Standing Committee on Social Issues

Substitute decision-making for people lacking capacity

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Terms of reference

The terms of reference for this inquiry are:

1. That the Standing Committee on Social Issues inquire into and report on the provisions for substitute decision-making for people lacking capacity in New South Wales, and in particular:

    (a) whether any NSW legislation requires amendment to make better provision for:
        (i) the management of estates of people incapable of managing their affairs; and
        (ii) the guardianship of people who have disabilities.

2. That the committee report by February 2010.

This Inquiry was referred to the Committee by the Hon John Hatzistergos MLC, Attorney General, on 30 June 2009.

Committee Membership

Hon Ian West MLC	Australian Labor Party	*Chair*
Hon Trevor Khan MLC	The Nationals	*Deputy Chair*
Hon Greg Donnelly MLC	Australian Labor Party	
Hon Marie Ficarra MLC	Liberal Party	
Dr John Kaye MLC	The Greens	
Hon Helen Westwood MLC*	Australian Labor Party	

* The Hon Helen Westwood MLC replaced the Hon Mick Veitch MLC as a Social Issues Committee member on 2 December 2009, as per the resolution of the House (Legislative Council Minutes No. 132, Item 18).

Committee Secretariat

Ms Rachel Simpson, Director

Mr Jonathan Clark, Principal Council Officer

Ms Kate Harris, Council Officer

Ms Lynn Race, Assistant Council Officer

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Chair's Foreword

The number of people who will need the support of substitute decision-making arrangements of some kind is expected to increase dramatically in the coming decades. This is due largely to Australia's ageing population and the increasing number of dementia cases diagnosed each year. The Committee heard that in 2008 there were an estimated 227,000 people in Australia with dementia. By 2050 that number is estimated to increase by 330%, against an estimated population increase of less than 40%.

Of course, people with dementia are only one group who may need the support of substitute decision-making. There are also people with mental illness, intellectual disability and acquired brain injury. These groups include some of the community's most vulnerable members.

In making legislative provisions that impact on people with disabilities governments must strike a delicate balance between protecting these people from harm – either from themselves or from others who would take advantage of them – and respecting and promoting their right to live autonomously and free from restriction.

It is not possible to make a decision on behalf of someone else without taking away their right to make that decision themselves. It is not possible to protect a person from the consequences of their own decisions without taking the position that we know better than they where lie their best interests.

In recent years there has been a paradigm shift in relation to people with disabilities, towards an emphasis on ability rather than disability, capacity rather than incapacity, and rights rather than protection. This has lead to the adoption of the social model of disability and the principles encapsulated in the United Nations Convention on the Rights of Persons with Disabilities. The principles most relevant to this inquiry are the presumption of capacity, the principle of least restriction and the promotion of assisted decision-making, as opposed to substitute decision-making.

The Committee endorses these principles and has been guided by them in considering the evidence presented to it throughout this inquiry and in making recommendations.

At the same time we must be mindful that the presumption of capacity and respect for autonomy does not and must not relieve the government of its duty towards people who lack capacity. We all – the government, service providers and the general community – have an obligation to exercise a duty of care towards society's most vulnerable members. We must exercise that duty of care without being paternalistic or discriminatory – but also without fear of being accused of the same.

To this end, the Committee has sought to direct attention towards safeguards for people under substitute decision-making orders in terms of regularly reviewing the need for orders, appropriate monitoring and support of managers and guardians, and appropriate guidelines at the more intrusive end of the spectrum of interventions.

The Committee has also directed attention towards extending the reach of guardianship services by recommending the NSW Government prioritise assessment of a community guardianship proposal and develop a proposal to establish an Office of the Public Advocate in this state.

The terms of reference for this inquiry were broad, and the range of issues raised under them grew and grew throughout the inquiry process and ultimately encompassed a number of areas we did not anticipate. Chief among these was the difficult issue of end-of-life decision-making, including the authority of a guardian to consent to the cessation of life-sustaining treatment and the status in NSW of advance care directives. On this issue the Committee did not hear from a broad enough range of stakeholders to make appropriately informed recommendations. Consequently, the majority of the

Committee has recommended that the NSW Government consider the need for a further inquiry into provisions for end-of-life decision-making and advance care directives in NSW.

I would like to thank the Committee secretariat - Rachel Simpson, Jonathan Clark, Kate Harris and Lynn Race - for their efforts in managing the inquiry process and preparing this report.

I would also like to thank my fellow Committee members for their application to the difficult task of balancing the competing duties we all have towards people with disabilities and for doing so in a non-partisan and compassionate way.

Hon Ian West MLC

Executive Summary

Chapter 1 – Introduction

The Attorney General, the Hon John Hatzistergos, referred this inquiry to the Committee on 30 June 2009. This followed a proposal made by the Attorney General during his second reading speech on the NSW Trustee and Guardian Bill 2009 that the Committee inquire into and report on whether NSW legislation requires amendment to make better provisions for people incapable of managing their affairs and the guardianship of people with disabilities.

The Committee's inquiry focussed on the *NSW Trustee and Guardian Act 2009* and the *Guardianship Act 1987* under which the Guardianship Tribunal and the Mental Health Review Tribunal make financial management and guardianship orders, and the NSW Trustee and Guardian, the Public Guardian and private managers and guardians implement those orders. To a lesser extent, the Committee also examined provisions under powers of attorney and enduring guardianship for people to make arrangements for their own future outside of the tribunal system.

The Committee received a total of 44 submissions and held four public hearings.

Chapter 2 - A delicate balance

This chapter provides an overview of a fundamental difficulty in making provisions for people with disabilities and of the major themes that emerged during the inquiry.

Any provisions for substitute decision-making must strike a delicate balance between two competing duties of government towards people with disabilities – to respect and maximise their autonomy while at the same time protecting them from abuse. The manner in which these competing duties have been weighed throughout history reflects the dominant paradigm of the era in relation to the treatment of people with disabilities.

The current paradigm, which emphasis principles such as the presumption of capacity, the principle of least restriction and the promotion of assisted decision-making – as opposed to substitute decision-making – is largely enshrined in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). The way in which the UNCRPD can inform and be incorporated into NSW legislation formed one of the major themes of this report.

Another theme was the importance of safeguarding the welfare of people under substitute decision-making orders and monitoring substitute-decision makers.

Finally, an important theme to emerge during the inquiry was the way in which the reach of guardianship services can be increased through proactive guardianship, community guardianship and enhanced systemic and individual advocacy.

Chapter 3 – Background

This chapter provides an outline of the current practice of substitute decision-making in Australia and some overseas jurisdictions in terms of who requires substitute decision-making, in what areas of life do they require substitute decision-making, who adjudicates their need for substitute decision-making and who is appointed as their substitute decision-makers.

A number of conditions affect decision-making capacity, including psychiatric illness, dementia, intellectual disability and acquired brain injury. People affected by these conditions may required a substitute decision-making arrangement to help manage their financial affairs, their general lifestyle – including where to live and work and what routine medical and dental care to receive – or to give medical consent in more serious matters such as cessation of life-sustaining treatment, sterilisation or amputation.

The need for a substitute decision-making order can be met through a number of means. In decreasing order of formality, these include orders made by a court or tribunal, 'pre-emptive' measures taken by the person themselves – such as powers of attorney and enduring guardianship – or informal arrangements such as support from family and friends.

In NSW, the effect of the recently proclaimed *NSW Trustee and Guardian Act 2009* has been a rearrangement of the state entities responsible for substitute decision-making. These entities, which may be appointed through the tribunal system, are now the NSW Trustee and Guardian and the Public Guardian. All Australian jurisdictions have legislation providing for the appointment of a state entity as substitute decision-maker for a person lacking capacity.

During the inquiry two overseas jurisdictions were promoted as representing the current best practice in the area of substitute decision-making: the United Kingdom and the province of Alberta in Canada. Legislation from both these jurisdictions is considered in this chapter.

Chapter 4 - The definition of 'capacity'

The definition of 'capacity' is central to determining the need for substitute decision-making. However, in NSW there is no legislative definition. Instead, the definition used is derived from a 1982 Supreme Court judgement. Some witnesses pointed out limitations with this definition and the need for a standard definition to be provided in legislation. From evidence presented to the Committee there emerged certain key elements this definition should contain. These elements are the acknowledgement that decision-making capacity varies both from time to time and from domain to domain, a reference to capacity rather than *in*capacity, and a reflection on the 'functional' approach by avoiding tying incapacity to an underlying disability.

Chapter 5 – General principles and the United Nations Convention on the Rights of Persons with Disabilities

This chapter examines some of the key principles underpinning the practice of substitute decision-making. These principles flow from the current dominant paradigm reflected in the social model of disability, which seeks to remove barriers to people with disability living independent lives in the

community. They are also incorporated into the United Nations Convention on the Rights of Persons with Disabilities, ratified by Australia in July 2008.

The particular principles promoted as being relevant to the issue of substitute decision-making for people lacking capacity were the presumption of capacity, the principle of least restriction and the promotion of assisted decision-making. The Committee has been guided by these principles throughout the inquiry and has sought where possible to make recommendations that harmonise the relevant pieces of NSW legislation with these principles and with each other.

Chapter 6 – Making substitute decision-making orders – the Guardianship Tribunal

This is the first of two chapters that examine the operation of the tribunal system in NSW in making substitute decision-making orders, focusing on the Guardianship Tribunal.

The Guardianship Tribunal recognises that a substitute decision-making order is an intrusive measure and devotes significant resources, in the form of its Enquiry Service and its Co-ordination and Investigation Unit, to resolving cases pre-hearing without the need for an order. If matters proceed to hearing the Guardianship Tribunal is guided by the *Guardianship Act 1987*.

The *Guardianship Act 1987* provides the factors that must be considered when determining and reviewing the need for guardianship and financial management orders and assessing the suitability of managers and guardians. Some inquiry participants pointed out inconstancies within the Act in the provisions for making financial management orders versus guardianship orders, and appointing a financial manager versus a guardian. The Committee has made recommendations to remove these inconsistencies and at the same time increase consistency with the relevant principles of the UNCRPD.

Guardianship orders are time limited and the need for them to continue is reviewed when they expire. By contrast, financial management orders do not have to be time limited. The *Guardianship Act 1987* provides that the Guardianship Tribunal may set a time limit on a financial management order or review it on its own motion or an application made under the Act – however it is not required to do so. In this chapter the Committee considers evidence relating to the duration and review substitute decision-making orders and the argument that they should be automatically reviewed after a fixed time period.

Chapter 7 – Making substitute decision-making orders – the Mental Health Review Tribunal

This chapter focuses on the Mental Health Review Tribunal (MHRT) and the manner in which it determines the need for financial management orders. The MHRT is guided in this process by the *NSW Trustee and Guardian Act 2009*.

Some inquiry participants pointed out inconsistencies between the *NSW Trustee and Guardian Act 2009* and the *Guardianship Act 1987* in the provisions for making financial management orders. As in Chapter 6, the Committee has made recommendations to remove these inconsistencies and at the same time increase consistency with the relevant principles of the UNCRPD.

