced to NSW Treasury Corporation.

In the Committee's view, the adoption of a "mixed" approach recognises the Protective Commissioner's prior experience and performance record in the management of the lower risk investment products but, at the same time, also accepts the reality that the management of the new growth-oriented types of investment would be more appropriately undertaken by NSW Treasury Corporation which has a "specialist" investment role within the NSW Public Sector.

The Committee therefore recommends that the Protective Commissioner should take urgent steps to finalise its Implementation Strategy for the restructured Common Fund so that an appropriate amount of funds can be transferred across to NSW Treasury Corporation for investment as soon as possible. Part of the Implementation Strategy will require the existing financial planning process to be expedited as the individual financial plans of protected persons will form the basis on which decisions on asset allocation will be made at the whole-of-fund level. Further, the Committee believes that detailed discussions will need to be held with NSW Treasury Corporation to determine the contents of the contractual arrangements and to resolve all implementation issues including the linkage of NSW Treasury Corporation's administration systems to the various systems within the Office of the Protective Commissioner.

Recommendation 1

That the amendments to the Protected Estates Act giving effect to diversified financial planning and management of the Common Fund on behalf of protected persons be commenced as soon as possible.

Recommendation 2

That further change management initiatives (such as conduct of workshops and seminars) be implemented to assist staff in better understanding and performing their roles under the new financial management regime.

Recommendation 3

That contract para-planners be employed, from time to time, to complement the existing financial planning resources.

Recommendation 4

That the existing financial planning process be further streamlined by, for example, maximising the use of standard templates for the financial plans and standard investment strategies within the computerised financial planning system.

Recommendation 5

That a panel of external financial planners be established to provide expert advice on the more complex financial planning issues.

Recommendation 6

That the existing investment products within the Common Fund be continued to be managed by the Protective Commissioner whilst the management of all other new forms of investment should be outsourced to NSW Treasury Corporation.

Recommendation 7

That a revised Implementation Strategy be developed to give effect to the proposed "mixed" investment management approach.

Recommendation 8

That a due diligence inquiry be conducted to clarify the investment management requirements, contractual arrangements and ongoing relationship with NSW Treasury Corporation as well as other legal and taxation issues.

Recommendation 9

That actions be taken to expedite the establishment of the Investment Advisory Committee and that all the external members of the Committee be selected on the basis of their expertise in the financial markets.

Recommendation 10

That the issue of whether the Protective Commissioner should continue to retain the financial planning function as well as the function relating to the management of the existing forms of investment within the Common Fund be re-examined in three years' time.

Chapter 3:

Increasing Transparency

Introduction

In addition to issues about improvement of financial performance, the Committee heard accounts about the need for the Office of the Protective Commissioner to improve transparency and accountability in relation to fees, in the provision of clients' financial statements, and to guard against the potential for fraud. The Committee notes that many of these matters have been addressed through the Audit Office Review, and in reforms subsequently introduced by the Protective Commissioner.

The 1999 Audit Office Review

In September 1999 the New South Wales Auditor General tabled the findings of a Performance Audit done by the Audit Office into some areas of the administration of the Office of the Protective Commissioner and the Office of the Public Guardian.

The Performance Audit was described by the Audit Office as being *a short audit of limited scope* primarily focussing on complaints the Audit Office had received about the Protective Commissioner and the Public Guardian and whether these were evidence of significant problems in the management and systems within either or both organisations.

Ultimately, the Auditor General identified a number of areas which required improvement. These were:

- documentation and transparency of decision making;
- transparency of trust accounts;
- funding of the Office of the Protective Commissioner;
- internal complaints systems;
- external review.

In relation to areas two and three which focussed on financial administration, the Auditor General made the following comments:

> "The Audit Office considers that the current funding arrangements for OPC, whereby their operations are funded from clients' money without any detailed statement being provided to the clients, represent at least the perception of a conflict of interest. The Audit Office considers that there is a need to establish a more transparent funding arrangement……In addition the Audit Office considers that there would be benefit in an independent body being appointed to review regularly the level of fees for services being charged to clients by OPC."

Fees

The Office of the Protective Commissioner is fully funded by clients on a fee-for-service basis. The fees being charged by the Office of The Protective Commissioner have been an issue which has attracted much controversy throughout the course of the Inquiry. Many relatives and friends of protected persons who made written and verbal submissions to the Committee complained about the level and types of fees charged and the explanations given by the Protective Commissioner in relation to them. The general feeling expressed here was that the current fee structure was excessive, inequitable and arbitrary.

It should be noted that the majority (55%) of those interviewed in the *OPC Client Survey 2000* were satisfied with the Protective Commissioner's management of their finances. Five of these respondents wanted to manage their own finances. A number of submissions to the Inquiry (for example Witness C and Witness S) proposed that the Protective Commissioner exercise more flexibility in financial management matters for some clients. It was argued that, in some instances where clients had demonstrable capacity to manage their finances, significant savings could be made on fee payment, particularly where the impost was on a pension as the primary source of income.

In the February 2000 survey of Private Managers, approximately half of the respondents indicated that they received value for money in relation to the fees charged by the Protective Commissioner. A very high percentage (91%) said they would like to be consulted if the fee structure of the Office were to change. The report notes " Some of the qualitative data would suggest that there are concerns about the fees charged by the OPC and others indicate anxieties and unease about the way that money is invested by the OPC" (page 10). The report also indicated some concern about the level of fees charged for Court Visitors – 44% of respondents overall and 56% of those aged 41-50 years felt that the cost of a visit by the Court Visitor was not good value for money (page 9).

Fees Charged

The fees charged by the Office of the Protective Commissioner were the subject of heated debate by many people who submitted to the inquiry. It was difficult for the Committee to draw comparisons from comparable jurisdictions as there is no uniform method of charging between the Australian jurisdictions although it is understood that the Victorian State Trustee and the New South Wales Protective Commissioner are currently working together to attempt to introduce benchmarking between the two states which the Committee considers admirable.

Fees charged by the Protective Commissioner are set out by the Protected Estates Regulation 1995. They do not attract any GST liability. Fees on capital are charged as follows:

- 4% on the first $100,000
- 3% on the second $100,000
- 2% on the third $100,000
- $1% on the excess above $300,000.

Fees on income charged by the Protective Commissioner are as follows:

- 2.5% on Centrelink pensions
- 2.5% on rental income received through a real estate agent
- 5.25% on all other income.

There are also fees charged for supervising private managers (4% on net annual income by the person whose affairs are being managed). There is no fee on an Australian Government pension, if that pension is more than 50% of the person's total net income. Annual accounts fees of $100 are charged for the filing, examination and passing of the accounts.

Other services which attract a fee are:

- regular, direct payment of an allowance into a bank account ($25 pa)
- preparation an lodgment of a simple tax return ($40-150)
- visit and report undertaken by Court Visitor (from $210)
- Property inspections, arrangement of repairs, preparation of inventories and arrangement of storage ($50-80)
- legal advice and representation (from $140 per hour).
-

The Committee found it useful to look to a major private sector competitor of the Office of the Protective Commissioner, to gauge the real difference in fees charged between the public and private sectors. This would be the primary option for a client of the Protective Commissioner who wished to have their estate managed elsewhere.

The major private sector competitor offers a "Full Personal Care" service similar to that provided by the Office of the Protective Commissioner. In addition to managing and acting as custodian of client's investments it will pay clients' household and medical bills, collect refunds etc.

Unlike a client of the Office of the Protective Commissioner, who pays their full establishment fee at the point of entry, the major private sector competitor offers a lower establishment fee initially but charges ongoing management and transaction fees while the Office of the Protective Commissioner does not. These include: ongoing management fees of a minimum of 1.925% per annum; $5 fees for each bill payment and $20 fees for each medical refund processed; $300 per hour for any additional professional services such as legal or taxation work; as well as transaction costs of 0.55% on amounts invested and annual management fees and expenses of 0.88%. In addition, the major private sector competitor will charge fees for the provision of information, fees for assets held in the client's name and an early termination fee.

Under the private sector competitor model, a person with $50,000 making full use of its Full Personal Care Service and adopting a managed investments strategy would pay 7.15% of capital in Establishment fees and Transaction costs. In addition they would pay 4.75% of capital in Ongoing Management and Managed Investments Annual Management Fees totalling 11.90% of their capital. By comparison, clients with $300,000 in capital only pay a total of 4.45% of capital in combined fees. The high percentages for small estates occur because of the private sector competitor's minimum fees.

Applying the private sector competitor model to the Office of the Protective Commissioner client base would result in the following approximate income:

Estate Value $	**No. of Clients**	**Est.**	**Total Est. $**	**Ongoing. Man. $**	**Total Ongoing Man. $**
0	923	3,300	3,045,900	1,936	1,786,928
1 cent - 25,000	4,138	3,300	13,655,400	1,936	8,011,168
25,000 - 50,000	1,015	3,300	3,349,500	1,936	1,965,040
50,000 – 75,000	425	3,300	1,402,500	1,936	822,800
75,001 – 100,000	236	3,300	778,800	1,936	456,896
100,001 – 125,000	179	3,300	590,700	2,166	387,647
125,001 – 150,000	128	3,300	422,400	2,647	338,800
150,001 – 175,000	105	3,300	346,500	3,128	328,453
175,001 – 200,000	73	3,300	240,900	3,609	263,484
200,001 – 225,000	68	3,300	224,400	4,090	278,163
225,001 – 250,000	49	3,300	161,700	4,572	224,021
250,001 – 275,000	47	3,300	155,100	5,053	237,497
275,001 – 300,000	54	3,300	178,200	5,534	298,856
300,001 – 325,000	45	3,438	154,688	5,947	267,609
325,001 – 350,000	35	3,713	129,938	6,291	220,172
350,001 – 375,000	37	3,988	147,538	6,634	245,479
375,001 - 400,000	19	4,263	80,988	6,978	132,584
400,001 – 425,000	24	4,538	108,900	7,322	175,725
425,001 – 450,000	25	4,813	120,313	7,666	191,641
450,001 – 475,000	20	5,088	101,750	8,009	160,188
500,000 – 1,000,000	207	8,250	1,707,750	11,963	2,476,238
1,000,000-	226	22,000	4,972,000	23,650	5,344,900
Total	**8096**		**32,075,865**		**24,614,289**

From the above it can be calculated that the average Establishment fee under the private sector competitor model as applied to the Office of the Protective Commissioner client

base would be $3,961.94. On the basis of the additional 865 estates that the Protective Commissioner received in 2000 – 2001 it could expect to receive $3,427,078 in Establishment fees per annum.

It should also be noted that the private sector competitor charges Establishment and Ongoing Management fees on the value of the "portfolio". This "portfolio" includes all assets controlled by the private sector competitor. The above calculations are based solely upon assets within the Protective Commission's common fund and so underestimate the fees which the Protective Commissioner would charge if it included all assets under its control.

Further, in 2000 – 2001 the Office of the Protective Commissioner obtained 558 medical refunds and paid 144,392 bills on behalf of clients. Under the private sector competitor model this would result in additional fees totalling $733,120.

Unlike the private sector competitor, the Protective Commissioner does not currently charge an hourly rate for most of its services in the areas of disability services, financial planning, law, taxation and property management. If the 32 officers currently employed to perform those services billed at an hourly rate of $150 per hour (half the private sector competitor rate) for 216 days per year, the Protective Commissioner could expect to receive an additional $4,147,200 in fees per year.

In addition, each year on average an additional amount of $94,026m is invested on behalf of clients. Using the private sector competitor model, this would result in transaction fees of $94.026 x 0.55% = $517,100. The total annual investment fees would be (on a managed fund basis) $808.221m x 0.88% = $7,112,257.