The MHRT, if satisfied there is a need for a financial management order, can only appoint the NSW Trustee and Guardian as the financial manager and cannot, like the Guardianship Tribunal, appoint a private manager. It was proposed that the MHRT be given the authority to appoint a private manager. However, the Committee received evidence from the MHRT that it did not want or have the appropriate resources to exercise this authority. Instead, the MHRT proposed that it be enabled to refer such matters, and other matters where the estate of the person was complex, to the Guardianship Tribunal, which has more adequate resources to investigate the suitability of private managers. The Committee agrees and has made this recommendation.

This chapter also addresses the three legislative amendments to the *NSW Trustee and Guardian Act 2009* that the Attorney General asked the Committee to consider in his letter referring the inquiry.

Chapter 8 – Powers of attorney and enduring guardianship

Powers of attorney and enduring guardianship are two instruments available to people outside the tribunal system with which they can make provisions for their own future, in anticipation of a time when they may lack decision-making capacity. Powers of attorney relate to financial affairs whereas enduring guardianship relates to lifestyle matters.

A general power of attorney ceases to have effect once the principal loses capacity, and therefore evidence relating to general powers of attorney is outside the terms of reference for this inquiry, but is nevertheless considered in this chapter. Enduring powers of attorney and guardianship continue to have effect after the principal loses capacity.

The Committee considers evidence in relation to safeguarding the principal under a power of attorney from financial abuse as well as reviewing, revoking and registering powers of attorney and enduring guardianships. However, the Committee notes that the Land and Property Management Authority (LPMA) tabled its 'Review of the *Powers of Attorney Act 2003*' in December 2008 in which it makes recommendations addressing a number of the concerns raised during this inquiry in relation to powers of attorneys. The LPMA review focussed exclusively on powers of attorney and involved consultation with a more specific group of stakeholders than was possible during the current inquiry. Readers are therefore referred to the LPMA's review and its recommendations in relation to powers of attorney.

Chapter 9 – Implementing substitute decision-making orders – financial management orders

This is the first of two chapters that examine implementing substitute decision-making orders in NSW. It focuses on financial management orders and the role of the NSW Trustee and Guardian and private managers.

The first issue addressed in this chapter is the use of the word 'guardian' in the title 'NSW Trustee and Guardian' and the potential this has to create the impression that the NSW Trustee and Guardian and the Public Guardian are one entity. The Committee has recommended that the title be amended to remove the word 'guardian'.

The NSW Trustee and Guardian is appointed as the financial manager of last resort for people who cannot manage their own financial affairs. It is guided in its endeavours by the best interests of the

person under management and seeks to consult with and maintain contact with them. Some inquiry participants raised concerns about the degree of consultation and one-to-one contact the NSW Trustee and Guardian has with its clients. These concerns and the response from the NSW Trustee and Guardian are considered in this chapter.

An important aspect of the NSW Trustee and Guardian's role is to oversee the activity of private managers, including commercial trustee organisations. Private managers lodge accounts for review annually and various options are available if a private manager is found to be performing unsatisfactorily. On the other hand, the majority of managers perform their role satisfactorily and the Committee considers the proposal that the NSW Trustee and Guardian should have the discretion to vary the reporting period and allow, for example, well-performing managers to lodge accounts for review less frequently. The Committee also recommends that the NSW Trustee and Guardian be empowered to step in and assume management duties on the death of a private manager.

Chapter 10 – Implementing substitute decision-making orders – guardianship orders

This chapter focuses on the implementation of guardianship orders and the role of the Public Guardian, specifically in relation to restrictive practices and authorising NSW Police to use 'reasonable force' in moving a person under guardianship from one place to another. The Committee recommends consideration be given to legislative provisions clarifying both these areas.

The majority of this chapter is devoted to the Public Guardian's proposal for a community guardianship program, which would utilise the Public Guardian's authority to delegate its functions to another person. Community members would be trained to deliver guardianship services in their community with one advantage being a closer cultural and linguistic match between the guardian and the person under guardianship. The Committee considers evidence on the way in which community guardians would be recruited, trained, supported and monitored, including some concerns about the checks and balances required when delegating the considerable power and influence a guardian has over the person under guardianship.

An important feature of the Public Guardian's proposed community guardianship program is that community guardians are delegated their functions by and therefore directly supervised by the Public Guardian, as opposed to being appointed directly by the Guardianship Tribunal, as is the case in Western Australia.

The Committee has recommended the NSW Government prioritise assessment of the community guardianship proposal.

Chapter 11 – Proactive guardianship and individual and systemic advocacy

The Public Guardian is in a position where it may become aware of vulnerable people living in circumstances that may warrant a guardianship order being made. It also has a range of services to offer such people. However, currently the Public Guardian cannot be proactive in investigating the need for guardianship, but must instead make an application to the Guardianship Tribunal, which will then investigate the need for an order. Nor can the Public Guardian provide any of its services without a guardianship order being in place. The Public Guardian has proposed it be given more proactive

powers in both these circumstances and be enabled to investigate the need for guardianship itself and to provide its service without the need for a guardianship order. The Committee has recommended consideration be given to the former and that legislative amendment provide for the latter.

The issue of proactive guardianship forms part of a broader discussion of individual and systemic advocacy on behalf of people with disabilities. NSW is alone among Australian jurisdictions in not having a state appointed Public Advocate who can advocate on behalf of individuals and for systemic change generally. The Committee considers the proposal from a large number of inquiry participants that such an office be established in NSW and recommends that the NSW Government engage the relevant department or agency to develop a proposal to this end.

An issue that impacts on the Public Guardian's ability to advocate systemically on behalf of people with disabilities is ministerial responsibility for the *Guardianship Act 1987*, which currently resides with the Minister for Disability Services. The Committee considers the proposal that responsibility for administering the Act be transferred to the Attorney General. Two central arguments were put forward in support of this transfer: firstly, that it would reflect a general move from a 'welfare-based' approach to a 'rights-based' approach in regard to people with disability, and secondly that it would remove the actual or perceived conflict of interest that currently exists for the Public Guardian who when advocating on behalf of people with disability may at times need to be critical of service delivery from bodies under the authority of the Minister for Disability Services.

Chapter 12 – Implementing substitute decision-making arrangements – medical consent and end-of-life decision-making

While routine medical and dental treatment for a person lacking capacity can be consented to by their guardian, other medical interventions lie beyond the scope of a guardianship order. These include medical treatment for involuntary patients in mental health facilities, termination of pregnancy, amputations and cessation of life-sustaining treatment.

This chapter considers evidence relating to the authority given to medical officers under the *Mental Health Act 2007* in relation to medical treatment for a person detained in a mental health facility, and inconsistencies between the *Mental Health Act 2007* and the *Guardianship Act 1987* with respect to consent for termination of pregnancy. The Committee recommends that the authority of medical officers be clarified and that provisions for termination of pregnancy be harmonised.

This chapter also considers the issue of medicating mentally ill persons against their will and the difficult situation that arises when a mentally ill person wishes to reject medication that is contributing to them regaining capacity. The right to refuse treatment must be weighed against the person's risk of harm to themselves and others, the possibility of relapse and the fact that given the full course of treatment and full recovery, the person themselves may endorse the involuntary treatment regime.

Finally, the Committee considers evidence on end-of-life decision-making, including the role of advance care directives in NSW. There is currently considerable ambiguity in NSW with respect to the rights of a person to consent to cessation of life-sustaining medical treatment on behalf of a person lacking the capacity to make or communicate that decision themselves. The status of advance care directives in NSW is also unclear despite a recent Supreme Court judgement that appears to give them some validity in common law.

The Committee did not receive evidence from a sufficiently broad range of stakeholders to make recommendations in relation to end-of-life decision-making and advance care directives. The majority

of the Committee has recommended that the NSW Government consider a further inquiry focussing specifically on the provisions for end-of-life decision-making and advance care directives in NSW and consider referring such an inquiry to the NSW Law Reform Commission.

Summary of Recommendations

Recommendation 1 **35**

That the NSW Government pursue legislation establishing a single definition of 'capacity' applicable to legislation related to substitute decision-making for people lacking capacity.

That the legislative definition acknowledge the fact that a person's decision-making capacity varies from domain to domain and from time to time and defines 'capacity' in relation to a particular decision with reference to, but without being limited to, the following:

- the ability to understand information relevant to the decision
- the ability to retain that information for a period that allows the decision to be made within an appropriate timeframe
- the ability to utilise that information in the decision-making process
- the ability to foresee the consequences of making or not making the decision
- the ability to communicate the decision to others

That legislation should in addition ensure that a person is not considered incapable of making a particular decision simply on the basis of their having a disability.

Recommendation 2 **62**

That the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to explicitly require a presumption of capacity as the starting point for any considerations.

Recommendation 3 **63**

That the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to include a statement to the effect that a person is not to be presumed to lack capacity simply because they make a decision that is, in the opinion of others, unwise.

Recommendation 4 **63**

That the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to include an explicit statement to the effect that the legislation supports the principle of assisted decision-making.

Recommendation 5 **63**

That the NSW Government consider amending NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to provide for the relevant courts and tribunals to make orders for assisted decision-making arrangements and to prescribe the criteria that must be met for such orders to be made.

That such consideration address the parameters of assisted decision-making, in particular the limit at which the assisting decision-maker's obligation to prevent harm overrides their responsibility to assist.

(d) the practicability of services being provided to the person without the need for the making of such an order.

Recommendation 12 **85**

That the NSW Government pursue an amendment to the *Guardianship Act 1987* to explicitly require the Tribunal to consider the adequacy of existing informal arrangements when determining the need for a financial management order.

Recommendation 13 **88**

That the NSW Government pursue an amendment to the *Guardianship Act 1987* to require that the Tribunal shall not be satisfied a prospective financial manager, other than the NSW Trustee and Guardian, is suitable unless it is satisfied that:

(a) the personality of the proposed financial manager is generally compatible with that of the person under the financial management order

(b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed financial manager and those of the person under the financial management order and

(c) the proposed financial manager is both willing and able to exercise the functions conferred or imposed by the proposed financial management order.

Recommendation 14 **89**

That the NSW Government pursue an amendment to the *Guardianship Act 1987* to clarify that the NSW Trustee and Guardian is to be considered the financial manager of last resort and appointed only after consideration of the availability and suitability of a private manager, whether that be a friend or family member or a commercial trustee corporation, has been made.

Recommendation 15 **95**

That the NSW Government consider amending the *Guardianship Act 1987* to require the automatic review of financial management orders by the Guardianship Tribunal.

That the NSW Government consider in particular the additional burden such an amendment may place on the resources of the Guardianship Tribunal.

Recommendation 16 **98**

That the NSW Government pursue an amendment to section 25P of the *Guardianship Act 1987* to provide that the Tribunal may revoke a financial management order if it is satisfied there is no longer a need for a person to manage the affairs of the person subject to the order.

Recommendation 17 **101**

That the NSW Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* so that the Mental Health Review Tribunal is not required to automatically consider a person's need for a financial management order when the Tribunal conducts a mental health inquiry following a person's detention in a mental health facility or conducts a review of a forensic patient's case, unless evidence of a need for such an order arises during the inquiry or review.

Recommendation 18 **104**

That the NSW Government pursue an amendment of the *NSW Trustee and Guardian Act 2009* to require bodies considering financial management orders in respect of a person under that Act be satisfied that there is a need for the order and that the making of an order is in the person's best

- whether the Office of the Public Advocate and the Office of the Public Guardian should be merged or exist separately.

Recommendation 33 **183**

That the NSW Government consider the merits of transferring responsibility for administering the *Guardianship Act 1987* from the Minister for Disability Services to the Attorney General.

Recommendation 34 **189**

That the NSW Government consider the need for amendments to the *Mental Health Act 2007* and the *Guardianship Act 1987* in relation to the authority of medical officers to authorise medical treatment for a person detained in a mental health facility and the manner in which substitute consent for the termination of pregnancy is determined.

That the NSW Government consult broadly on the need for such amendments, including with NSW Health, medical officers, the Mental Health Review Tribunal, non-government organisations, community groups and families of people detained under the *Mental Health Act 2007*.

Recommendation 35 **202**

That the NSW Government consider the need for an inquiry focussing specifically on the provisions for end-of-life decision-making and advance care directives in NSW and consider referring such an inquiry to the NSW Law Reform Commission.

Chapter 1 Introduction

This chapter provides an overview of the manner in which the Inquiry was conducted and the structure of the report.

Terms of reference

1.1 The Chair tabled a letter, dated 30 June 2009 from the Hon John Hatzistergos MLC, Attorney-General, requesting the Committee conduct an inquiry into the legislative provisions for the management of estates of people incapable of managing their affairs and the guardianship of people who have disabilities. The Committee adopted the terms of reference, which are reproduced on page iv of this report, on 30 June, 2009.

Conduct of the inquiry

Submissions

1.2 The Committee advertised a call for submissions in the *Sydney Morning Herald* and the *Daily Telegraph* on the 15 July 2009. A media release announcing the inquiry and the call for submissions was sent to all media outlets in NSW. The Committee also wrote to a number of relevant stakeholders inviting them to participate in the inquiry process. The closing date for submissions was initially 21 August 2009, however the Committee resolved to extend the submission date to the 18 September 2009.

1.3 The Committee received a total of 44 submissions, including 6 supplementary submissions, to the inquiry. Public and partially confidential submissions were published on the Committee's website. A full list of submissions is provided in **Appendix 1**.

Public hearings

1.4 The Committee held four public hearings at Parliament House on 28 and 29 September, and 4 and 5 November 2009.

1.5 A list of witnesses is set out in **Appendix 2** and published transcripts are available on the Committee's website. The list of documents tabled at the public hearings is provided in **Appendix 3**. A list of witnesses who provided answers to questions taken on notice during hearing is provided in **Appendix 4**.

1.6 The Committee would like to thank all those who participated in the inquiry, whether by making a submission, giving evidence or attending the public hearings.

1.7 The Committee considered this report on 22 February, 2010. Minutes of the Committee are included in **Appendix 5**.

Report structure

1.8 Chapter 2 provides an overview of a fundamental difficulty in making provisions for people with disabilities, the major themes the emerged during the inquiry, and the recommendations relating to these themes.

1.9 Chapter 3 provides an outline of the current practice of substitute decision-making in NSW, other Australian jurisdictions and some overseas jurisdictions, in terms of who requires substitute decision-making, in what areas of life do they require substitute decision-making, who adjudicates their need for substitute decision-making and who is appointed as their substitute decision-makers.

1.10 Chapter 4 examines the definition of capacity, the current lack of a legislative definition in NSW, the limitations of the common law definition in use, and proposals for a legislative definition.

1.11 Chapter 5 examines some of the key principles underpinning the practice of substitute decision-making in the context of the current dominant paradigm in relation to people with disabilities represented in the social model of disability and the United Nations Convention on the Rights of Persons with Disabilities, and the potential for NSW legislation to be harmonised with these principles.

1.12 Chapter 6 examines the operation of the Guardianship Tribunal under the *Guardianship Act 1987* and its role in determining the need for guardianship and financial management orders.

1.13 Chapter 7 examines the operation of the Mental Health Review Tribunal under the *NSW Trustee and Guardian Act 2009* and its role in determining the need for financial management orders.

1.14 Chapter 8 considers the evidence presented in relation to powers of attorney and enduring guardianship, two instruments available to people outside of the tribunal system.

1.15 Chapter 9 examines the implementation of financial management orders and the role of the NSW Trustee and Guardian and private managers.

1.16 Chapter 10 examines the implementation of guardianship orders and the role of the Public Guardian. It also considers evidence in relation to a proposed community guardianship program.

1.17 Chapter 11 examines proposals from the Public Guardian that it be enabled to proactively investigate the need for guardianship and provide guardianship services without the need for a guardianship order. It also examines proposals for the establishment of an Office of the Public Advocate in NSW and ministerial responsibility for the *Guardianship Act 1987*.

1.18 Chapter 12 examines the evidence presented in relation to medical consent for treatments beyond the scope of a guardianship order and issues around end-of-life decision-making and advance care directives.

Chapter 2 A delicate balance

The terms of reference for this inquiry are broad and the Committee has been mindful of the responsibility placed on it by the Attorney General for to conduct a comprehensive inquiry. During the second reading speech for the NSW Trustee and Guardian Bill 2008 the Attorney General asked the Committee to consider the amendments contained in the Bill as part of a general reference:

> In order to address any further concerns and ensure that they are canvassed through a comprehensive consultation process—particularly with the disability sector—it is proposed that the Legislative Council Standing Committee on Social Issues inquire into these additional matters as part of a general reference and report on whether the New South Wales legislation requires amendment to make better provision for the management of estates of people incapable of managing their affairs, and the guardianship of people who have disabilities…[1]

Consequently, the Committee's inquiry has been expansive, both in the range of subject areas – from financial management through to end-of-life decision-making – and in the distance it sought to span between philosophical and ethical principles and the minutiae of legislation. The resulting report is multifaceted, complex, and has invariably not dealt with every area of substitute decision-making to the same level of detail.

Competing duties

2.1 The practice of substitute decision-making for people lacking capacity lies at the intersection of two competing duties of government towards vulnerable people – to respect their autonomy and to protect them from abuse. We cannot make a decision on someone's behalf without taking away their right to make that decision for themselves, and at the same time making the difficult judgement that we know better than they where lies their best interests.

2.2 In seeking to balance these duties, some encroachment on the freedom of vulnerable individuals is inevitable. To encroach too far is to prevent a person from fully exercising their capacity; to encroach too little is to leave them open to abuse from others and from their own mismanagement. At either extreme, the government will have failed to act in the person's best interests.

2.3 In this regard the Committee is mindful that while a person should not be coerced into utilising services or entering into arrangements that may compromise their autonomy, neither should their access to support and appropriate services be difficult. Importantly, the Committee is of the view that the presumption of capacity, as discussed in Chapter 5, does not and must not relieve the government of its duty towards people who lack capacity. In addition, service providers and the wider community play an important role in maintaining between autonomy and protection by exercising their duty of care towards people lacking capacity.

[1] *NSWPD (Legislative Council)*, 23 June 2009, p 16488

Historical setting

2.4 Societies have provided for the care and protection of people lacking decision-making capacity for centuries. The manner in which this care and protection has been delivered has reflected the dominant paradigm of the era.

2.5 Since Roman times the law has provided some form of protection for people unable to care for themselves or their property.[2] However early English law merely protected the property of people lacking capacity and those without family or property were often left to join the itinerant poor drifting from town to town.[3] Over the centuries the state continued to take an active interest in managing and preserving the property of people lacking capacity. Distinctive mechanisms for the protection of the person and the protection of their property continue to this day.[4]

2.6 The shifting emphasis between care, treatment and control has reflected the social and cultural values of the time. People lacking capacity were once thought to be afflicted by evil spirits and were often isolated and punished. As a result of scientific advances in the seventeenth and eighteenth centuries a medical model began to prevail in which people lacking capacity were considered sick and in need of treatment and cure. This lead to the rise of institutions and asylums for both their care and confinement.

2.7 Late in the twentieth century the focus began shifting from a welfare-based model to a rights-based model. In the early part of the twenty first century as society faces the challenge of a diverse and aging population, the paradigm continues to shift. The principles underpinning the current paradigm are largely crystallised in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), ratified by Australia in July 2008. These include the presumption of capacity, the principle of least restriction and an emphasis on assisted decision-making rather than substitute decision-making.

2.8 Some of these principles are incorporated in the *NSW Trustee and Guardian Act 2009* and the *Guardianship Act 1987*. In his second reading speech for the NSW Trustee and Guardian Bill 2009, the Attorney General noted the role the principles contained in these Acts had in 'giving greater protection to the human rights of people with disabilities to live with dignity and as much autonomy as possible.'[5]

Themes and recommendations in the report

2.9 Clear themes emerged during the inquiry and have informed the Committee's consideration of the complex framework for substitute decision-making in NSW. They are reflected in the Committee's recommendations and are summarised here.

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2 Buti A, 'The Early History of the Law of Guardianship of Children: From Rome to the Tenures Abolition Act 1660', *University of Western Sydney Law Review,* 2003, Vol 7, No 1, p 92

3 Quinn M J, *Guardianships of Adults: Achieving justice, autonomy and safety,* New York, Springer Publishing Company Inc., 2005, p 19

4 For example financial management orders to protect property interests and guardianship orders to protect the person.

5 *NSWPD (Legislative Council)*, 23 June 2009, p 16487

Focus on capacity

2.10 The modern paradigm informing the practice of substitute decision-making focuses on 'capacity' rather than 'incapacity', and 'ability' rather than 'disability'. This underlines the importance of language and clear definitions (**Recommendations 1 [Ch 4, p 35] and 6 [Ch 5, p 63])**

Principles in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)

2.11 The UNCRPD represents a comprehensive statement of modern best practice with respect to people with disabilities, including those lacking decision-making capacity. The particular principles it enshrines that are relevant to this inquiry are:

(1) the presumption of capacity,

(2) the principle of least restriction, and

(3) the promotion of assisted decision-making.

2.12 The Committee believes that should be explicitly imported into NSW legislation related to substitute decision-making and has recommended legislative amendments to achieve this (**Recommendations 2 [Ch 5, p 62], 3 [Ch 5, p 63], 4 [Ch 5, p 63], 5 [Ch 5, p 63] and 19 [Ch 7, p 106])**.

Consistent application of UNCRPD principles in NSW legislation

2.13 In addition to including explicit statements of support for the principles of the UNCRPD, NSW legislation should be consistent in reflecting these principles in the various provisions made for substitute decision-making.

2.14 A substitute decision-making order, whether it is being made or reviewed, should not be based solely on lack of decision-making capacity, but should be based also on the need for the order and the best interests of the person for whom the order is sought (**Recommendations 8 [Ch 6, p 77], 16 [Ch 6, p 98]), 17 [Ch 7, p 101], 18 [Ch 7, p 104] and 22 [Ch 7, p 114])**.

2.15 The principle of restricting a person's autonomy as little as possible should be consistently applied and preference given to assisted decision-making over substitute decision-making (**Recommendations 9 [Ch 6, p 77], 12 [Ch 6, p 85] and 14 [Ch 6, p 89])**.