Protective Commissioner annual fees under the private sector competitor model would, accordingly, be in the order of:

Establishment fees	$3.427m
Ongoing Management fees	$24.614m
Full Personal Care fees	$733,000
Fees for Additional Services	$4.147m
Transaction costs	$517,000
Managed Investments Annual Management fees	$7.112m
Total	**$40.550m**

This amount is almost twice the Protective Commissioner's 2000 – 2001 estimated revenue stream of $21,361m. It is difficult to draw the conclusion on this approximate comparison that the Protective Commissioner's fees are excessive. The Committee believe that the previous rates of return on investments have really been a much larger issue than that of fees charged.

However, the Committee did believe that the Audit Office's recommendation that the Independent Pricing and Regulatory Tribunal review the fees had merit, particularly given the dual issues of cross subsidisation and clients' often limited means.

Self Funding and Cross Subsidisation

It is a matter of government policy that the Office of the Protective Commissioner is self funded. In tandem with this the Protective Commissioner is the financial guardian of last resort. It cannot refuse clients. Around half of the Protective Commissioner's clients have less than $50,000 in assets and find it difficult to afford fees at a rate which are commercially viable for the organisation. The above comparison between the major private sector competitor and the Protective Commissioner's fee structures illustrates this point.

Section 57 of the *Protected Estates Act*, 1983 (NSW) allows the Protective Commissioner to transfer a contribution from the Common Fund to meet its operating expenses. This amount currently represents a little over 1% of the value of the Fund.

The Committee received evidence from some clients and their relatives with significant assets where concern was expressed about the issue of cross subsidisation. The obvious alternative to cross subsidisation is the provision of Community Service Obligations to the Protective Commissioner from the government. This is done in Victoria in relation to State Trustee clients who fall below a particular financial threshold. However, it must also be noted that, unlike the Office of the Protective Commissioner, the Victorian State Trustee is corporatised and therefore pays dividends to the government.

The Committee considered the issue of whether the Protective Commissioner should receive Community Service Obligations at this time, although it felt that it may be necessary in the future. The Committee's reluctance to recommend such a path at this time is predicated on the future rates of return which the diversification of investments should achieve. Like the issue of fees, the Committee believed that the cross subsidisation issue may be greatly exacerbated by continuing conservative rates of return, thus rates of return need to be improved.

Fraud Prevention and Detection.

The inability of a high proportion of the Protective Commission's clients to effectively monitor their estates has the potential to increase risk of fraud. This was particularly so when, in the past, the Protective Commission was not providing regular financial statements to their clients or their families. It is apparent to the Committee from the evidence presented that the Protective Commission must have in place ongoing, clear and effective procedures that minimise the risk of fraud.

Past Fraud

Fraud has been uncovered at the Protective Commission. The amount and extent of such fraud is a matter for conjecture. Evidence presented to the Committee by several families and friends of protected people suggested that there have been numerous instances of fraud involving large sums of money. COPPA (Carers of Protected Persons Association (COPPA) Inc. submitted to the Committee that one ex-employee defrauded the Office of a substantial sum and that staff of the Office had been guilty of client fraud on 8 occasions.

The Office of the Protective Commissioner confirmed the instance of fraud referred to by COPPA, which occurred "several years ago"; the amount involved totalled $586,000 and the perpetrator was gaoled. In evidence to the Committee, the Protective Commissioner, Ken Gabb, identified two additional instances of fraud, for the sums of $43,000 and $17,000. In both of these cases the perpetrator has been charged and convicted of fraud. The money defrauded was reimbursed to the Common Fund. In one instance, the perpetrator of the fraud has repaid all the money plus interest and the other person has been ordered by the court to repay the amount taken over a period of time. In the meantime the Office of Protective Commission has reimbursed the individual accounts immediately so that the client has not suffered. When the perpetrators repay the money. this will go back into the Office of Protective Commission's general funds.

Risk Assessment

Irrespective of the extent and amount of fraud that has occurred in the Office of the Protective Commission, the evidence provided to the Committee suggests that in the past the Commission did not have an effective fraud control program. Evidence provided to the Committee during its inquiry suggests, however, that steps have now been taken to ensure there are adequate strategies for risk management and fraud control.

In 1999, the Attorney General commissioned an independent consultant, Arthur Anderson, to conduct a business risk project of the financial operations of the Office of the Protective Commission. The report prepared following the completion of the project concluded that *"the findings of this review support the prevailing view that the OPC has not employed an effective risk management and control strategy in the past (inclusive of an effective approach to fraud control and internal audit).*

Staff Survey

As part of its 1999 business risk project, Arthur Anderson conducted a survey of the Protective Commissions staff. On receiving a response rate in excess of fifty per cent of staff, the consultants reported that the Protective Commission's staff:

- frequently observed activities that may be viewed as unethical;
- frequently observed activities that attract negative legal consequences, and
- there exists a less than average perception that staff are aware of ethical issues, will report legal or ethical violations or that bad news is well accepted.

The consultants concluded that *"Overall the survey registered a perception that the OPC were more focused on 'Protecting top management' and satisfying external stakeholders than on values"*.

The report provided a number of strategic and tactical approaches to be undertaken by the Commission that in the review of Arthur Anderson will facilitate management's ability to improve its current control environment. Basically the report suggested a fraud control strategy that included three important elements - staff cultural change, fraud control and a deterrence and detection plan.

New Fraud Control Strategies

The Committee was informed that the Protective Commission worked with the Independent Commission Against Corruption and consultant, Arthur Anderson, to review the Commission's processes and introduced a number of initiatives. Those initiatives include:

- developing a new Internal Audit Plan
- conducting courses developed by the Independent Commission Against Corruption for the all staff of the Office of the Protective Commission called "Conduct Becoming"
- segregating the approval of expenditure from the actual payment of expenditure (restricting the ability of one person to control both the approval and the actual expenditure of money)
- separating those who are responsible for the initial securing of assets, identifying assets and undertaking the client planning and budgetary process with the client and their family members from those who will have ongoing management (therefore reducing the possibility of collusion or hiding some of the resources of the client), and,
- establishing a Quality Control and Audit Unit to regular spot audits undertaken by senior staff.

The Committee considers that it is of concern that fraud had occurred, and accepts that the nature of the administrative duties that the Office is require to perform means it is essential to have ongoing mechanisms in place to guard against fraud. The Office is required to administer a large number of accounts with some clients requiring money on an almost daily basis, thus the imposition of restrictive practices to ensure total prevention of any fraud would reduce the efficiency of the organisation. The optimum approach as recommended by the Independent Commission Against Corruption is one of fraud control rather than fraud prevention.

Audit Requirements

The Protective Commissioner is the subject of a number of regular audits. An independent private company, the Internal Audit Bureau, conducts regular reviews of specific aspects of the Protective Commissioner's operations. For instance, it recently reviewed the Protective Commissioner's Carers' payroll; conducted a client cash payments review; examined financial reporting and audit requirements; undertook an Audit Risk Assessment of Pay Client Expenses Exception Report; and, delivered Suggested Violation and Audit Reports.

The New South Wales Audit Office also conducts annual audits of the Protective Commission's financial statements.

Conclusion

There is implicit protection for investment of funds with the Office of the Protective Commissioner, due to its status as a government statutory agency, but this does not

override the need for the Protective Commissioner to have clear and effective procedures for risk management and fraud control.

The Committee considers that the recent improvements undertaken by the Protective Commissioner have significantly limited the potential for fraud. The issuing of regular account statements has also provided the Protective Commissioner's clients with an increased ability to monitor the financial management of their funds and provides a means by which fraud may be detected.

The Committee considers, however, that a fraud prevention procedures audit will help to assure transparency and accountability in the dealings of the Office of the Protective Commissioner.

Recommendation 11

That the Independent Pricing and Regulatory Tribunal examine and establish standard fees for service offered by the Office of the Protective Commissioner, and review these fees on a regular basis.

Recommendation 12

That the New South Wales Audit Office be requested to undertake an a fraud prevention procedures audit of the Office of the Protective Commissioner, paid for by the Office of the Protective Commissioner and that the report be made available publicly.

Chapter 4:
Complaints and Review Processes

Introduction

In both the Office of the Public Guardian and the Protective Commissioner, decisions are made by the substitute decision-maker which, on occasion, are challenged by clients, family members, carers or other related persons. Such decisions might include (for the Public Guardian) decisions about where a person should live or work, what kinds of support services they should receive, and health care. For the Protective Commissioner, such decisions might include day-to-day financial management, lifestyle purchases, investment decisions or decisions involving property arrangements. In situations where decisions are disputed, complainants should be made aware of good practice guidelines which ensure fairness in the complaints process, the right of the complainant to be heard, and an assurance that due process will be followed.

Both the Public Guardian and the Protective Commissioner have recently revised complaints procedures in the light of recommendations in the Audit Office *Performance Audit Review*. The effects of any revisions may not, therefore, be reflected in the evidence provided by a number of submissions to this Inquiry. Nevertheless, the Committee received evidence to suggest that there remain some issues relating to complaints handling and appeal processes which could be greatly improved to ensure transparency.

Specifically in relation to the Protective Commissioner, where the challenge of a decision becomes an appeal process before the Supreme Court, the Committee considers that more user-friendly, less costly and less intimidating measures could be employed. This view is in line with the analysis undertaken by the Audit Office *Performance Audit Review,* and the relevant measures are detailed below.

Findings of the Audit Office Review

The Audit Office assessed complaints information and noted that examples of complaints regarding the Public Guardian included invasion of privacy and items missing or lost from home; forcing of medication or medical practices without consent; and employment of inappropriate live-in carers.

The Audit Office noted that examples of complaints for the Protective Commissioner concerned issues about arbitrary or unexplained expenditure; carers not receiving financial entitlements; inappropriate conduct or comments; perceived partiality of the Protective Commissioner in situations of family conflict; numerous decision changes; and legal costs incurred in the process of seeking a revocation order.

The Audit Office considered that much of the documentation from complainants was incomplete, many of the statements were “of an extreme nature and contained

allegations of illegal conduct" (page 31). It found that documentation rarely included evidence of action by relevant government departments to investigate or resolve complaints. Upon a review of particular cases, it concluded that in some instances the Protective Commissioner had not communicated clearly to potential beneficiaries of estates the rationale for the Commission's decision. The Audit Office concluded that in these instances, in any event, the decision was not regarded as acceptable by the potential beneficiaries, who "feared some erosion of their probable future inheritance" (page 32). In a similar review of the Public Guardian's files, the Audit Office found that staff had sought to reassure complainants.

In relation to concerns about concerns about consent for clinical trials, the Audit Office noted that strict guidelines applying to the Guardianship Tribunal about such consent include safeguards that ensure that consent is only granted where there is a possibility the person will benefit and where the Tribunal "is satisfied the treatment is necessary either to save the person's life or prevent serious damage to their health" (extract of letter from President of the Guardianship Tribunal, quoted at page 34). It further noted that the only trials approved so far include new treatments for stroke, dementia, severe sepsis or hospital-acquired pneumonia – and that access to these treatments for 30 people who could not give consent occurred as a result of consents being given by their spouse or other family member.

Audit Office Recommendations

The Audit Office observed that the Public Guardian and the Protective Commissioner were making little use of their formal complaints handling systems in addressing particular cases. It noted that both agencies were revising complaints procedures, and that each recognised their systems could be made more user-friendly. It identified oversights, however, in material and explanations provided to the complainant; in registering details of staff involved in a complaint; in complaint monitoring and review; and in external processes of review. The Audit Office recommended that the Public Guardian and the Protective Commissioner review and enhance their complaints handling systems in line with best practice guidelines.

Complaints Handling by the Public Guardian

The Public Guardian has developed new policies, procedures and supporting information, and proposes a review/refinement of these in the latter part of 2000/2001. Policies and procedures guide the "reason for making a decision" and record major decisions in the life of the person who cannot make decisions for her/himself in the *Reasons for Decision* database. The reasons for decision are made available to the person under guardianship, the person who asked for the decision to be made/reviewed and on request, to others with a genuine interest in the person's life.

A Complaints Support Officer has been appointed on the staff of the Public Guardian to assist in resolving complaints informally between the staff member concerned and the person making the complaint. Where a complaint remains unresolved, it may proceed through more formal channels.

The Public Guardian process seeks to finalise complaints within 10 working days of receipt of the complaint.

Views of Clients and Related Persons

The Committee heard evidence from witnesses about a range of issues that had formed the basis of complaints. These included:

- a perceived lack of information provided and explained to parties about guardianship (for example, evidence provided by Witnesses I and P);
- concern about delays in allocating a permanent guardian (evidence provided by Witness H);
- perceived difficulties in the Public Guardian undertaking an effective client advocacy role (evidence provided by Witnesses C and L);
- concern about staff being unaware of client circumstances (for example, evidence provided by Witnesses K and L); and,
- concern about Guardianship Tribunal decisions not being enacted by the Public Guardian (evidence provided by Witness K).

Several respondents commented adversely on their perception of individual staff members' dealings with clients and related persons. In a submission, one respondent described their agency's experience of certain staff "sticking to policy, even ideology, even where it is not in the best interests of their clients to do so". (Intellectual Rights Disability Service, page 4).

A concern expressed in general terms by a number of respondents involves the suggestion that rhetoric about maintenance of family relationships in the Act and in the Public Guardian's literature is eroded in practical terms by a perceived organisational philosophy that applies stereotypes, fails to adequately take into account the views of family members, or judges these to be of less value than people providing services to a person under guardianship or protection (for example, evidence provided by Witness G).

Complaints Handling by the Protective Commissioner

The Protective Commissioner introduced a new complaints management system in July 1999, and in response to Audit Office recommendations, introduced policies and procedures for complaints handling and the review of decisions in November 1999. These were updated in March 2000. Included in these mechanisms has been information to clients and relevant stakeholders about how to lodge a complaint. Other client feedback processes have also been introduced, and these are addressed in the next chapter.

In its literature, the Protective Commissioner encourages clients or other persons to discuss disagreement about decisions with the Estate Manager, and if not satisfied, to seek a formal review of the decision. Written and oral complaints are referred by the Estate Manager to the Quality Service and Client Relations Branch for registration and follow-up by the relevant Manager. To the extent that complaints relate to the decision-making processes of the Office, it should be noted that a formal Reasons for Decision document is recorded, and a copy of the decision sent to the client and other involved

parties in relation to *significant* decisions (that is, decisions outside the Estate Manager's delegation; real estate; changing the nature of an asset; large scale expenditure; decisions deemed to be involving a dispute or conflict; and, requests for group expenditure by institutions).

Compliments and Complaints

The Protective Commissioner has noted an increase in the number of complaints and compliments in 1999/2000 "following efforts to make the feedback process easier" (Protective Commissioner, submission to the Inquiry, page 18). In fact, based on the Commissioner's statistics, compliments more than doubled, and complaints rose by 40% over the one-year period. In 2000/2001, the numbers of compliments and complaints have each fallen significantly again (by 50% and 70% respectively). The Protective Commissioner has indicated that the additional feedback (particularly from clients) is a welcome contribution to service improvement.

The Protective Commissioner notes that it resolved 72% of complaints, review of decisions and 'Ministerials' within 21 days; 94% were resolved within 30 days; and the remainder took longer than 30 days or are unresolved.

The Protective Commissioner reports that complaints concerned "timeliness, delays associated with making decisions, lack of consultation or not receiving information, frequent changes of Estate Manager, dissatisfaction with decisions made and fees charged" (Protective Commissioner, submission to the Inquiry, page 19). In its documentation, the Protective Commissioner underlined the complexity in making substitute decisions, and noted that in situations of (often) scarce resources and family conflict about the best interests of the client, "at least one of the parties can feel aggrieved" (Protective Commissioner, submission to the Inquiry, page 19).

Views of Clients and Related Persons

The Committee received evidence from witnesses about the following areas of complaint:

- concern about the length of time taken to get bills paid (for example, evidence from Witnesses A and P);
- perceived difficulties experienced in obtaining financial statements (evidence from Witnesses A, E and P);
- perceived unfairness in fees charged (evidence from Witnesses H, M, P and U);
- concern that the protected person's invested funds are eroding and insufficient will be left for their long-term care (evidence from Witnesses E and R)
- perceptions of poor financial management, overpayment, etc (evidence from Witnesses B, H, P and R);
- non-responsiveness or tardiness from officers (evidence from Witnesses C and K);
- perception that staff are not consulting with/working with families (evidence from Witnesses N and U); and,
- insufficient client contact or knowledge (related to staff turnover) (for example, evidence from Witnesses C and K).

It should be noted that there were also expressions of support (for example from the Disability Council of New South Wales, People with Disabilities and Council for the Ageing) for the Protective Commissioner in submissions and evidence, including expressions of appreciation for noticeable improvements in service delivery. Given the nature of this Inquiry, it is perhaps unsurprising that the emphasis from clients and related persons was on perceived negative issues relating to client service.

Constraints Upon Commissioner in Responding to Complaints

The Committee was concerned with indications it received of a general misunderstanding about the respective roles of the Public Guardian, the Protective Commissioner and the Guardianship Tribunal. Some complaints to respective bodies are therefore generated by misunderstanding about where the decision originated. Further, the Committee acknowledges that at least some complaints are generated by a lack of understanding among family members and related parties about the requirement for the Protective Commissioner to protect the privacy of the protected person. This misunderstanding about the issues dealt with and powers of the respective bodies is reflected in the community at large.

The Commissioner is in an invidious position in terms of explaining or defending decisions. As an Officer of the Supreme Court, the agency is not at liberty to respond to concerns raised, where these matters may affect the privacy of a protected person. Similarly, officers of the Public Guardian are strictly prohibited by Statute from disclosing information without the consent of the person under their care. This action can, on occasion, reflect an extreme level of formality and may lead to the appearance of a closed institution. This is particularly so in instances where public inferences are made that the Protective Commissioner stands to benefit from an 'interest' in holding a client's estate. The Committee believes it is important for the Commissioner to uphold the privacy of the individual, but at the same time, the agency needs to continue to address a raft of issues to help improve its responsiveness to clients, family members and related persons.

Different Complaints Systems or Different Issues?

The Committee received indications from submissions and evidence that the complaints handling system of the Public Guardian was *apparently* more responsive than that of the Protective Commissioner. In particular the role of the Complaints Support Officer and emphasis on informal resolution of complaints within the Public Guardian was regarded with appreciation. The process would appear to allow clients to understand and negotiate unfamiliar and daunting territory, and to encourage cooperation between parties, at least in defining the terms of the complaint. The Protective Commissioner offers the same service for complaints handling, but the process takes longer and is rather more formal, and impersonal. The Committee believes that part of the reason for the situation lies is based in the Public Guardian's traditional role of advocacy on behalf of the client while historic guardedness of the Protective Commissioner in making financial decisions almost inevitably means that one party or another will not be pleased with the process.

Improved Complaints Handling

The Committee notes that there has been progress by both agencies in addressing complaints handling systems. Nevertheless, the Committee endorses the Audit Office view that there needs to be concerted and *ongoing* effort to ensure that both the Ombudsman's guidelines for complaint handling, and the application of the Australian Standard for Complaints Handling (AS 4269 – 1995) are being embraced.

The Ombudsman's guidelines suggest a tiered or staged approach to complaints handling, including:

- staff empowered with clear delegations to resolve complaints whenever possible at first contact
- staff log complains for later analysis
- more senior staff or designated complaints officer reviews/investigates unresolved complaints
- still unresolved complaints referred externally (Ombudsman's Office "Effective Complaints Handling", noted in Audit Office *Performance Audit Review*, page 46).

The Australian Standard for Complaints Handling points to the need to ensure fairness in the complaints process by ensuring the complainant's right to:

- be heard
- know whether the organisation's relevant product and service guidelines have been followed
- provide and request all relevant material to support the complaint
- be informed of the criteria and processes, including the avenues for further review, applied by the organisation dealing with complaints
- be informed of the organisation's decision and the reasons for that decision
- know that the complaint is being reviewed independently where possible, and
- confidentiality, if requested (Australian Standard AS4269 – 1995, quoted in *Performance Audit Review*, page 46).

The Committee notes that both the Public Guardian and the Protective Commissioner have responded to the recommendations of the Audit Office in its Review, but in the course of this Inquiry, the Committee heard of contemporary examples of the complaints system not responding for clients or related persons.

The Committee believes that in addition to the guidelines and standards referred to above, there is a need for detailed ongoing monitoring and reporting on the complaints handling mechanisms of the respective agencies, to include:

- recording of names of persons complained about (this was also mentioned in the *Performance Audit Review*)
- numbers of complaints, matters complained about and comment on trends
- length of time to resolution of complaints

- documentation about steps taken by officers in the conflict resolution process
- a more effective breakdown of Ministerial correspondence (eg complaints/compliments/other)
- details of mechanisms and number of unresolved complaints referred externally.

Staff training in complaints resolution and in the communication of difficult and complex decisions will also assist ongoing improvement in relation to complaints handling.

It is also important that internal procedures documents should reflect the same client focus in intent and language as documents prepared for external consumption.

Review of Decisions by the Public Guardian

In the review of decision process, the Public Guardian emphasises the informal resolution of issues, to enable discussion and clarification about concerns and procedures to occur. Where a matter is unresolved, it is referred to more senior staff for a decision. The Public Guardian's intent is that responses to a request to review a guardianship decision will be made within ten working days. Where it is anticipated that investigation and review of the decision will take longer, the person seeking the review is notified.

Individuals can also request the Guardianship Tribunal to review a guardianship order where there are concerns about the appointment of the Public Guardian, or the powers given to the Public Guardian under an order. The Tribunal may also hold a review if there is new information to consider.

Anyone who has been a party to a guardianship application before the Guardianship Tribunal can appeal to the Supreme Court if they disagree with the decision.

There is no reference in the Public Guardian's procedures to the availability of external mediation processes for reviewing decisions.

Review of Decisions by the Protective Commissioner

The Protective Commissioner encourages a step-by-step approach to discussion and explanation of the complaint, prior to its formal lodgment. In the *Client Feedback* brochure, the Protective Commissioner notes that where a decision made by an Estate Manager remains unresolved following referral to the Manager, Quality Service and Client Relations, a client or other person can request that The Protective Commissioner investigate the complaint; seek external mediation; or appeal to the Supreme Court or seek a review of the Guardianship Tribunal.

A client or other person may also make an application to either the Guardianship Tribunal or the Supreme Court when a person's circumstances have changed, to have a Financial Management Order changed or revoked. Many clients and related persons found this process to be daunting. In evidence, one witness described a situation in which a protected person had shown improvement in their abilities after leaving an

institution, and had applied, through family members for a greater degree of operation of their estate, but this was denied, and the family members were, in the view of the witness "pretty poorly treated" in their approaches to the Commission (evidence from Witness M). The witness indicated a concern that this represented a continuity of "the institutionalisation of the person".