2.16 The manner in which the need for a substitute decision-making order and the suitability of a potential substitute decision-maker is determined should be consistent under different pieces of legislation (**Recommendations 11 [Ch 6, p 85], 13 [Ch 6, p 88] and 23 [Ch 7, p 116])**.

Safeguards and monitoring

2.17 People under substitute decision-making orders must be safeguarded from abuse, mismanagement and unnecessary restriction to the greatest extent possible.

2.18 Orders should remain in effect for the shortest period that is appropriate. To this end, particular attention must be paid to how and when orders are reviewed, and consideration given to the automatic review of all orders without the need for an application for review (**Recommendations 10 [Ch 6, p 81] and 15 [Ch 6, p 95])**.

2.19 Those charged with managing the affairs of a person lacking capacity should be held to high standards and an appropriate regime for monitoring their performance must be in place (**Recommendation 25 [Ch 9, p 138])**.

2.20 The spectrum of responses available for people lacking capacity must include certain powers of restriction, detention and removal in order to ensure in extreme cases that a person is not at risk of harming themselves or others. Special consideration must be given to the circumstances and manner in which these powers are exercised (**Recommendation 27 [Ch 10, p 148] and 28 [Ch 10, p 151])**.

Extending the reach of guardianship services

2.21 It is important that guardianship services can be efficiently delivered to those in need. This is becoming increasingly important in light of Australia's ageing population and the expected increase in demand for guardianship services in the coming decades.

2.22 One proposal for increasing the reach of guardianship services is to allow the Public Guardian to proactively investigate the need for guardianship without having to apply to the Guardianship Tribunal and to act without the need for a guardianship order being in place **(Recommendations 30 [Ch 11, p 169] and 31 [Ch 11, p171])**.

2.23 Another proposal to extend the reach of guardianship services and facilitate cultural and linguistic compatibility between guardians and people under guardianship is a community guardianship program, under which community members are recruited, trained and supported to deliver guardianship services in their own communities **(Recommendation 29 [Ch 10, p 164])**.

2.24 Guardianship services should include both systemic and individual advocacy. NSW is alone among Australian states in not having a Public Advocate. Consideration must be given to establishing an Office of the Public Advocate in NSW **(Recommendation 32 [Ch 11, p 177])**.

Chapter 3 Background

This chapter provides an outline of current practices around substitute decision-making in terms of the people who require substitute decision-making, the areas of their lives in which they require substitute decision-making, and the processes and instruments involved in appointing a substitute decision-maker. It also provides an overview of the current situation in New South Wales, including the effect of the *NSW Trustee and Guardian Act 2009*, other Australian states and territories and as well as some overseas jurisdictions.

People requiring substitute decision-making

3.1 People requiring substitute decision-making cannot be identified simply by reference to a disability. Nevertheless, there are certain conditions that impact on cognition and affect decision-making capacity.

Disabilities Affecting Cognition

3.2 Some conditions affecting cognition are permanent, some temporary and some only become apparent with advancing age. These conditions include:

- psychiatric illness
- dementia
- intellectual disabilities and
- acquired brain injury.[6]

3.3 A significant proportion of the Australian public will at one time or another develop a psychiatric illness.[7] A psychiatric illness is treatable and controllable and in many cases curable. However, for a small proportion of people they will need lifelong treatment and may go on to develop a psychiatric disability.

3.4 Dementia is the term used to describe the symptoms of a large group of illnesses that can affect brain functioning. It includes of memory loss, and impairment of reasoning and social skills.[8] Alzheimer's and Parkinson's diseases are examples of conditions that cause dementia.

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6 Submission 21, Brain Injury Association of NSW Inc, p 4; Submission 17, Alzheimer's Australia NSW, p 3; Submission 13, New South Wales Trustee and Guardian, p 5

7 Australian Bureau of Statistics *2007 National Survey of Mental Health and Wellbeing: Summary of Results,* Australian Bureau of Statistics, Canberra, 2008, p 7

8 Alzheimer's Australia web site <www.alzheimers.org.au/upload/HS1.1.pdf> accessed 23 October 2009

3.5 An intellectual disability is characterised by below average intellectual functioning and deficits in at least two areas of adaptive behaviour such as self-care or communication.[9] An intellectual disability is a subset of the broader term, developmental disability, which also includes physical disabilities that occur before the age of eighteen.[10]

3.6 Acquired brain injury refers to any type of brain damage that occurs after birth. A brain injury can occur suddenly from events such as trauma or stroke or can develop gradually as a result of disease or prolonged substance abuse.[11]

Areas in which people require substitute decision-making

This section outlines the three primary areas of a person's life in which substitute decision-making arrangements are implemented, namely their financial, lifestyle and health affairs.

Financial

3.7 Financial substitute decision-making arrangements protect the current and future financial, legal and property interests of the person lacking decision-making capacity. The financial interests of a person include having sufficient money to purchase necessities such as food. Their legal interests include their right to sue for damages, and their property interests might include the purchase and sale of real estate. Substitute financial decisions have the same legal effect as if made by the person lacking decision-making capacity. Substitute financial decision-makers have a fiduciary relationship with the person lacking decision-making capacity and must exercise their decision-making powers in the interests of that person.

3.8 Financial substitute decisions may relate to small sums of money for recreational use through to buying and selling shares or real estate. For example financial management decisions made by the New South Wales Public Trustee include the purchase and construction of dwellings, investment of funds and the provision of maintenance funds.[12]

Lifestyle

3.9 Lifestyle decisions are fundamentally about caring for and protecting the person lacking decision-making capacity and may include deciding where a person should live and work, what routine health care they are to receive and who they may have contact with. Given their personal nature, lifestyle decisions, influence the day-to-day experience of the person lacking decision-making capacity.

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9 Intellectual Disability Rights Service Web Site "What is an Intellectual Disability" <http://www.idrs.org.au/cjsn/lawyers/02.html> accessed 23 October 2009

10 Centre for Developmental Disability Studies, Sydney University Web Site <http://www.cdds.med.usyd.edu.au/html/WhatIsDD.html> accessed 23 October 2009

11 Better Health Channel Web Site http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Acquired_brain_injury> accessed 23 October 2009

12 Public Trustee New South Wales *Annual Report 2007/08*, p 13

Health

3.10 Generally lifestyle decisions include routine health care decisions. However, there is a range of health decisions that cannot be made by a lifestyle decision maker and require a specific health substitute decision-maker. These decisions may include the cessation of life sustaining treatment, sterilisation or the removal of a non-regenerative body part.

3.11 A range of options has evolved to create a special class of substitute decision-maker for certain health decisions. The scope of the health decision depends on the particular legislation. For example, South Australia's *Consent to Medical Treatment and Palliative Care Act 1995* applies to substitute treatment decisions during the terminal phase of a terminal illness or when in a persistent vegetative state, while Victoria's *Medical Treatment Act 1988* allows substitute health decisions to be made only for current medical conditions.[13]

Appointing substitute decision-makers

3.12 In Australia, substitute decision-making arrangements are made in three primary contexts:

- On the application of a concerned person, a court or tribunal can sanction voluntary or compulsory decision-making arrangements for a person lacking decision-making capacity.
- A person with decision-making capacity can themselves make formal pre-emptive arrangement that remain valid after the person loses decision-making capacity. These arrangements may become active at a specified time.
- Informal arrangements may include the support and assistance of family and friends when a person lacking capacity has to make a decision.

Formal court or tribunal sanctioned arrangements

3.13 Courts and tribunals are reluctant to intervene in the personal and financial affairs of people and each state sets out specific criteria that must exist before the state will make substitute decision-making orders.

3.14 Court and tribunal sanctioned substitute decision-making arrangements identify a particular substitute decision-maker. The state will undertake this role as a last resort only if a suitable private manager or guardian is not willing or available. In figure 3.1 details of the state entity that undertakes this role are illustrated.

13 *Consent to Medical Treatment and Palliative Care Act 1995* (SA), s 7; *Medical Treatment Act 1988* (Vic), s 5

Figure 3.1 State entities undertaking substitute decision-making roles

Type of Decision	NSW	VIC	TAS	SA	WA	QLD	ACT	NT
Financial	NSW Trustee and Guardian	State Trustee	Public Trustee or Public Guardian	Public Trustee	Public Trustee or Public Advocate	Public Trustee	Public Trustee or Public Advocate	Public Trustee or Public Guardian
Lifestyle	Public Guardian	Public Advocate	Public Guardian	Public Advocate	Public Advocate	Adult Guardian	Public Advocate	Public Guardian

3.15 In addition, each state and territory identifies a court or tribunal to review, vary or revoke formal pre-emptive, informal or formal court or tribunal sanctioned substitute decision-making arrangements.

Formal pre-emptive arrangements

3.16 Formal arrangements pre-empting loss of capacity can be put in place for financial, lifestyle and health decisions. These arrangements are classified as 'enduring'. The unique feature of an enduring document is that it remains legally valid after the 'donor' or 'principal' has lost decision-making capacity. A document not specified to be enduring, ceases to have legal effect if the donor or principal loses decision-making capacity.[14]

3.17 Formal pre-emptive arrangements for financial substitute decision-making for people lacking capacity are commonly called enduring powers of attorney. The enduring power of attorney gives specific financial decision-making powers to the person(s) nominated in the document. An enduring power of attorney may be effective immediately or commence only if and when the principal loses capacity.

3.18 Formal pre-emptive arrangements for lifestyle substitute decision-making are commonly called enduring guardianships.[15] Enduring guardianships do not have effect until the donor or principal has lost decision-making capacity.[16]

3.19 Formal pre-emptive arrangements for health substitute decision-making are referred to by a variety of names, for example advanced care directives or living wills.

14 See for example, *Powers of Attorney Act 2003* (NSW) sch 1, s 163F

15 State and territory differences in terminology are detailed under the relevant jurisdiction.

16 Office of the Public Guardian web site <http://www.lawlink.nsw.gov.au/lawlink/opg/ll_opg.nsf/pages/OPG_yourwaytoplanahead> accessed 20 November 2009

Informal arrangements

3.20 Informal decision-making arrangements are by their nature ad hoc and context specific. Informal decision makers are often family members or friends. The legislative term that includes this group of people is 'person responsible'.[17]

3.21 A responsible person can be a spouse, carer, close friend or relative and it is usual for the legislation to identify a hierarchy of informal substitute decision-makers.[18]

3.22 In many situations decisions of informal substitute decision-makers are considered to have full legal authority, however they may not be recognised by some institutions.

Current situation in New South Wales

3.23 This section examines the effect of the New South Wales *NSW Trustee and Guardian Act 2009,* the role of the NSW Trustee and Guardian, the role of the Public Guardian, and the range of substitute decision-making arrangements implemented in New South Wales.

Effect of the *New South Wales Trustee and Guardian Act 2009*

3.24 The *NSW Trustee and Guardian Act 2009* established the NSW Trustee and Guardian as a statutory corporation, conferring on it functions previously exercised by the Public Trustee and Office of the Protective Commissioner. The *NSW Trustee and Guardian Act 2009* repeals and substantially re-enacts the *Public Trustee Act 1913* and *Protected Estates Act 1986* and merges the functions of the Public Trustee and Protective Commissioner in one office.

3.25 In addition, it introduces a number of amendments designed to improve the system under which financial managers make substitute decisions for people unable manage their financial affairs.