Officer of the Supreme Court

The Protective Commissioner maintains a registry and courtroom within its premises. The co-location of the registry with the offices of the Protective Commissioner has efficiencies in respect to the sharing of rent, staff etc. It has, however, been the subject of concerns expressed to the Committee that the Office of the Protective Commissioner and the Protective Division of the Supreme Court are one and the same organisation.

The Protective Commissioner and the Deputy Commissioner are deemed an officer of the Supreme Court by virtue of Section 5(8) of the *Protected Estates Act.* An appeal to the Supreme Court, against a decision of the Protective Commission, is lodged with the Registrar of the Protective Division, an officer employed by the Protective Commissioner. The Registrar determines preliminary questions of fact and interlocutory applications, conducts the preliminary hearings of that appeal and liaises with the protective list Judge. In an appeal by the family of the protected person, the Protective Commissioner acts on behalf of that person instructing solicitors to look after the interests of the alleged incapable person's interests. Thus, clients and their families perceive that an appeal to the Supreme Court may appear to be an appeal to an officer employed by the Protective Commissioner.

The Committee accepts that the final decisions made by the Protective Division are made by a Supreme Court Judge, independent of the Protective Commissioner's Office. Nevertheless the strong submissions and evidence provided during this Inquiry are such that the Committee queries the necessity to retain the nexus between the Protective Commissioner and the Protective Division Registry.

The protection of people deemed incapable of managing their financial affairs has been the inherent jurisdiction of the Supreme Court *"for as long as there has been European settlement of this country"*. (submission to the Inquiry, Ken Gabb, Protective Commissioner, page 10). Prior to 1983, when the *Protect Estates Act* was passed by Parliament, the Protective Commissioner was a division of the Supreme Court and termed the *Master in Lunacy.* The Court supervision of protected persons can be traced back to the Middle Ages in England, being transposed to Australia at the time of settlement and maintained to the present time.

England had maintained a direct Court supervision until recently. While there have been minor changes over time, the Court of Protection had maintained a significant role of monitoring the financial affairs of protected people, termed *patients*, firstly by the administration by staff of the Court, and from 1987 through the functions of the Public Trust Office. That link was severed with the establishment of the Office of the Public Guardian in April 2000.

The New South Wales Protective Commissioner derives the bulk of his power and functions from the *Protected Estates Act 1983, as amended.* Further power is derived

from the *Supreme Court Rules* (Part 76), specifically the Protective Commissioner's functions in regard to visits and reports by the Court Visitor and the supervision of private financial managers.

During its deliberations, the Committee sought the views of the Chief Judge in Equity, His Honour Mr Justice Young. His Honour is of the view that the supervision of private financial managers and the duties of the Court Visitor in particular nessitates the supervision by the Supreme Court through the Protective Commissioner. His Honour further stated that "*it is difficult to see any advantage in the proposal* (to remove the Protective Commission as an officer of the Court) *unless there is a substantial raft of provisions protecting the Commissioner from the risks inherent in his operation and empowering him to do what he may on now do as an officer of the Court" (see His Honour's response in the annexure to this report).* The Committee considers that His Honour's response does not advance the case for maintaining the *status quo.* In no other jurisdiction is the Officer of the Supreme Court role in place. For example, in Victoria, the State Trustee supervises private financial managers, while the Court Visitor Program is the role of the Public Advocate - neither are Supreme Court Officers.

The Committee considers that the function of Officer of the Supreme Court should be removed from the Protective Commissioner. The relevant powers contained within the Supreme Court Rules may be transferred to the *Protected Estates Act.* Any relevant provisions deemed necessary to protect the Commissioner in the performance of his duties may be inserted within that Act. Adequate supervision and monitoring of the functions of the Protective Commissioner and the Public Guardian may be performed by the establishment of a complaints mechanism allowing appeals against decisions of both bodies to the Administrative Decisions Tribunal. The Committee is also of the view that it is important that the Ombudsman can investigate allegations of mismanagement or maladministration.

External Review Mechanisms – Supreme Court

The Committee considers that external mechanisms for the review of decisions are vital for both the Protective Commissioner and the Public Guardian. Submissions to the Committee indicate significant public concern in respect to people's inability to take their complaints to an outside organisation. This inability has lead to frustration and continued disaffection, irrespective of the many accomplishments of the two offices.

Currently an appeal may be made to the Supreme Court in limited instances. As previously noted, the fact that the Protective Commissioner is an officer of the Supreme Court has created a public perception that the Court may be reluctant to find against the decisions of the Commissioner. Concerns were also expressed that an appeal to the Supreme Court is overly formal and daunting being complicated for those not legally trained.

Family members of protected persons informed the Committee that the not only has the complaints handling procedures been ineffective for them, the procedures have also taken some considerable time and an appeal to the Supreme Court only wastes time when the decision complained of may require some immediate action. The Committee noted the Protective Commissioner's advice that judges of the Court have been very co-operative and will deal with matters almost instantaneously, if necessary. Nevertheless

the Committee concurs with the finding of the Audit Office that there is a need for more user friendly, simpler, quicker and cheaper external complaint mechanism to which an aggrieved client can seek a final resolution of a dispute with the Protective Commissioner.

An appeal to the Supreme Court is also relatively expensive. In most cases, a person aggrieved with a decision of the Protective Commissioner will be required to pay significant legal costs in bringing an appeal. The costs of the Protective Commissioner are also debited to the individual's estate, regardless of the result, more than doubling the costs. This can be a significant barrier to the lodgment of an appeal and a cause of great resentment by clients and related persons.

The formality of proceedings is also a barrier to lodging appeals to the Supreme Court. As the Audit Office observed *"an appeal to the Supreme Court is intimidating and unsuited to resolving the complex human relations problems observed in these cases"*. There is no doubt that a high proportion of the complaints could be resolved through the use of an external mediation mechanism.

Review of Other Disputed Matters

Evidence was given to the Committee by individuals and organisations who considered that the lack of an external complaint mechanisms left the dispute unresolved. Complainants have no means by which they can vent their concerns and, even if their complaint is unresolved, at least the process by which an external body can be involved may often significantly reduce levels of tension or ill-will.

The Committee heard evidence from Mr. Robert Fitzgerald, Commissioner for Community Services, indicating the need for three components in a good complaints handling system. These are: the use of best practice in terms of complaints handling as recommended by the Ombudsman; an internal complaint handling procedure that provides for a merit review of the decision itself (addressed above), and *"the third and critical element is an external review body that is able to handle complaints in respect of the processes by which decisions are made. It is those three components that lead to the best outcomes for complainants, for people with issues of concern"* (transcript of proceedings, 8 September 2000). Mr. Fitzgerald considered the lack of an external review mechanism leaves both the Offices of the Protective Commission and the Public Guardian vulnerable.

The Committee considers that there is a strong need for an external review mechanism that provides for a review of individual decisions, and also provides a mechanism that may highlight deficiencies and improve their service delivery. The Committee considers that the optimum review mechanism requires the involvement of the Administrative Decisions Tribunal and the New South Wales Ombudsman's Office.

The Administrative Decisions Tribunal was established to provide a central, cost effective and convenient way for people to obtain a review of administrative decisions. Its proceedings are relatively informal, removing the necessity for legal representation, and it is cost effective - with no legal fees charged for cases brought before the Community Services Division. The Community Services Division of the Tribunal, with

the power to review decisions of the Ageing and Disability Department, has the expertise and skill to review decisions in the area of people with disabilities.

The Administrative Decision Tribunal has the power to:

- Reverse the decisions completely or in part;
- Substitute a new decision for the original decision; or
- Order the administrator to reconsider the decision in the light of the ruling.

The Tribunal may also facilitate mediation sessions designed to resolve disputes between the decision-maker and the complainant.

The Administrative Decision Tribunal may, however, only resolve individual cases brought before the Tribunal. It does not have the power to investigate or monitor the complaint handling mechanisms. General or systemic deficiencies in service delivery identified in cases brought before the Tribunal cannot be referred back to the organisation.

The Committee considers that while the Protective Commissioner and Public Guardian have taken significant steps in addressing the problems with its complaint handling process, the evidence suggests past systemic problems that had developed over a period of time, and remained undetected. There is a need, in the Committee's view, for an external agency, such as the Ombudsman, to monitor the complaints handling processes and identify and assist in the resolution of any systemic deficiencies.

Unlike the Administrative Decisions Tribunal, the New South Wales Ombudsman cannot reverse a decision and a substitute a new decision. The Ombudsman may deal with complaints about the conduct of New South Wales' government agencies, and investigate and report on any action or inaction relating to a matter of administration. Importantly the Ombudsman may review the decision-making processes of an agency and report on any deficiencies observed, working with the organisation to resolve any such issues.

Under Schedule 1 of the *Ombudsman's Act*, 1987 (NSW), the New South Wales Ombudsman currently has no jurisdiction to investigate actions of the Protective Commissioner or Public Guardian. The Committee suggests this jurisdiction requires amendment to include the Office of the Protective Commissioner and the Office of the Public Guardian, in relation to administrative matters.

It is acknowledged that this proposal affects both the legal status of the Protective Commissioner and the jurisdiction of both the Ombudsman and the Administrative Decisions Tribunal. The Committee considers, however, that effort spent now, in addressing the required legislative changes will result in a simpler, more affordable mechanism both for clients and for the Protective Commissioner. Under this proposal, appeals to the Supreme Court would still be available for cases unresolved by other mechanisms.

Recommendation 13

That ongoing monitoring of the internal complaints handling mechanisms by the Public Guardian and the Protective Commissioner, with particular regard to the Ombudsman's guidelines, AS 4269 – 1995 and refinements identified by this Committee and detailed in the report above be a feature of reporting by respective agencies.

Recommendation 14

That staff training in complaints resolution and in the communication of difficult and complex decisions to clients and related persons be supported.

Recommendation 15

That the Protective Commissioner's Annual Report reports on how client compliments and complaints are monitored and used to inform service changes.

Recommendation 16

That the Protective Commissioner be removed as an officer of the Supreme Court of New South Wales. That all duties, powers and functions currently contained with the *Supreme Court Rules* deemed relevant be transferred to the *Protected Estates Act.*

Recommendation 17

That the Administrative Decisions Tribunal of New South Wales be the first point of external appeal from decisions of the Public Guardian and the Protective Commissioner.

Recommendation 18

That the Office of the Public Guardian and the Office of the Protective Commissioner be included in Schedule 1 of the *Ombudsman's Act,* 1974 (NSW) and therefore subject to scrutiny by the New South Wales Ombudsman.

Chapter 5:
Client Relations/Consultation

Introduction

One of the areas of ongoing challenge and opportunity for both the Public Guardian and the Protective Commissioner is the area of client relations. Describing complex legal and financial matters can be difficult enough, without the inclusion of emotion, conflict, disability and language factors. But the inclusion of these factors is the reality that the Public Guardian and the Protective Commissioner must address on a day-to-day basis. This Committee heard evidence from the Public Guardian and the Protective Commissioner indicating their sincerity and application in seeking to take into account client and stakeholder wishes while making decisions for the client. The Committee also heard repeated accounts from clients and stakeholders about perceived failure by the Public Guardian and the Protective Commissioner to address and honour the client relationship.

Audit Office Review

The Performance Audit conducted by the New South Wales Audit Office found that "decision-making by OPC/OPG was not always transparent and/or clearly communicated to relevant persons. As a consequence, some decisions relating to lifestyle, medical treatments or financial matters may have been viewed with suspicion and concern by those involved or their families" (page 3). The Audit Office focused on systems within the respective agencies that relate to decision-making or dealing with complaints. It found that there were no substantial systemic flaws in the handling of guardianship matters. However, it observed a number of "deficiencies in operating practices", including:

- length of time taken to understand reasons for decisions from correspondence
- individuals having little understanding of the extent of their estate/balance of trust account and little record of adequate advice to clients on this matter
- the belief of some individuals that their estates now belonged to the Protective Commissioner
- little use made by either agency of formal complaints handling systems to address client concerns
- no simple external review process available to arbitrate disputed matters (pages 35, 36).