Amalgamation of the Protective Commissioner and Public Trustee

3.26 The Protective Commissioner was an independent public official appointed to protect and administer the financial dealings of individuals who were unable to make financial decisions. The Public Trustee on the other hand, appointed by the Governor, was responsible for acting as an independent and impartial trustee executor, attorney and agent for members of the public generally. The Public Trustee provided services such as will-making, estate administration, executor services, trust management and power of attorney management.

3.27 Prior to the commencement of the *NSW Trustee and Guardian Act 2009* the roles of Protective Commissioner and Public Trustee were distinct and held by different people. The Act merges their roles and combines personal trustee and financial management services under the authority of the Chief Executive Officer of the NSW Trustee and Guardian.

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17 See for example, *Guardianship Act 1987* (NSW), s 33A

18 Professor Terrence Carney Professor of Law, Sydney Law School, Evidence, 28 September 2009, p 31

Separation of Protective Commissioner and Public Guardian

3.28 The Protective Commissioner and Public Guardian were previously separate offices with distinct roles, but with one person holding both positions. Since the enactment of the *Trustee and Guardian Act 2009* the position of CEO of the NSW Trustee and Guardian and the Public Guardian are now held by different people. The Public Guardian reports administratively to the Chief Executive Officer of the NSW Trustee and Guardian, but remains a functionally separate body. The Hon John Hatzistergos, NSW Attorney General, argued that creating two statutory officer positions will allow the Public Guardian and NSW Trustee and Guardian to focus on their core roles and will avoid the situation in which one officer is able to make decisions that affect all aspects of a client's life.

> This engenders a clear delineation between the role of the guardian and financial manager, ensuring no one statutory officer has the power to make decisions in all areas of a person's life and is consistent with other Australian jurisdictions.[19]

3.29 Ms Imelda Dodds, Acting Chief Executive Officer of the NSW Trustee and Guardian stated that the new legislation strengthens the independence of the Public Guardian, thus reducing the potential for a conflict of interest. She held that while the Public Guardian is administratively responsible to the Acting Chief Executive Officer of the NSW Trustee and Guardian, the former is independently funded and the latter has no authority in which to interfere with its statutory role as a decision-maker.[20]

New South Wales Trustee and Guardian

3.30 The New South Wales Trustee and Guardian provides personal trustee, financial management and substitute decision-making services. These services include:

- managing client assets and helping them plan for their future under powers of attorney
- providing advice to clients about their estate
- making wills and acting as executor and/or trustee under wills
- financial management for people with decision-making disabilities
- authorising and directing the performance of private managers appointed by the Supreme Court or Guardianship Tribunal
- managing property subject to restraint or forfeiture
- acting as trustees for protected defendants
- managing the affairs of missing persons
- promoting the making of a wills, enduring power of attorneys and enduring guardianships

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19 *NSWPD* (Legislative Council), 23 June 2009

20 Ms Imeda Dodds, Acting Chief Executive Officer, NSW Trustee and Guardian, Evidence, 28 September 2009, p 2

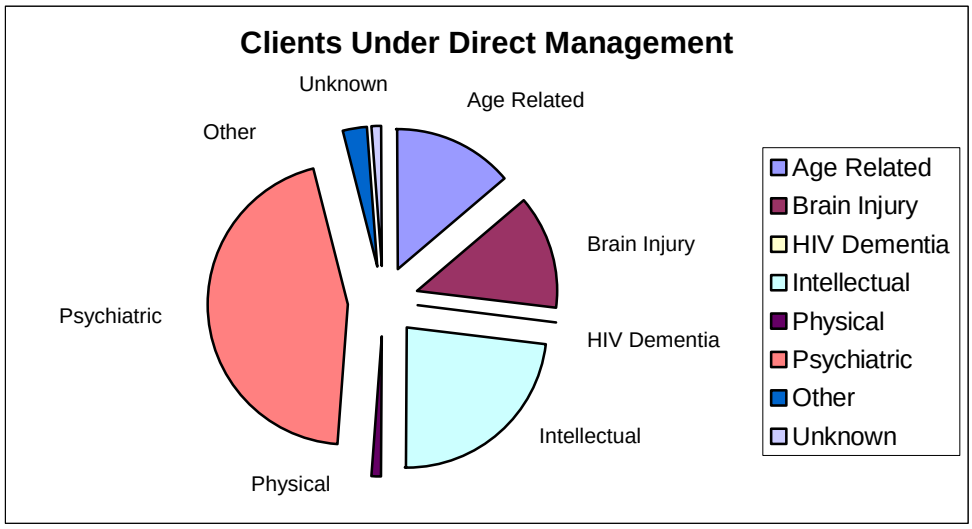
- providing advice on government policy, legislation and law reform.[21]

3.31 The services of most relevance to the current inquiry are financial management for people with decision-making disabilities and authorising and directing the performance of private managers appointed by the Supreme Court or Guardianship Tribunal. Evidence relating to the NSW Trustee and Guardian's delivery of these services is considered in Chapter 9.

New South Wales Trustee and Guardian clients lacking decision-making capacity

3.32 Clients of the NSW Trustee and Guardian who lack decision-making capacity are directly managed. Of directly managed clients, the most common condition affecting their decision-making capacity is a psychiatric condition, followed by intellectual disability, then an aged related condition and acquired brain injury. Figure 3.2 below provides a breakdown of directly managed clients.

Figure 3.2 New South Wales Trustee and Guardian clients under direct management



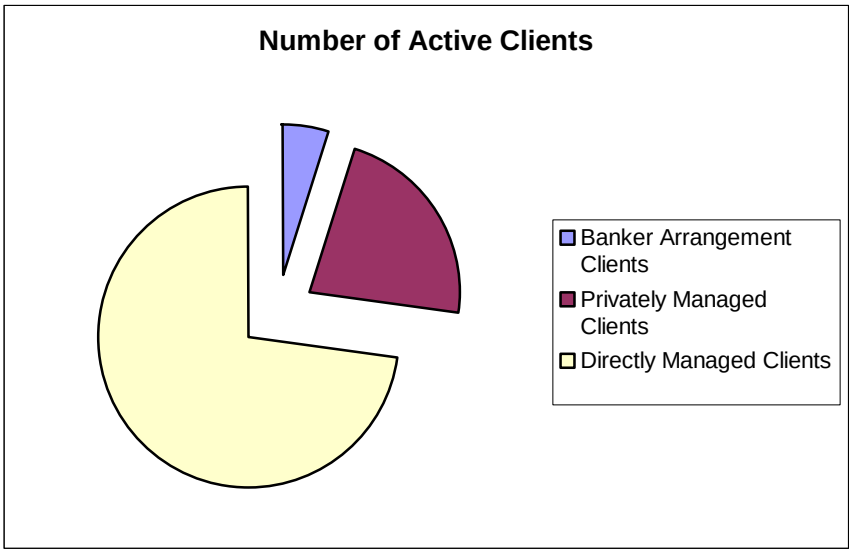
Source: Submission 13, New South Wales Trustee and Guardian, p 4

3.33 Over the last six years the percentage of directly managed clients compared to privately managed clients has steadily decreased.[22] Figure 3.3 provides an analysis of New South Wales Trustee and Guardian's clients under financial management as at August 2009.

21 Submission 13, p 2

22 Submission 13, pp 3-4

Figure 3.3 NSW Trustee and Guardian active clients August 2009

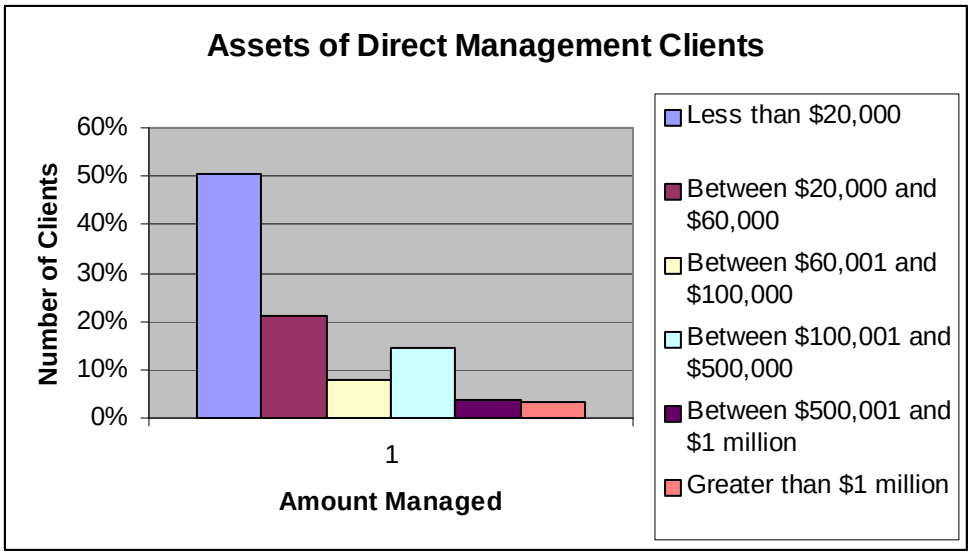


Clients	Total
Banker Arrangement Clients	636
Privately Managed Clients	2795
Directly Managed Clients	9182
Total	12613

Source:: Submission 13 New South Wales Trustee and Guardian, p 3

3.34 Just over half the directly managed clients of the New South Wales Trustee and Guardian have less than $20,000 worth of assets under management. A breakdown of the value of the assets of directly managed clients is set out in Figure 3.4.

Figure 3.4 Value of directly managed client assets



Source: Submission 13, New South Wales Trustee and Guardian, p 7

New South Wales Public Guardian

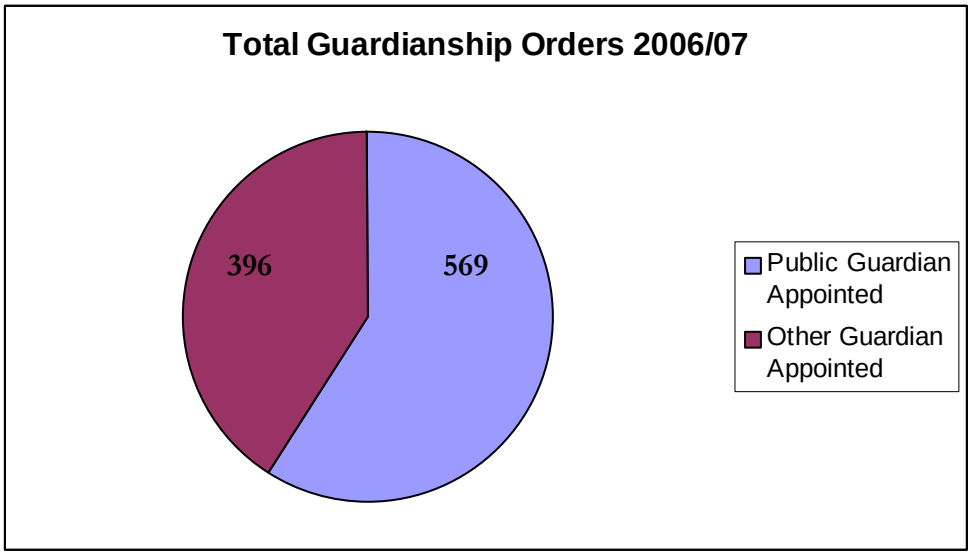
3.35 The New South Wales Public Guardian is the guardian of last resort appointed by the Guardianship Tribunal. Most guardianship orders give the Public Guardian responsibility for making decisions about issues such as where the person should live, what medical treatment and other services the person should receive.[23]

Clients of the New South Wales Office of the Public Guardian

3.36 At the end of the 2008/2009 financial year there were 1886 individuals under the guardianship of the New South Wales Office of the Public Guardian.[24]

3.37 The NSW Guardianship Tribunal provided figures from the 2006/2007 financial year during which it appointed the Public Guardian as guardian in just under sixty percent of guardianship orders, illustrated in Figure 3.5.