The Audit Office outlined recommendations to address these deficiencies.

Client/Stakeholder Communications - the Public Guardian

The process for the Public Guardian in consulting with a client involves a visit or call to discuss a decision. The visit may include the use of an interpreter, if appropriate. In its submission, the Public Guardian notes that, in remote parts of the State, and in an emergency, a third party may be used to obtain the person's view (page 8). The Public Guardian may also refer to current or previous correspondence or documents the person may have prepared expressing their views about the matter under consideration. In addition, the Public Guardian seeks the views of other involved persons, such as joint guardians, family members, carers, etc. Health care professionals and service providers (and documentation prepared by them) are also consulted, where appropriate.

In a submission to this Inquiry, the Community Services Commission observed that client contact between the Public Guardian and clients was less than optimal - often restricted to the time of the decision. Their 1998 report, *Respite Care – A System in Crisis*, indicated that only 10% of the group studied had regular contact with their substitute decision-maker or guardian – the Public Guardian was substitute decision-maker for 68% of consumers in the group (submission to the Inquiry, page 5). Commissioner Fitzgerald noted that best practice would require more regular contact than is currently provided, to maintain involvement and interest in the care circumstances of the client. He suggested the need to benchmark both the amount and type of contact required between the Public Guardian and clients, and indicated that the Public Guardian should address ways of maximising opportunities for personal contact, in particular (submission to the Inquiry, page 6).

The Committee notes with concern the increasing numbers of people coming under guardianship, whether through the usual process, through repeat orders, or through the demographic effect of the ageing population. It concurs that these will place increasing strain on the staff resources and capacity of both the Public Guardian and the Protective Commissioner to communicate effectively with clients. It is all the more imperative, therefore, to ensure that optimal processes are developed urgently, for the present time and conditions.

Improving Communications

The Committee notes the application by the Public Guardian of new Guardianship Standards, and suggests that these should help to address many of the above concerns. Along with the suggestion for benchmarking client contact (noted above), the Committee would support the view expressed by the Community Services Commissioner, that the Public Guardian should report against these new standards in its Annual Report (submission to the Inquiry, page 8). Other suggested mechanisms for improving transparency in communications include: an ongoing program of random audits of cases (and public reporting of the audit results); and a program of surveying stakeholders about issues relating to service satisfaction.

Client/Stakeholder Communications - the Protective Commissioner

The Protective Commissioner has highlighted the difficulty of balancing the wishes and interests of the client and those of family and concerned persons. In meeting the

'primary concern' of the client's overall best interests, taking into account both immediate and long-term needs, the Protective Commissioner notes the struggle for control over the affairs of the client which may ensue. Where a client can make decisions for themselves, and where prudent, the Protective Commissioner notes that it encourages them to do so. The Protective Commissioner also takes into account information and documentation provided to the Court or Tribunal in making an order, as well as ongoing consultation with clients, family, carers and service providers.

Much of the evidence and submissions received from clients and family members was concerned directly and indirectly with communications issues. An element of the communications between agencies and related persons will inevitably involve occlusion (ie the recipient shutting out those messages they do not wish to hear). There is nevertheless an imperative for both agencies, in terms of their social responsibility, to improve communications with related persons and the general public on an ongoing basis.

Of particular concern to clients, family members and advocates is the perception of reluctance on the part of the agencies to provide information, unavailability of officers on the phone, perceived rudeness on the part of officers, and ongoing long delays on the part of officers in responding to queries (for example, evidence from Witnesses P and Z). In relation to the Protective Commissioner some family members expressed the view that *they* had initiated all communications with the office, without reciprocation. Clearly, related persons have felt aggrieved at the perceived tone of communications, using terms like "dictated to", "ordered and commanded", "not treated with respect, but with suspicion", etc (for example, evidence from Witnesses I, M and T).

Court Visitors

The Protective Commissioner also uses externally appointed Court Visitors to, from time to time, visit clients and provide an assessment of their living environment, social interaction and unmet needs. Their confidential report is provided to the Protective Commissioner, and where Private Managers are involved, they receive a summary of the general recommendations from their Commission representative. Court Visitors are not usually appointed in cases where a Guardian for the person has been appointed by the Guardianship Tribunal. Court visits occur under the Court Visitor Program of the Protective Commissioner, or at the direction of the Supreme Court. Under the Supreme Court Rules, Court Visits are required to be carried out every six months. Clearly, from evidence received in the course of this Inquiry, this has not occurred. Recent guidelines issued by the Chief Judge in Equity of the Supreme Court suggest that Court Visits need to be 'considered and justified'. The program of visits undertaken by Court Visitors increased dramatically in 1999/2000 (approximately double the number in the previous year). It should be noted that Court Visitor fees are charged against the estates of clients for whom reports are furnished.

The role of Court Visitors, too, was not generally fully understood. It was regarded by some as expensive and not well organised, in terms of arranged appointments (comments noted in *OPC Client Services Survey*). There were also complaints from related persons, that Court Visitors were 'not independent' (evidence from Witness K), and that Court Visitor reports were not provided to related persons, but only to the Protective Commissioner (*OPC Client Services Survey*).

The Committee is concerned to ensure that the role of Court Visitors in making an independent assessment of individuals' life circumstances remains truly independent and of the highest standard. The Committee suggests that, in the light of confusion about the role of the Court Visitor, the Protective Commissioner may wish to review communications with clients and related persons about the Court Visitors' role.

Keeping in Contact

The Committee supports the intent of the Protective Commissioner, in its restructuring, to develop an 'Intake' team (ie Estate Manager, Regional Manager and other relevant professionals) to oversee initial contact with clients and related persons. This, together with the proposal to develop small clusters of Estate Managers to share responsibility for a group of clients, should assist in alleviating concern about dependence upon a sole Estate Manager carrying all of the knowledge about one client/being the sole contact point for a client or other stakeholders.

The reality is that for many clients, particularly clients of the Protective Commissioner, telephone, rather than face to face contact has been the norm. For example, at a Protective Commissioner Focus Group conducted in March 2000, in Tamworth, group members noted the perception that while there is greater communication between clients and Estate Managers than in the past, noone was aware of any face to face meetings between Estate Managers and their clients (*OPC Focus Groups 2000*, page 5). This view is borne out by a survey of clients, who also indicated that, where they had had face-to-face contact with an Estate Manager, this made subsequent telephone contact easier to manager (for example, Interview No 30, *OPC Telephone Survey of Clients, 2000).*

There is a sense that Estate Managers need to better understand the local circumstances and needs of a client, and to develop a better knowledge of support services in the client's own community, and that this cannot be achieved by remote contact.

The Committee acknowledges the resource implications of developing a program of face-to-face contact between the staff of the Protective Commissioner and clients, particularly for regional areas, but suggests that this will be an essential element in building confidence between clients and officers of the organisation.

Staff support and skill development to this end will be vital. While staff duty statements address the requirement for client and stakeholder input to decisions, the *quality* of client contact (including face-to-face contact), and liaison with local/regional service and support agencies such as Mental Health Teams, DOCS, etc needs specifically to be addressed, within a client service focus. The Committee acknowledges the work undertaken by both the Public Guardian and the Protective Commissioner to improve staff training, but notes the ongoing concerns expressed by clients and related persons indicating gaps in the client service focus. Accordingly, the Committee recommends that current staff are provided with quality training in these areas and in caseload management, to improve service responsiveness and to ensure that services provided by the Protective Commissioner, in particular, are more locally relevant.

Ongoing staff training in effective communications, as an adjunct to disability awareness and cultural awareness training, is also appropriate. The training programs of service organisations with a diverse client interface could be mined for their best practice, in particular to ensure that staff can walk *in the client's shoes* to experience how it might feel to be exposed to bureaucratic practices and procedures.

The Committee believes that a process of benchmarking the amount and type of client contact (similar to that proposed by the Public Guardian) is also relevant to an improved client focus.

Call Centre?

The Protective Commissioner notes that it is currently exploring the concept of a call centre to better manage simple enquiries/requests. It is not the intent of the Protective Commissioner that this would replace contact with an Estate Manager (submission by the Protective Commissioner, page 12). The Committee suggests that such a proposal needs to be considered very carefully, before proceeding. Clients and stakeholders have identified the need for greater face-to-face contact with Estate Managers (*OPC Focus Groups 2000: Service Providers, Family and Carers)* to humanise issues, address limited capacity to master technology and avoid alienation caused by particular types of technology. In the community at large, the jury is still out on whether call centres, with their issue-based and geographical detachment, provide an increased level of service to the population at large, or merely add to a sense of rage and helplessness.

Client Newsletter

In April 2000, the Protective Commissioner initiated a client newsletter (intended to be biannual) to assist in client communications. However, on the basis of the Protective Commissioner's own client surveys, it would appear that few clients can recall seeing the newsletters. Of these, a small number found them to be of interest (*OPC Telephone Survey of Clients, 2000*, page 2). While not a substitute for face-to-face communication, perseverance with a plain-language newsletter may be a worthwhile option for the Protective Commissioner to explain general processes and new developments. On the basis of current indications of receipt and readership, this option should, however, be monitored. The Committee notes that the Protective Commissioner has developed a specific newsletter, *Connect,* for service providers. This should help update those with service responsibility for clients and may help to address the concern about some acting as gatekeepers for clients' incoming mail (*OPC Telephone Survey of Clients, 2000*, page 2). Similarly, a specialised newsletter for Private Managers, *Managing*, will assist in delivering timely information for the well-being of clients.

Consultation to Inform Policy Development – the Public Guardian

The advocacy role undertaken by the Public Guardian to improve service options for clients or client groups is seen as a clear step in which client and stakeholder consultation is used to inform policy and service development. Two particular examples illustrate the point. These include:

- *Heads and Tales*, the publication documenting issues impacting on people with brain injury. The document was compiled following a community consultation in 1999; and,
- the provision of advocacy services for a group of twenty-seven people with developmental disability living in Department of Community Services' Group Homes. These are not people under public guardianship, but have been successfully supported in negotiating with service providers without the restrictions a guardianship order can place on a person's autonomy (submission by the Public Guardian, page 16).

However, it should be noted that the Community Services Commission, while strongly supportive of the Public Guardian, and of the advocacy role described in the Group Homes process, above, has expressed misgivings about the capacity for potential conflict of interest where the Public Guardian takes on a formal advocacy role for a client where it is also acting as the service provider (Dawson, evidence to the inquiry, page 16). It is conceivable, for example, that advocating strongly for the best outcome for a client, particularly where there are scarce or competing resources, might require criticism of the service provision arm of the organisation. In such an instance, the Public Guardian might compromise the client's needs for the organisation's ends.

The Committee acknowledges the potential for conflict of interest in such instances, but suggests that there are clear advantages to clients and client groups in the advocacy role undertaken by the Public Guardian. Thus vigilance through client feedback mechanisms and through the Community Services Commission are vital to ensuring that clients' needs are not compromised in the broader process.

Client/Family Consultations – the Protective Commissioner

The Protective Commissioner conducted a series of focus groups with service providers, families and carers in 1999 and 2000. These informed the topics for discussion with clients in telephone and face-to-face surveys conducted during 1999 and 2000. A survey of Private Managers was undertaken in February 2000.