Figure 3.5 Guardians appointed by the Guardianship Tribunal



Source: Submission 5a New South Wales Guardianship Tribunal p 3

3.38 The profile of people under guardianship has changed significantly in the past twenty years. In 1989 over 95 percent of people under guardianship had an intellectual disability. In 2008/2009 this figure had dropped to 38 percent. This decrease has corresponded to an increase in aged people under guardianship and those who have some form of dementia.[25] This is illustrated in Figure 3.6.

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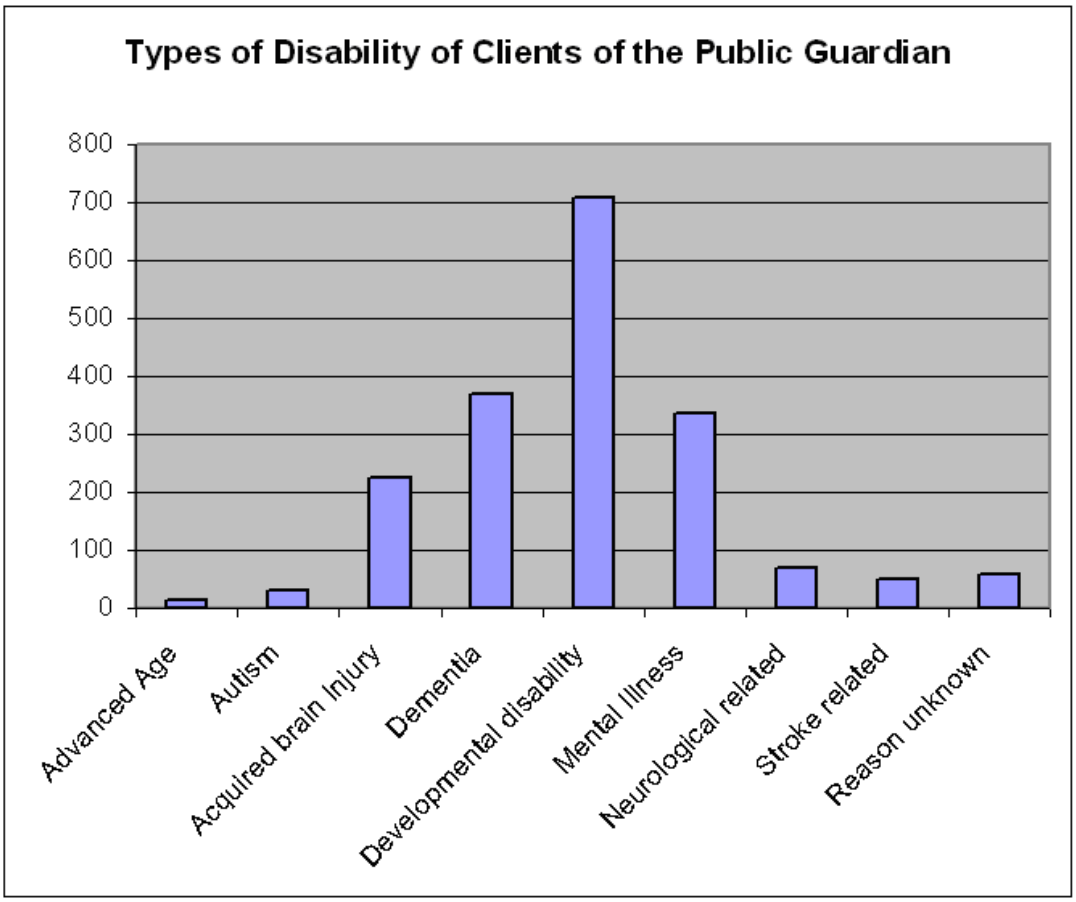
23 Submission 7, New South Wales Office of the Public Guardian, p 8

24 NSW Office of the Protective Commissioner and Public Guardian, *Annual Report 2009*

25 Submission 7, p 5

Figure 3.6 Types of disability of people under guardianship



Source: NSW Office of the Protective Commissioner and Public Guardian, Annual Report 2009

3.39 Evidence relating to the Public Guardian's service delivery is considered in Chapters 10 and 11.

Substitute decision-making arrangements in New South Wales

3.40 In New South Wales the Supreme Court, Guardianship Tribunal and Mental Health Review Tribunal (MHRT) are the primary bodies involved in making formal substitute decision-making arrangements for people lacking capacity. Two of the instruments available to them are guardianship orders and financial management orders[26]. A guardianship order does not permit the appointed guardian to make financial decisions. Evidence relating to the Guardianship Tribunal and the MHRT is considered in Chapters 6 and 7.

[26] The Mental Health Review Tribunal makes financial management orders but not guardianship orders.

3.41 Formal pre-emptive substitute decision-making arrangements for financial, lifestyle and health decisions can be made in New South Wales. Enduring powers of attorney for financial decisions are created under the *Powers of Attorney Act 2003* (NSW).

3.42 Enduring guardianship grants lifestyle decision-making powers to the appointed guardian and are created under *Guardianship Act 1987* (NSW). Evidence relating to powers of attorney and enduring guardianship is considered in Chapter 8.

3.43 New South Wales does not have legislation providing for pre-emptive health substitute decision-making. Advanced health care directives are recognised at common law when developed according to New South Wales Department of Health's advice.[27] Evidence relating to substitute consent for medical treatment is considered in Chapter 12.

3.44 Informal substitute decisions are ad hoc and context specific. Being informal they are rarely guided by legislation. A 'person responsible', as defined in the *Guardianship Act 1987* (NSW) can make informal substitute health decisions.[28]

Substitute decision-making in other jurisdictions

This section outlines provisions for substitute decision-making in other Australian jurisdictions in terms of court or tribunal sanctioned orders, formal pre-emptive and informal substitute decision-making arrangements.

Formal court or tribunal substitute decision-making

3.45 In all Australian states and territories an application to the relevant court or tribunal for a substitute decision-making order can be made on behalf of a person lacking decision-making capacity.[29] The criteria applied by courts and tribunals when determining the need for an order differ from jurisdiction to jurisdiction.

Formal pre-emptive substitute decision-making

3.46 Formal pre-emptive substitute decision-making arrangements are possible in all states and territories. A person with decision-making capacity can appoint a substitute decision-maker under an enduring power of attorney or an enduring guardianship. These arrangements generally come into effect when the person loses the capacity to make decisions. The extent to which the substitute decision-maker is able make financial, health and lifestyle decisions vary

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27 Department of Health Web Site "Using Advance Care Directives" <http://www.health.nsw.gov.au/pubs/2004/adcaredirectives.html> accessed 8 September 2009

28 *Guardianship Act 1987* (NSW), s 33A

29 *Guardianship and Management of Property Act 1991* (ACT), s 7; *Guardianship and Administration Act 1986* (Vic), ss 46 and 19; *Guardianship and Administration Act 1995* (Tas), Part 5; *Guardianship and Administration Act 1993* (SA), ss 33 and 37; *Guardianship and Administration Act 1990* (WA), ss 40 and 44; *Guardianship and Administration Act 2000* (Qld), s 12; *Adult Guardianship Act 1988* (NT), s 8

between jurisdictions[30]. For example, in Tasmania a person with decision-making capacity can authorise an attorney to make financial decisions by creating an enduring power of attorney.[31] A person with decision-making capacity can also create an enduring guardianship giving lifestyle and health decision-making powers to a guardian in the event they are no longer capable of making those decisions.[32] Tasmania is also one of two jurisdictions that require enduring powers to be registered in order to be effective.[33]

3.47 Currently in Western Australia formal pre-emptive substitute decision-making arrangements can only be made by a capable person to create an enduring power of attorney to give another person the authority to act as their substitute financial decision-maker.[34] If the State Administrative Tribunal makes a financial management order it can operate alongside the power of attorney, revoke the power or amend the power.[35] The *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) which is yet to be proclaimed amends the *Guardianship and Administration Act 1990 (*WA) to allow capable adults to execute enduring powers of guardianship.[36] An enduring guardian can be appointed as a substitute health decision-maker.[37] This new legislation will also introduce advanced health directives, to allow a person to consent to or refuse medical treatment in the future.[38]

Informal substitute decision-making

3.48 Australian states and territories also provide for informal substitute decision-making. Queensland and the Australian Capital Territory allow statutory health attorneys to make informal health substitute decisions for a person lacking capacity[39]. Victoria and Tasmania similarly provide a statutory framework in which a 'person responsible', as set out in the

30 *Powers of Attorney Act 2006* (ACT), s 8; *Instruments Act 1958* (Vic), s 115; *Guardianship and Administration Act 1986* (Vic), s 35A; *Guardianship and Administration Act 1995* (Tas), Part 5; South Australian Public Trustee Web Site <http://www.publictrustee.sa.gov.au> accessed 3 February 2010; *Consent to Medical Treatment and Palliative Care Act 1995* (SA); *Powers of Attorney Act 1980* (NT), s 18; *Natural Death Act 1988* (NT); *Powers of Attorney Act 1998* (Qld); *Guardianship and Administration Act 2000* (Qld)

31 Tasmanian Office of the Public Guardian Web Site <http://www.publicguardian.tas.gov.au> accessed 1 October 2009

32 *Guardianship and Administration Act 1995* (Tas), Part 5 and Tasmanian Office of the Public Guardian Web Site <http://publicguardian.tas.gov.au> accessed 2 October 2009

33 *Powers of Attorney Act 2000* (Tas), s 16

34 *Guardianship and Administration Act 1990* (WA), s 104

35 *Guardianship and Administration Act 1990* (WA), s 108

36 Tasmanian Office of the Public Advocate Web Site <http://www.publicadvocate.wa.gov.au> accessed 1 October 2009

37 WA Public Advocate Web Site <http://www.publicadvocate.wa.gov.au> accessed 2 October 2009

38 WA Public Advocate Web Site <http://www.publicadvocate.wa.gov.au> accessed 2 October 2009

39 *Powers of Attorney Act 1998* (Qld), s 63; *Guardianship and Management of Property Act 1991* (ACT), s32B

relevant legislation, can make informal health decisions[40]. Western Australian and South Australia legislate for a range of informal health substitute decision makers[41].