(a) Client Surveys, 1999 and 2000

The 2000 face-to-face client survey reported a number of issues, including:

- concern about frequent changes of Estate Managers, apparent inconsistency in decisions between Estate Managers, no notification of changes of Estate Managers
- the need to simplify client newsletters
- the need for clearer financial statements
- concern about client confidentiality vis-à-vis service providers accessing clients' mail
- use of the term 'Estate Manager' being somewhat misleading for clients
- little understanding of the role of the Estate Manager
- no apparent handover of information from one Estate Manager to another
- no real interest, competence or access to electronic communication.

This survey report did not propose recommendations or a process for discussing issues arising from the survey.

In the report of the telephone survey of clients, 2000, the author discusses issues arising from the 1999 survey, including:

- a high level of client satisfaction with the Protective Commissioner
- most clients having no idea of the extent of their estate
- some clients experiencing difficulty in obtaining information from their Estate Manager
- no notification of changes of Estate Manager
- few clients had ever met their Estate Manager
- the high cost of STD calls.

The author of that report notes interim responses by the Protective Commissioner to the above issues. These are:

- the Protective Commissioner now undertakes a twice-yearly mailout of financial statements, twice-yearly newsletter and a summary Annual Report
- a 1300 number has been established to enable better telephone contact for people outside the metropolitan area.

The 2000 survey report identifies the following issues:

- clients found receipt of their financial details was empowering
- few remember receiving newsletters
- some nursing homes are filtering clients' mail
- phone communication with Estate Managers was not the most effective means of communicating – face-to-face contact was identified as necessary and preferred
- having established face-to-face contact and rapport with the Estate Manager, facilitated phone access could be useful
- while frequency of change of Estate Manager had fallen, all clients had experienced at least one change, and there was still an issue of lack of notification of the change
- few clients had received visits from Estate Managers
- there was very little interest in electronic communication.

This survey report did include recommendations for the Protective Commissioner, including:

- the need to address face-to-face contact between Estate Managers and clients
- the need for addressing ease of access by clients to telephones (including mobile, cordless, etc)
- the need to notify residential institutions about the purpose of financial statements for clients, and invite discussion with the Protective Commissioner about any concerns they might have in passing on these and other client correspondence.

(b) Focus Groups

The 2000 focus groups' report identified the following issues:

- delays in the Protective Commissioner implementing Management Orders (rendering short-term orders impractical)
- frequent changes in Estate Managers, no notification of changes of Estate Managers
- lack of comprehensive handover information from one Estate Manager to another
- limited face-to-face contact with Estate Managers (with the note that video-conferencing might help fill a gap)
- inconsistent decision-making by Estate Managers, and a concern that they are imposing their own values in making decisions
- concern at lack of knowledge by Estate Managers about disability issues
- identification of the secure interview rooms at the offices of the Protective Commissioner as 'daunting'
- a mixed response, at best, to the concept of a call centre for handling enquiries
- electronic communications are not a useful option.

The report also suggested changes which could be made by the Protective Commissioner to address these issues:

- the preparation of handover summaries by Estate Managers
- minimising the delays in initiating Management Orders
- establishing better communications between Estate Managers and clients
- notifying any changes in Estate Manager
- initiating disability awareness training for Estate Managers
- regularising Court Visits
- excluding service providers from undertaking client inventories
- using secure interview room at the Protective Commissioner only if a high risk is indicated
- instituting an automatic review process for Management Orders.

(c) Survey of Private Managers

Private Managers are persons other than the Protective Commissioner, who have been appointed by the Supreme Court or the Guardianship Tribunal to manage the financial affairs of a person with a disability. Private Managers, thus appointed, are supervised in their duties by the Protective Commissioner. The report of the 2000 survey of Private Managers identified the following issues:

- private managers need more information about how the Protective Commissioner manages client investments
- there was general satisfaction with the Protective Commissioner Support Officers, but a handover function was suggested to brief incoming Support Officers

- the responsiveness and understanding of the Court Visitor was queried by many respondents (geographic factors may have been reflected in the results)
- about half of the respondents indicated they get value for money in terms of the Protective Commissioner fees charged; most sought discussion with the Protective Commissioner if there was any proposal to change the fee structure
- concern that the annual accounting form is difficult to follow
- there was minimal support for electronic reporting of accounts.

The report's recommendations include:

- that the findings of the survey be shared with the Protective Commissioner staff
- that a summary report of the survey be sent to private managers (respondents)
- that an information kit on the role of the Private Manager be prepared by the Protective Commissioner
- that a handover process for departing/incoming Support Officers be instituted
- that accounts be linked to the financial year
- that annual financial reporting be conducted through either electronic or print forms
- that regular briefing sessions be instituted for Private Managers
- that performance management relating to the collaborative relationship between Support Officers and Private Managers be a feature
- that competency-based training for Support Officers be developed
- that the Protective Commissioner provide more information on how its investments are made.

Consultations Informing Changes to Policy and Practice?

In initiating these surveys and consultations, the Protective Commissioner has offered stakeholders an opportunity to have input on policy and service issues. It is not clear, however, how the Protective Commissioner intends to act upon these recommendations. The Committee noted the potential undesired effect of generating antagonism if survey respondents see little action, or indeed, should they have expectations of the consultations beyond the capacity of agencies to deliver on changes. Future consultation reports might include sections on the mechanism(s) for processing of recommendations or suggested changes and reporting (as in the case of the 1999 client telephone survey) on changes made as a result of consultations.

The Public Interface

The Committee observes that neither the Public Guardian nor the Protective Commissioner enjoys the best of public relations. Like many agencies operating in the disability field, their role only becomes known to the general public in a time of crisis. The Committee feels that there is some advantage in both agencies revisiting their public relations mechanisms, to clarify roles and rebuild public confidence.

The Committee notes that there is currently an Advisory Committee which serves both the Protective Commissioner and the Public Guardian. Although there have been suggestions that a singular Advisory Committee can provide a 'learning organisation' model between the two organisations, there may be some advantage in exploring the potential for separate Advisory Committees serving separate organisations. Such a move would enable a complete focus upon respective client service needs. To this end, the Advisory Committees should include relevant stakeholder groups, including representatives of families/carers and peak disability advocacy groups.

The Committee received several suggestions concerning proposed name changes for the Public Guardian and the Protective Commissioner. These are exemplified by a Witness comment:

> *"The current names of both organisations have a custodial inference and are fairly archaic"*(evidence from Leonie Manns, Disability Council of New South Wales, page 7).

Suggested changes proposed a more direct reference to the advocacy role of the Public Guardian, and a more explicit and explanatory reference to the financial management role of the Protective Commissioner. The Committee believes it would be appropriate for the respective organisations to consult more directly with their respective clients and interested parties in the near future about possible name changes.

Recommendation 19

That Protective Commissioner staff duties specifically address the quality of client contact (including face-to-face contact) and liaison with local and regional support services as may be used by the client. That current staff are provided with additional training in effective client contact, including communications, disability awareness training, cultural awareness training and caseload management.

Recommendation 20

That funding be sought to pilot the development of locally-based client contact services (including regional New South Wales) of the Protective Commissioner.

Recommendation 21

That the Protective Commissioner continue its program of outreach to clients and related persons through surveys and focus groups, to gain input on policy and service issues. Further, that the Protective Commissioner consider appropriate means of enhancement for this program, including feedback as to how client suggestions and recommendations are being considered and acted upon.

Recommendation 22

That the Protective Commissioner and the Public Guardian consider the potential for the establishment of separate Advisory Committees, including relevant stakeholder groups, to serve the respective organisations.

Recommendation 23

That the Protective Commissioner and the Public Guardian consult with clients and relevant stakeholder groups about potential name changes for the respective organisations, reflecting more appropriately the advocacy role of the public guardian and the financial management role of the Protective Commissioner.

Chapter 6:
Staff Support

Introduction

Throughout this Inquiry, the Committee heard expressions of support for the importance of the social function provided by the Public Guardian and the Protective Commissioner. Many agencies and individuals similarly expressed empathy and understanding for staff seeking to deliver effective client outcomes in often difficult circumstances. There were a number of concerns, however, about systemic issues and individual deficiencies which are apparently affecting the quality of service delivery.

The Committee acknowledges the reforms which both agencies have sought to implement as a result of the Performance Audit Report, and their impact upon agency staff. The Committee notes that these reforms are important, equally for client and public confidence, but also so that staff may have confidence in the transparency of agency operations, and in support systems for their professional conduct. It also notes that client surveys conducted by the Protective Commissioner indicate an increased satisfaction with aspects of service in the period 1999 to 2000.

In addition to the particular need for face-to-face contact between staff and clients, addressed in the last chapter, areas for further action, in relation to staff support, are also outlined below.

Client Awareness Training

The Committee heard that the two agencies had experienced mixed success in making their services person-centred, rather than process-centred. In a submission to the Inquiry, the New South Wales Council for Intellectual Disability suggested that the Public Guardian had achieved far greater success in this regard, because it had "the benefit of having been established during a time when thinking about disability is focussed more on rights than on protection" (submission to the Inquiry from New South Wales Council for Intellectual Disability, page 1). The Committee would concur that, in its view, the literature of the two agencies – both that which is publicly disseminated, and internal procedures, does reflect this difference. Recommendation has been made elsewhere in this report to address the need for a client-centred/person-centred orientation in relation to documentation. In their submission, Helen Seares, of the Council for Intellectual Disability, suggested that the culture of the Protective Commissioner reflected a far greater and more historically entrenched process-orientation, where "staff are selected primarily on the basis of their financial skills, with people skills and understanding of disability often come a poor second" (page 1).

The Committee notes that staff duty statements address requirements to "ensure the provision of high quality, timely and responsive services to all clients, inclusive of those clients who may present with some challenging behaviours due to the effect of their

disability", and the need for "understanding of the needs, rights and expectations of people with a disability". There is not, however, a sense that staff are receiving adequate training and support to achieve these requirements to the highest level of service.
The Committee agrees with the suggestion, proposed by the Council for Intellectual Disability and other witnesses (for example, Disability Council of New South Wales; David Kitching, Faculty of Psychiatry of Old Age), that there is a need to ensure that staff of both agencies, and of the Protective Commissioner in particular, are provided with quality Disability Awareness Training on appointment, and that in-service training is provided on an ongoing basis to all staff as a means of updating skills and current good practice. Given the range of concerns expressed by advocacy organisations, clients and related persons alike, about communications difficulties with people with a disability, it is suggested that the current Disability Awareness Training Program provided through the Attorney-General's Department may need to be upgraded. The Committee notes that, in the course of this Inquiry, a number of disability advocacy organisations and professional bodies offered their assistance to the organisations in relation to the design and delivery of such training.

The Committee also heard evidence from the Multicultural Disability Advocacy Service of New South Wales, about the need for cross-cultural awareness training and practice, closely allied with disability awareness training. Particular issues include: ensuring access to services; understanding of when and how to engage interpreter services; and, addressing cultural stereotypes (page 7 of evidence).

Staff Turnover and Caseloads

In evidence to the Committee, the Protective Commissioner reported that staff turnover figures of 11.41 per cent for 1999-2000 were not regarded as particularly high (the Public Guardian's turnover rate was slightly higher, at 15 per cent).

The Protective Commissioner reports that an average caseload per Estate Manager is 87 clients per person. While some advocacy groups have reported instances of Commission staff indicating they are overburdened (for example Intellectual Disability Rights Service), the Protective Commissioner has developed an internal system to measure the complexity of client affairs and the resources needed to meet those needs. According to that measure, the caseload is well within a manageable range. It should be noted that for a jurisdiction with a broadly similar role, the State Trustee's Office in Victoria has an officer caseload at least double the rate of the Protective Commissioner. Further, the staff turnover rate in Victoria in 1999 (latest available figures) was 17.6 per cent. The Committee acknowledges the reality that there will be ongoing staff turnover, but seeks to ensure that it is a positive experience for all concerned.