Overseas jurisdictions

3.49 This section looks at provisions for substitute decision-making in two overseas jurisdictions, England and Alberta, Canada. Several Inquiry participants noted the English and Alberta legislation as representing best practice in this area.[42]

United Kingdom

3.50 The *Mental Capacity Act 2005* (UK) came into force in England and Wales in April 2007. The *Mental Capacity Act 2005* had its basis in the 1995 Law Commission Report of England and Wales No.231 on Mental Incapacity. Further public consultation and a review by the Joint Committee of both Houses was undertaken prior to a bill being put before parliament in 2004 and assented to in 2005.

3.51 The *Mental Capacity Act 2005* is designed to empower people to make decisions for themselves and is underpinned by five statutory principles:

- a person must be assumed to have capacity unless it is established that they lack capacity
- a person is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success
- a person is not to be treated as unable to make a decision merely because he or she makes an unwise decision
- a act done, or decision made for or on behalf of a person who lacks capacity must be done or made in his or her best interest
- before the act is done, or the decision made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.[43]

3.52 The *Mental Capacity Act 2005* (UK) is intended to assist and support people who may lack decision-making capacity and to discourage anyone who is involved in their care from being overly restrictive or controlling. It aims to balance the rights of the individual to make decisions for themselves with their right to be protected from harm.[44]

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40 *Guardianship and Administration Act 1986* (Vic), s 37; *Guardianship and Administration Act 1995* (Tas), Part 3

41 *Guardianship and Administration Act 1990* (WA), s 119 (3); *Guardianship and Administration Act 1993* (SA)

42 Professor Carney, Evidence, 28 September 2009, p 34

43 *Mental Capacity Act 2005* (UK), s 1

44 Department for Constitutional Affairs and the Department of Health, 'Mental Capacity Act Explanatory Notes', Her Majesty's Stationery Office, London, 2005

3.53 The *Mental Capacity Act 2005* is supported by the Mental Capacity Act 2005 Code of Practice (the Code) that explains how the *Mental Capacity Act 2005* is to operate on a day-to-day basis and offers best practice examples for carers and practitioners.[45] The Code has statutory force, which means that some categories of people have a legal duty to comply with it when working with people lacking decision-making capacity. The people required to have regard to the Code include:

- an attorney under a Lasting Power of Attorney
- a person acting in a professional capacity for in, or in relation to the person lacking decision-making capacity (for instance ambulance officers and police) and
- a person being paid for acts in relation to the person lacking decision-making capacity (for instance care workers).[46]

3.54 The Code reflects the fact that people may lack capacity to make some decisions but may have capacity to make other decisions. It does this by defining a person lacking capacity as a person who lacks capacity to make a particular decision or take a particular action for him or herself at the time the decision or action needs to be taken.[47]

Alberta, Canada

3.55 In June 2005 the Government of Alberta announced a review of the *Dependent Adults Act RSA 2000* and the *Personal Directives Act RSA 2000*. The review was completed and the final report and recommendations presented in January 2007. During the course of this review Cindy Ady, the Legislative Review Chair visited Australia and met with New South Wales government officials and observed matters before the New South Wales Guardianship Tribunal.

3.56 As a result of the review, the *Adult Guardianship and Trustee Act SA 2008* was introduced to replace the two earlier pieces of legislation. The *Adult Guardianship and Trustee Act SA 2008* commenced operation on the 30 October 2009.

3.57 The *Adult Guardianship and Trustee Act SA 2008* defines decision-making capacity as the ability to understand the information that is relevant to a decision or the failure to make a decision, and to appreciate its reasonably foreseeable consequences.[48]

3.58 The *Adult Guardianship and Trustee Act SA* 2008 is built upon four key principles:

- an adult is presumed to have the capacity to make decisions until the contrary is determined
- an adult is entitled to communicate by any means that enables them to be understood and the means by which the person communicates is irrelevant to the determination as to whether they have decision-making capacity

45 'Mental Capacity Act 2005 Code of Practice' (UK), 2007, p v

46 'Mental Capacity Act 2005 Code of Practice' (UK), 2007, p 178

47 'Mental Capacity Act 2005 Code of Practice' (UK), 2007, p 3

48 *Adult Guardianship and Trustee Act SA* 2008 cA-4.2, s 1

- where an adult requires assistance to make a decision or does not have the capacity to make a decision their autonomy must be preserved by ensuring that the least restrictive and least intrusive form of effective assistance or substitute decision-making is provided
- in determining whether a decision is in the adult's best interest consideration must be given to any wishes known to have been expressed or values and beliefs held by the adult while they had capacity.[49]

3.59 The *Adult Guardianship and Trustee Act SA 2008* provides that a person may make a supported decision-making authorisation nominating up to three people who can assist the person make decisions. Some of the activities a supporter may undertake include accessing and collecting information to assist the person make decisions. Decisions made with the assistance of a supporter(s) are regarded as the decisions of the supported person.[50]

3.60 The *Adult Guardianship and Trustee Act SA 2008* also provides for a co-decision maker. The Court of the Queen's Bench appoints co-decision makers. With their assistance, guidance and support, a person with impaired decision-making capacity is able to make decisions.[51]

3.61 The Court of the Queen's Bench makes both guardianship orders and trusteeship orders.[52]

49 *Adult Guardianship and Trustee Act SA 2008* cA-4.2, s 2

50 *Adult Guardianship and Trustee Act SA 2008* cA-4.2, ss 4(1), 6(1)

51 *Adult Guardianship and Trustee Act SA 2008* cA-4.2, s 11

52 *Adult Guardianship and Trustee Act SA 2008* cA-4.2, ss 21, 43

Chapter 4 The definition of 'capacity'

This chapter examines the definition of 'capacity' in the context of substitute decision-making for people lacking capacity. It begins by identifying where the issue of capacity arises in NSW legislation and discusses the practical definition derived from Supreme Court case law that is currently utilised. Evidence on the need for a standard legislative definition of capacity, and suggestions as to the form such a definition could take, is then examined.

Legislative reference to capacity

4.1 The issue of capacity arises in both the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009* in that an order cannot be made under either Act unless the person is considered 'incapable' of managing their affairs – in other words, their decision-making capacity is not sufficient for them to manage their affairs. These Acts provide guidelines for determining the need for a substitute decision-making order, the former for the Guardianship Tribunal and the latter for the Supreme Court and Mental Health Review Tribunal.

Guardianship Act 1987

4.2 In relation to making a guardianship order the *Guardianship Act 1987* provides the following guidance to the Guardianship Tribunal:

> If, after conducting a hearing into any application made to it for a guardianship order in respect of a person, the Tribunal is satisfied that the person is a person in need of a guardian, it may make a guardianship order in respect of the person.[53]

4.3 The Act defines a *person in need of a guardian* as 'a person who, because of a disability, is totally or partially incapable of managing his or her person.'[54]

4.4 In relation to making a financial management order the *Guardianship Act 1987* provides the following guidance to the Guardianship Tribunal:

> The Tribunal may make a financial management order in respect of a person only if the Tribunal has considered the person's capability to manage his or her own affairs and is satisfied that:
>
> (a) the person is not capable of managing those affairs, and
>
> (b) there is a need for another person to manage those affairs on the person's behalf, and
>
> (c) it is in the person's best interests that the order be made.[55]

53 *Guardianship Act 1987* (NSW), s 14 (1)

54 *Guardianship Act 1987* (NSW), s 3

55 *Guardianship Act 1987* (NSW), s 25G

NSW Trustee and Guardian Act 2009

4.5 In relation to making a financial management order the *NSW Trustee and Guardian Act 2009* provides the following guidelines for the Supreme Court:

> If the Supreme Court is satisfied that a person is incapable of managing his or her affairs, the Court may:
>
> (a) declare that the person is incapable of managing his or her affairs and order that the estate of the person be subject to management under this Act, and
>
> (b) by order appoint a suitable person as manager of the estate of the person or commit the management of the estate of the person to the NSW Trustee.[56]

4.6 In addition the *NSW Trustee and Guardian Act 2009* provides the following guidelines for the Mental Health Review Tribunal (MHRT):

> If the MHRT after conducting a mental health inquiry orders that the person subject to the inquiry be detained in a mental health facility, it must:
>
> (a) consider whether the person is capable of managing his or her own affairs, and
>
> (b) if satisfied that the person is not capable of managing his or her own affairs, order that the estate of the person be subject to management under this Act.[57]

4.7 Neither the *Guardianship Act 1987* nor the *NSW Trustee and Guardian Act 2009* provide further assistance in the form of a definition of capacity. For such a definition, those making orders must turn to Supreme Court precedent. Ms Anne Cregan, Pro Bono Partner at Blake Dawson lawyers explained:

> The current position is that the court or tribunal needs to decide whether a person is capable of managing their affairs before they can appoint a substitute decision-maker. In determining what it means for a person to be incapable of managing their affairs, they are required to look at the Supreme Court test…[58]

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56 *NSW Trustee and Guardian Act 2009*, s 41 (1)

57 *NSW Trustee and Guardian Act 2009*, s 44

58 Ms Anne Cregan, Pro Bono Partner, Blake Dawson Lawyers, Evidence, 29 September 2009, p 9

Supreme Court definition of capacity

4.8 Several inquiry participants noted the 1982 NSW Supreme Court judgment of Justice Powell in *PY vs RJS* as the authority in NSW for determining whether a person is capable of managing their own affairs.[59]

4.9 Justice Powell's judgment defines the threshold for incapacity in terms of the ability to deal with everyday affairs and the risk that exists for the person if this ability is absent:

> … a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:
>
> (a) that he or she appears incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and
>
> (b) that, by reason of that lack of competence there is shown to be a real risk that either he or she may be disadvantaged in the conduct of such affairs; or that such moneys or property which he or she may possess may be dissipated or lost.[60]

4.10 Justice Powell's judgment continues by describing those (in)abilities which fall below the threshold and would not support a conclusion that the person is incapable:

> …it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner.[61]

4.11 In its submission, the Intellectual Disability Rights Services notes a separate judgment by Justice Powell in Re C (TN) and the *Protected Estates Act 1999* which further articulates this threshold:

> …it is not a question of whether the Protective Commissioner or somebody else could manage the affairs of the applicant better, or that if the applicant was left on her own the likelihood would be that her funds would soon be dissipated. One cannot be too paternalistic. People have the right to manage their affairs, unless they fall below the level that is prescribed by the Act.[62]

4.12 The Intellectual Disability Rights Service argued that the principles articulated by Justice Powell should be made explicit in NSW legislation.[63]

4.13 In *H v H* Justice Young clarified the meaning of the phrase 'ordinary routine affairs of man', situating them somewhere between housekeeping finances and complex financial affairs:

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59 See for example Submission 3, Intellectual Disability Rights Service, p 11; Submission 25, Blake Dawson Pro Bono Team, p 13; Answers to questions on notice taken during evidence 29 September 2009, Mr Alan Kirkland, Chief Executive Officer, Legal Aid NSW, Question 2 (a), p 3

60 PY *v RJS* [1982] 2NSWLR 700

61 PY *v RJS* [1982] 2NSWLR 700

62 Re C (TN) and the *Protected Estates Act 1999* NSWSC 456, quoted in Submission 3, pp 11-12

63 Submission 3, p 12

> [T]he ordinary affairs of mankind do not just mean being able to go to the bank and draw out housekeeping money. Most people's affairs are more complicated than that, and the ordinary affairs of mankind involve at least planning for the future, working out how one will feed oneself and one's family, and how one is going to generate income and look after capital. Accordingly, whilst one does not have to be a person who is capable of managing complex financial affairs, one has to go beyond just managing household bills.[64]

4.14 In *Re GHI* Justice Campbell provides two further factors to be considered when determining whether a person is 'incapable of managing their affairs'. The Law Society of NSW's guide for solicitors, 'When a client's capacity is in doubt', explains Justice Campbell's two additions to Justice Powell's original definition:

> The first is whether or not the person is willing to seek and take appropriate advice. In general, taking advice can "remove the risk that the lack of the abilities will cause the person to be disadvantaged in the conduct of his or her affairs."
>
> The second is whether the person has the ability to identify and deal appropriately with those who may be attempting to benefit from their assets through unfair dealing. In regards to Justice Powell's classic formulation, this factor is relevant since the skill to identify and deal appropriately with exploitation is necessary to carry out the 'ordinary routine affairs of mankind.' The lack of this skill may create a real risk that the person may be disadvantaged or that their estate may be dissipated or lost.[65]

Limitations of the Supreme Court definition

4.15 Some inquiry participants argued that Supreme Court judgment did not provide an adequate definition of capacity. In particular, it was suggested that it did not recognise the variable nature of a person's capacity and tended to define as capable - and therefore exclude from assistance - some persons who were in need of decision-making assistance.