The Committee heard of the need for departing staff to provide new staff with a 'handover' report on clients within the Protective Commissioner's Estate Manager caseloads. Clients and stakeholders reported that they had had several Estate Managers in a short period of time, and it was frustrating and upsetting to be required to 'tell their story' repeatedly to new Estate Managers. There were also instances where clients were not informed of a change in Estate Manager. The Committee believes that changes of practice in effective record-keeping and in informing clients of changed management arrangements would help to deliver a more effective and courteous service. The Committee suggests that an adjunct to well-documented files could be an audiotape

briefing prepared by departing staff for incoming staff. Further, the Protective Commissioner's proposed practice of providing 'clusters' of Estate Managers with an individual caseload, but a shared responsibility to 'stand in' for each other in emergency situations should help to alleviate this form of client alienation.

Other Staff Support Mechanisms

While acknowledging the importance of upholding client confidentiality, the Public Guardian and the Protective Commissioner might wish to look to other mechanisms to support staff in their decision-making and minimise any feelings of isolation. Methods of encouraging peer support and feedback are vitally important. Exposure to other jurisdictions may also be a useful part of training. Involving different staff in interagency meetings on a regular basis will also provide useful exposure to emerging issues and problem-solving processes.

Recommendation 24

That the training program for staff of the Public Guardian and the Protective Commissioner is augmented by in-service training on an ongoing basis to all staff to update skills and that additional opportunities are employed with linkages both in-house and externally to build on current good practice.

Chapter 7:

Other Jurisdictions

As part of this inquiry, the Committee has examined various other jurisdictions, including other Australian States and Territories, and overseas. These include:

Australian States

Most of the States within Australia have very similar laws in place regarding guardianship and administration of financial affairs of person's deemed incapable by reason of mental incompetency, to those of New South Wales. Most States have quasi-judicial bodies, termed Guardianship and Administration Boards (South Australia, Queensland, Tasmania, and Western Australia), or Guardianship and Management of Property Tribunal (Australian Capital Territory). Only Victoria has moved its guardianship and administrative matters from the Guardianship and Management Board to its centralised Tribunal, the Victorian Civil and Administration Tribunal (VCAT) in its Civil Division. Only Tasmania has retained a Court based system.

The significant variance between New South Wales and all other States is in the area of administration of people's financial affairs. All other States and Territories have designated their Public Trustee as the administrator or manager of last resort. New South Wales is the only State to "go it alone" and undertake the financial and investment duties of people's assets, consequently it is the only State that has one official responsible for the guardianship and administrative functions.

Queensland is the only State to have an organisation responsible solely for the promotion and protection of adults with impaired capacity. It does not have the function of guardianship. Most States, other than Tasmania, have a body called the *Public Advocate,* whose functions by virtue of its name and mission statements has as its primary concern the advocating on behalf of adults with impaired capacity.

South Australia

South Australia has a Guardianship and Administration Board that undertakes similar functions as the NSW Guardianship Tribunal. The Board is a quasi-judicial body determining applications, appointing guardians and administrators and reviewing such appointments.

The Board may appoint any individual such as a family member or friend, accountant, or solicitor, or a Trustee Company to act as an administrator for a person deemed incapable of handling their financial affairs. If there is no-one who is willing to accept the duties of an administrator the Board may appoint the South Australian Public Trustee. The Public Trustee also supervises the functions of private administrators.

Guardians appointed by the Board usually are close relatives or friends, the only criteria is that they must be a natural body (not a company or statutory body). In the absence of an appropriate person the Board, as a last resort, may appoint the Public Advocate as the person's guardian.

The Public Advocate was created in 1993 as an independent statutory official appointed under the provisions of the *Guardianship and Administration Act 1993.* The functions of the Public Advocacy include:

- acting as guardian of last resort,
- investigating matters where a person who has a mental incapacity is at risk of abuse, exploitation or neglect,
- taking an interest in programs being offered to people with mental incapacity,
- undertaking systemic advocacy to identify and act on areas of unmet or inappropriately met needs of people with mental incapacity,
- providing individual advocacy services, and supporting and promoting the interest of carers.

Queensland

In 2000, following a review process, Queensland restructured its system of caring for people with decision-making difficulties. The Guardianship Board was replaced by the *Guardianship and Administration Tribunal,* and a new organisation was established, the *Adult Guardian.* Its role is to:

- protect adults who have impaired capacity from neglect; exploitation or abuse;
- act as an guardian appointed;
- investigate complaints and allegations,
- mediate and conciliate between attorneys, guardians and administrators,
- act as attorney for a person under an enduring power of attorney.

The *Public Trustee* continues to act as administrator of 'last resort'. *The Office of the Public Advocate* was established to promote and protect the rights of adults with impaired capacity; encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy; promoting service and monitoring and reviewing the deliver of services and facilities to adults.

Tasmania

The appointment of guardians and administrators in Tasmania is the jurisdiction of the Guardianship and Administration Board. The Board is similar to other Australian jurisdictions in that it investigates applications, appoints and reviews guardians, administrators and enduring guardians, provides consent for medical and dental procedures and orders the making of statutory wills.

The Guardianship and Administration Board may appoint the Public Trustee as the administrator of last resort, and the Public Guardian as the guardian of last resort.

Western Australia.

Western Australia has an independent Statutory Tribunal, the Guardianship and Administration Board which is a independent statutory tribunal established in 1990 by the *Guardianship and Administration Act.* While the Board is a quasi-judicial body, the President of the Board may be a judge, master or registrar of the Supreme Court, or judge of the District or Family Court.

As in other States, the Board makes orders for the appointment of a responsible person as a guardian to make personal or lifestyle decisions, or an administrator to make financial, estate or legal decisions, in the best interests of someone who is not capable of making those decisions. The Public Advocate may be appointed as guardian if it is considered that no-one else is suitable or available to take on the role of a substitute decision-maker. Similarly, the Public Trust may be appointed as an administrator.

The Public Advocate, as in other states, was established by the *Guardianship and Administration Act* to advocate on behalf of people with a decision-making disability, including representation at hearings of the Board, investigating complaints or allegations, and conducting training and community education programs.

Victoria

In 1998, Victoria transferred guardianship and administration matters from the Guardianship and Administration Board to the Victorian Civil and Administrative Tribunal (VCAT). VCAT comprises eight lists, one of which is the Guardianship List. Its function is determining applications in respect to adults for the appointment of guardians, appointment of administrators, consents to major medical procedures, and the revocation or suspension of Enduring Powers of Attorney.

The Public Advocate is a statutory body established within the Attorney General's portfolio and is appointed by the Guardianship and Administration Act 1986. The Public Advocate provides advocacy, advice, information and services for people with a disability, their families and those who work with them. The Public Advocate acts a guardian as last resort under orders of the Guardianship List of VCAT.

The Public Advocate has developed a scheme involving " Community Guardians" working in regional areas. Currently the Public Advocate has around 50 cases handled by Community Guardians, who receive expenses and a small stipend for their services, and are supervised by the Public Advocate.

The Victorian State Trustee acts as an administrator on direction by VCAT. The State Trustee is an autonomous State Owned Company, paying dividends to the Government on an annual basis and receiving in return Community Service Obligations to compensate for administering those clients who cannot afford to pay fees. The State Trustee currently acts on behalf of approximately 7,000 individuals, managing around $400 million on their behalf.

Australian Capital Territory (ACT)

The ACT has the Guardianship and Management of Property Tribunal, comprising the President and two other members. The Tribunal may appoint guardians to make lifestyle decisions and a manager to deal with financial affairs. A friend or relative may be appointed by the Tribunal, however if there is no suitable person available and willing to be appointed, the Community Advocate may be appointed guardian and the Public Trustee may be appointed as a person's manager. One person, including the Community Advocate, may be appointed as both guardian and manager.

The Community Advocate is an independent statutory officer who has the legal duty to promote and protect the interests of children and adults with physical, mental, psychological and/or intellectual conditions. The Advocate's functions are similar in nature to other States, with one exception – they have a statutory role when appointed as guardian, to find a suitable person to take over this function. Once a suitable person is located, an application is made to the Tribunal to appoint such person as a Community Guardian.

Northern Territory

The Northern Territory's Office of the Adult Guardianship acts as a guardian of last resort. Applications for guardianship are made to the Local Court, which will take advice and recommendations from a Guardianship Panel. A Guardianship Panel is set up in all guardianship applications, and is appointed by the Minister and comprises the Executive Officer of the Office of the Adult Guardianship and two other members.

Administration of a person's financial affairs may be granted to a suitable person or to the Public Trustee. Applications to be appointed as a manager are made to the Northern Territory Supreme Court.

United Kingdom

The United Kingdom has maintained a system of appointing "receivers" to manage the financial arrangements of persons deemed by the Court of Protection to be incapable of managing their affairs due to mental incapacity. "Receivers" act similarly to private financial managers, dealing with all aspects of the person's financial and legal affairs. The emphasis of the UK system has been the identifying and appointing of private receivers to manage the person's affairs. It is only when there is no-one available, or deemed suitable, to look after a person's affairs did the Court order that the Office of the Official Solicitor to the Supreme Court take on the role of the "receiver of last resort".

Prior to the 1980's, the Court of Protection made lifestyle decisions upon application, monitored financial decisions made by an appointed "receivers", and made financial decisions, through the Official Solicitor, for those who did not have anyone to act as a receiver. The Office of the Official Solicitor to the Supreme Court also provided free legal representation for persons under a protection order. The Public Trust Office provided services for those who required a public body considered by testators as a safe appointment to act as executor in a will or codicil, or as trustee of a trust.

In 1987, the Court of Protection was relocated within the Public Trustee Office, later the Public Trust Office. Additional responsibilities were given to the Public Trustee to act as " receiver of last resort", perform judicial functions as authorised by the Court of Protection Rules, and deal with the registration of Enduring Powers of Attorney.

In 1999, the Public Trust Office was subjected to a five-yearly review, which found that despite the best efforts of Public Trust Office management and staff, the Agency "*has to date achieved disappointing results for many of those who have had to fall within its jurisdiction."* Concerns were raised in respect to the Agency's administrative performance, especially its management and financial controls.

The Review concluded that agencies are expected to match the best of the private sector, introducing ways and times of doing business that suit the client, not the provider of the service, and speed and accuracy of operations should be consistently high. The Review found that "*..attitudes towards how people with mental incapacity should be treated by the public services are markedly different from those that prevailed for decades*". The Law Commission had found that "*an intrusive, restrictive and paternalistic approach, however well-intentioned, is not what is wanted nowadays by people who are on the receiving end of it. Some personal freedoms and a reasonable degree of risk are craved by families that include someone with a mental incapacity, even while they recognise the need for irreplaceable financial assets to be judiciously protected."*

Following the review, the Lord Chancellors Department commissioned a report, *Making Changes: The Future of the Public Trust Office.* On releasing the report in April 2000, the Lord Chancellor announced that due to past criticisms of the performance of the Public Trust Office there needed to be a *"radical change.."* and that:

> *"The Public, and, especially the very vulnerable and their carer who need the services of the PTO* [Public Trust Office] *must be confident that these changes are delivered as efficiently and effectively as possible and without putting a greater financial burden on some of the poorest and most vulnerable members of the society."*

The changes aim to "*protect the interests of the vulnerable while avoiding unnecessary state intervention; creating a centre of excellence for provision of new services and making services more accessible locally; retaining ministerial accountability and implementing a programme of change".* Subsequently, the Lord Chancellor established a new organisation, *The Public Guardian Office* charged with performing two main functions. These are: provision of protection services to client's who are not able to manage their financial affairs (which includes providing help and advice to the families and advisers of the person who is incapable); and, acting as receiver of last resort to those people who do not have anyone to act on their behalf. The Public Guardian Office is also to implement a *Change Programme* to improve all its services provided to clients, particularly the vulnerable, following a period of consultation with interested persons and groups. The Change Programme of reforms will address past under-investment, improve service delivery and develop partnerships with the private and voluntary sector to facilitate locally based service, specifically private sector individual or groups and voluntary organisations, in taking over the function of acting as receiver for vulnerable people.

The Public Trust Office has been abolished with its services in respect to wills and trusts taken over by the Official Solicitor now called the Official Solicitor and Public Trustee.

France

France, like most European Countries, operates a guardianship system that is less paternalistic than New South Wales. The system relies heavily on the appointment of a lay person to act as guardian. Generally, France prefers to appoint the spouse, member of the family or close friend as guardian and only if that is not possible will the Court appoint a public officer. The Court maintains a list of appropriate persons, and organisations, that are willing to perform the function of guardian, currently the Court has sixty people on the list. The Court has power to make a guardianship order or a *Curatelle* (financial order), approximately fifty per cent of cases involve the making of a financial order only while in the other fifty per cent both guardianship and financial orders are granted.

As there are approximately half a million adults under some form of guardianship, the resources of the Court to adequately supervise guardians and audit the financial accounts of *curateurs* (financial managers) is stretched. The annual audit of the accounts and supervision of large financial transactions is performed by the senior court clerk who, by virtue of the increasing caseload, may only perform a perfunctory examination. As with other European countries with an ageing population, the number of cases coming before the Courts is increasingly placing a substantial strain on the Court to locate sufficient numbers of people to act as guardians.

The guardianship is under the jurisdiction of the *Tribunal d'instance* or Magistrates Court. This Court is not dedicated to guardianship matters but has a very busy caseload having a civil jurisdiction determining cases involving nationality disputes, tenancy matters etc., with a jurisdictional limit of $10,000, as well as hearing all cases involving guardianship and protection matters.

The French system has three levels of administration, each comprising a differing level of supervision depending on the needs of the person before the Court. These include a temporary order called Justice Backup (*sauvegarde de justice*), an order involving financial matters only, called Trusteeship (*Curatelle*) and the highest level, Supervision (*Tutelle),* being directly supervised by the Court.

Justice Backup (***Sauvegarde de justice)*** is generally a provisional protection measure, introduced only when the person is suffering a slight or momentary deterioration of mental faculties. A doctor makes a declaration that his patient is suffering a minor deterioration of mental faculties and forwards it to the Public Prosecutor with a report or assent of a psychiatrist. An order takes immediate effect and will last for two months, renewable each 6 months. It may also be used as a protection while waiting for an application of a higher degree of constraint.

Trusteeship (***Curatelle***) involves financial affairs which are placed in the hands of a third person (*curateur)* who will control all financial dealings. A person under Trusteeship may still have limited authorisation to complete day to day financial activities but for significant acts (ie sale of land etc) the curateur must agree. Curatelle only looks after

financial aspects. All financial dealings of the trustee are supervised by the Court/Tribunal.

Supervision (Tutelle) is the highest level of control. The Court appoints a board of guardians, comprising 4 to 6 people, who select a tutor (*Le tuteur*) subject to the acceptance by the Judge. One surrogate guardian is selected from the members of the board of guardians who then controls the tutor. The tutor has limited powers, acting under the control of the board of guardian, surrogate guardian and direct supervision of the Court. In cases where a person is alone, or without inheritance, or if there is family conflict the Court may appoint a special administrator (notary, private manager, association of management etc). The Special Administrator will have total control of financial affairs subject to the supervision of the Court.

Payment for the duties of either a curateur or tutelle is paid for from the estate of the client, if however that client does not have the means the court will pay. A significant increase in the number of clients has resulted in some judges appointing separate external auditors.

The Netherlands

Similar to France, the court system in The Netherlands for people under guardianship stems from the Curatelle (all 41 States in the Council of Europe subscribe). There is similarly a preference to appoint family members as guardians, but there are also difficulties in finding sufficient people to appoint as guardians where no family member is available. There has been no observed increase in guardianship – possible due to a lack of guardians, but also due to less traditional reliance on the State. There is no real separation between health and lifestyle decisions, and institutions are generally medically focussed.

New Zealand

New Zealand's legislative remedy for the protection of adults who lack the capacity to care for themselves or to manage their financial affairs is based on the premise that autonomy, or the ability to make one's own decisions, is a very important right which should not be removed lightly. Thus the purpose of the *Protection of Personal and Property Rights act 1988* is to *"provide for the protection and* ***promotion*** *of the personal and property rights of persons who are not fully able to manage their own affairs". (Emphasis added)*

Orders in respect to adults deemed incapacitated are made by the Family Court of New Zealand, which has a policy of encouraging self-reliance by imposing the less restrictive or interfering order. To reinforce this policy, the Act provides for "personal orders" that are specific and tailored to the immediate need of the subject. They are the least restrictive as they deal only with one aspect of the person's life. For example, an order might direct that the person be provided with medical advice or treatment, or with specific educational services, or that the person shall attend a medical institution for treatment (although the latter is rarely used).

If the Family Court considers that the person wholly lacks the capacity to either make or to communicate decisions relating to their personal care and welfare, and there is no other appropriate decision, it may make an order appointing a Welfare Guardian. A Welfare Guardian may be any person over the age of 20 years and who the Court is satisfied is able to carry out the duties in a satisfactory manner and that the proposed appointee will act in the best interests of the incapacitated person. Welfare Guardians, by statute, are required to encourage the person to act on his or her own behalf to the greatest extent possible, to facilitate the integration of that person into the community, and to consult so far as may be practicable with the person for whom the Welfare Guardian is acting. The expenses of a Welfare Guardian may be taken out of the property of the incapacitated person, or if there are insufficient funds, the expenses may be paid by the government upon a Court Order.

Similar to appointment of Welfare Guardians, if the Family Court considers that a person is wholly incompetent to manage his or her own affairs, a person may be appoint as a "property manager". The powers and duties of the manager are conferred by the Court and generally are similar to those of the Protective Commissioner in NSW. A variant in the New Zealand system is that if the property is not large (that is, no single item is worth more than $2,000 or the income or benefit is less than $20,000 per year), the court can make a personal order appointing someone to administer the person's property, rather than making a full property order. The New Zealand Public Trustee may be appointed as a person's property manager.

The Public Trustee operates on a commercial model, assisting only clients with estates of $50,000 or greater. People on low incomes receive limited support from community organisations. However, community organisations can only take control of an individual's funds in a trust if the organisation, itself, is a registered trust.

Canada

Although each province in Canada has slightly varying laws regarding the appointment of guardians or financial managers, there are a number of points of similarity. Similar to European Countries, Canadian Courts endeavour to appoint a person's spouse, family member or community organisation as guardians, or financial managers. If there is no one available or willing to act as a person's financial manager, the Court may appoint the Province's Public Trustee. There is, however no provision for the appointment of a public official as a guardian, the system relies heavily on community organisations assisting incapacitate persons.

Since the middle 1990's, Canadian Provinces have been reviewing their individual guardianship systems to streamline processes to make the system more available and more affordable. An example is the amendment to the guardianship system in Ottawa.

Ottawa amended its system in 1996 with the introduction of the *Substitute Decisions Act.* The Act provides for two methods of appointing guardians or financial managers. Court-appointed guardianships, either guardianship for property and guardianship for personal care, or the appointment of a *statutory guardians of property* without the need for a court order. A person may apply directly to the Public Guardian and Trustee requesting that organisation act as financial manager to a person who is incapable of

managing their affairs. On lodgment of the application the Public Guardian and Trustee will arrange for an assessor, who is specially qualified and whose name appears on a list of helping professionals, to visit the person subject to the application. The Assessor makes a determination whether or not that person is capable of managing property or if a guardian should be appointed to do so. If the assessor finds the person incapable, the Public Guardian and Trustee becomes the person's statutory guardian. A Certificate of Incapacity is issued by the assessor and operates until a re-assessment determines that the person is now capable to manage his or her financial affairs, or the Superior Court of Justice overturns the order on appeal.

Canada also suffers from the unavailability of appropriate persons to act as guardians. The Public Guardian and Trustee has a caseload of around 10,000 clients on which it actively conducts regular audits to determine cases suitable for transfer to private financial managers. At any time after a court order or Certificate of Incapacity is granted, a person's spouse, partner, relative, attorney for property or a trust company can nominate to take over from the Public Guardian and Trustee. The agency's caseload is such that regional offices hire property managers, often real estate agencies, to handle the financial planning and investing of their clients' assets.

United States of America (USA)

While each State in the USA has different laws regarding Guardians or Adult Protection Acts, there are a number of federally mandated systems which provides protection to the rights of persons with disabilities through legally based advocacy. There is no federally based system or funding for guardianship cases, all are the responsibility of each State.

For instance the Protection and Advocacy for Persons with Developmental Disabilities (PADD) Program was created in 1975 so that agencies could pursue legal, administrative and other appropriate remedies to protect and advocate for the rights of individuals with developmental disabilities under all applicable federal and state laws. The Client Assistance Program was established as a mandatory program in 1984. Every State and territory, as a condition for receiving funding, must have a Client Assistance Program.

The System of Guardianship in each State of the United States is a Court based system with the emphasis on appointing appropriate people to act as guardians for incapacitated people. There is no system for appointment of public officials as guardians. The fees for acting as a guardian must be funded from the assets of the client, there is little or no funding from the State. If a client has sufficient assets to meet the fees of the private guardian, there are numerous professional guardian companies willing to take up an appointment. The level of guardianship service depends on the means of the client. If the client does not have funds then the person is left to community organisations or charities to assist as best they can. Recently in Michigan, a non-profit organisation withdraw from the provision of professional guardianship cases after losing around three hundred thousand dollars per year. The only funding received in respect to guardianship was a Medicaid payment of $60 per month per client.

Recent research into the system of guardianship concluded that common to each State is the issue of lack of funds and resources. The lack of resources has resulted in

insufficient numbers of state guardians, guardians are generally not all well trained, and many are overworked. Courts also suffer from lack of funding. The lack of funding has resulted in inadequate review of guardian reports and monitoring of guardians in the performance of their duties.

While some States have or are taking steps to improve their guardianship systems, generally the lack of funding is preventing any real improvements.

The number of individuals with disabilities, (whether mental illness, developmental disabilities etc), will continue to increase due to improved survival rates of infants born with disabilities and increases in life expectancy. Predictions in the United States are that the elderly population will continue to expand rapidly in the next several generations. By the year 2035 a quarter of the population of the United States will be elderly. Some of these individuals will require surrogate decision-makers, and the concern is that the systems currently in place will not adequately cope with the increasing numbers. The issue of the adequacy of guardianship in the United States, as in all countries world wide, is a serious issue confronting individuals, families, government agencies and the judiciary.

Conclusion

Upon assessment of other jurisdictions, the Committee regards the New South Wales system as one of the most comprehensive in scope and capacity. While the roles of the Public Guardian and Protective Commissioner in NSW may be judged as more paternalistic, they are at least more equitable, in the sense that every person requiring the services has access to them.

There are, however, key points in the UK system on which the Public Guardian and Protective Commissioner may seek to model change processes, including changing organisational culture and achieving a local focus.

Appendices

Appendix 1: List of Submissions

Appendix 2: Letter from Mr Peter Young, Chief Judge in Equity Supreme Court of NSW

Appendix 3: Minutes of Meetings