4.16 Ms Nihal Danis, Senior Solicitor, Mental Health Advocacy Service, Legal Aid NSW, described Justice Powell's definition as 'somewhat narrow and ambiguous.'[66] Ms Monique Hitter, Director, Civil Law, Legal Aid NSW described it as 'a blunt instrument' which 'basically says you either have capacity or you have not.'[67]

4.17 Mr Alan Kirkland, Chief Executive Officer, Legal Aid NSW, noted that the definition was difficult to apply in practice and did not recognise variations in capacity:

> It does not offer much guidance where a person is capable in most areas of their life with the exception of complicated transactions or legal proceedings. It also does not

64 *H v H* [2000] NSW Supreme Court, Young J, 20 March 2000, unreported

65 'When a client's capacity is in doubt – A practical guide for solicitors', Law Society of NSW (2009), pp 11-12, quoting *Re GHI* (a protected person) [2005] NSWSC 581 at [119] per Campbell J.

66 Ms Nihal Danis, Senior Solicitor, Mental Health Advocacy Service, Legal Aid NSW, Evidence, 29 September 2009, p 62

67 Ms Monique Hitter, Director, Civil Law, Legal Aid NSW, Evidence, 29 September 2009, p 62

> offer guidance in relation to people who move in and out of capacity at different times.[68]

4.18 Ms Cregan noted similar difficulties applying the definition in practice, particularly the danger of excluding from legislative protection some persons in need of assistance. The danger arises when a person is capable of managing their day to day affairs – and is therefore deemed capable under the Supreme Court test – but is not capable of managing more complicated matters.[69] Ms Cregan provided the following example to illustrate this point:

> In practice we often find that with somebody's assistance or with things in place like automatic deductions from their bank account for bills a person can manage those affairs. In that case they fail that part of the test and they are therefore not considered incapable of managing their affairs and they do not fall within the legislation. However, in practice that person may not be able to instruct in a complex matter or manage a large sum of money. So the test is excluding people who need financial assistance. The test was devised for a very good reason—so that people are not placed under management when by and large they are doing okay. However, in practice it has inhibited people getting assistance when they need it.[70]

4.19 Furthermore, argued Ms Cregan, there is a tension between the application of the Supreme Court test and the provision in both the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2000* for financial management orders to apply to part of an estate as opposed to the entire estate, with this provision being 'inconsistent with a test that requires them, in effect, not to be able to manage their finances at all.'[71]

4.20 The issue of financial management orders applying to part of an estate is covered in more detail in Chapter 7.

Need for a standard definition of 'capacity' in NSW

4.21 Some participants noted the lack of a clear and single definition of capacity in NSW legislation, and the need for such a definition to facilitate consistent application of the law.[72]

4.22 In their submission, People With Disability Australia and the NSW Mental Health Coordinating Council (PWD & NSW MHCC) state that 'NSW law contains a number of different, and to a degree, inconsistent tests for capacity' which leads to 'uncertainty,

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68 Answers to questions on notice taken during evidence 29 September 2009, Mr Kirkland, Question 2 (a), p 3

69 Ms Cregan, Evidence, 29 September 2009, p 7

70 Ms Cregan, Evidence, 29 September 2009, p 9

71 Ms Cregan, Evidence, 29 September 2009, p 9

72 See for example Submission 25, p 1; Submission 14, Council on the Ageing (New South Wales), p 1; Submission 17, Alzheimer's Australia NSW, p 3

confusion and the inappropriate application of legal principles…'[73] They call for 'a single, overarching definition of capacity that is applicable in all civil law contexts.'[74]

4.23 Similarly, Ms Sue Field, the NSW Trustee and Guardian Fellow in Elder Law at the University of Western Sydney, stated that 'NSW does not have one single definition,' but rather 'a number of varying definitions.' Ms Field stated that 'first and foremost there needs to be a standard definition of what we mean by mental capacity.' [75]

4.24 Mr Douglas Herd, Executive Officer with the Disability Council of NSW, argued that a definition of capacity was required in order to assist those who had the responsibility of making substitute decision-making orders:

> To have nothing on the statute books anywhere I think would leave a gap in our legislation. The reason it is important…is that there are those who have to take the difficult decisions about placing someone under guardianship or taking away their rights from them… The people who make the decisions about these people need some guidance from Parliament and in law about how they should act, when they should act and on what basis they should act.[76]

Suggestions for a definition of 'capacity'

4.25 The Committee received a number of suggestions as to the form a legislative definition of 'capacity' should take, in terms of both the general concepts it should incorporate and its specific wording. The key general proposal to emerge was that it should reflect the fact that decision-making capacity covers a 'spectrum,' varying from domain to domain and from time to time. In other words, the definition should acknowledge the fact that capacity is decision-specific and may diminish or improve over time. In addition, some inquiry participants argued that the legislative definition should avoid perpetuating the 'status' approach where capacity is assumed to be lacking simply if a person has a disability. These issues are discussed in the following sections.

The 'spectrum' of capacity

4.26 Throughout the inquiry, the variable nature of capacity was referred to as the capacity 'spectrum' or 'continuum.' These terms were used to refer to variation in two dimensions: variation in capacity from domain to domain - or from one area of a person's life to another - and variation over time. In relation to variation over time, it was also noted that this may involve fluctuation in capacity or a more gradual decline or improvement in capacity.

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73 Submission 4, People with Disability Australia Inc and NSW Mental Health Coordinating Council, p 18

74 Submission 4, p 20

75 Ms Susan Field, New South Wales Trustee and Guardian Fellow in Elder Law, University of Western Sydney, Evidence, 28 September 2009, p 36

76 Mr Douglas Herd, Executive Officer, Disability Council of NSW, Evidence, 28 September 2009, p 47

Capacity variation from domain to domain

4.27 Professor Ian Hickie, Executive Director of the Brain and Mind Research Institute at the University of Sydney, was supportive of the 'spectrum' approach to capacity, explaining that 'at any particular point in time [a person's] capacity about one set of decisions may be impaired but their capacity with regards to other sets of decisions may not be impaired.' Professor Hickie further stated that:

> …a rather arbitrary black or white, "yes" or "no", you have got capacity or you do not, does not tend to work…There may be issues related to finance or health care options which are quite different in a particular instance. So a person may have a retained capacity in one area, may require assistance in some particular areas, but in another area be quite impaired in terms of their decision-making.[77]

4.28 Similarly, Ms Field stated that the view of capacity as something you either had or did not have was incorrect and that 'each individual decision needs to be looked at.'[78]

4.29 Blake Dawson's Pro Bono Team recommended the legislative definition enable a 'a limited financial management order to made in circumstances where a person can manage their day-to-day affairs but not a particular aspect of their estate' in order to address the inconsistency discussed above at paragraph 3.18.[79]

4.30 Ms Brenda Lee Doyle, the Provincial Director of the Office of the Public Guardian in Alberta, Canada, stated that one of the key concepts in Alberta's *Adult Guardianship and Trustee Act 2008* was that 'capacity is seen on a continuum. So a person is neither capable nor incapable; there are more gradients to it.' Ms Doyle further stated that in the Alberta legislation there was 'a focus on a targeted approach to capacity assessment with very much a domain-specific process.'[80]

4.31 Ms Colleen Pearce, the Public Advocate of Victoria, described Victorian legislation on this issue as 'blunt' and identified the need for 'a better understanding of capacity – that a decision for an order for guardianship should be decision specific.' Ms Pearce further stated that this approach would 'leave intact for the individual concerned as much autonomy in their decision-making as is possible.'[81]

4.32 Alzheimer's Australia likewise stated that a 'decision-specific approach to capacity is more likely to maximise the decision-making capacity of a person whose capacity is in question.'[82]

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77 Professor Ian Hickie, Executive Director, Brain and Mind Research Institute, University of Sydney, Evidence, 4 November 2009, p 23

78 Ms Field, Evidence, 28 September 2009, p 37

79 Submission 25, p 14

80 Ms Brenda Lee Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada, Evidence, 5 November 2009, p 3

81 Ms Colleen Pearce, Public Advocate of Victoria, Evidence, 5 November 2009, p 53

82 Submission 17, p 3

Capacity variation over time

4.33 In relation to variation in capacity over time, Professor Hickie stated that capacity may change 'day-to-day, certainly week-to-week, certainly month-to-month.'[83]

4.34 Ms Cregan likewise noted that 'an individual with a mental illness may, at times, have full capacity to make decisions and at other times lack capacity to a large degree, or entirely, to make his or her own decisions.'[84]

4.35 Ms Rachel Merton, Chief Executive Officer of the Brain Injury Association of NSW, stated that '[T]he decision-making capacity of people with acquired brain injury may fluctuate considerably, especially in the first two years after their injury.'[85]

4.36 With regard to capacity either improving or diminishing over time, Carers NSW stated that in relation to intellectual disability, '[c]apacity is something which can be learned and can be developed through education and support' and that 'a person at aged eighteen may not be able to make decisions regarding their affairs, however, at aged twenty-five they are likely to have developed the capacity to make that type of decision.'[86]

4.37 In relation to dementia, a different picture was presented by Alzheimer's Australia, who noted that 'a person's level of capacity will diminish over time.'[87]

Avoiding the 'status' approach

4.38 In addition to reflecting the fact that capacity varies, some inquiry participants recommended that the definition avoid reflecting a 'status' approach to disability and refer to 'capacity' rather than '*in*capacity'.

4.39 PWD and NSW MHCC promoted a 'functional' approach to disability, and explained the meaning of the 'status', 'outcome' and 'functional' approach:

> - [t]he status approach involves the declaration of incapacity based on the 'mere' fact that the person has cognitive impairment (for example, intellectual or psycho-social impairment).
>
> - the outcome approach involves the declaration of incapacity based on the deviation of the person's conduct from their previous pattern of conduct or from social norms.

83 Professor Hickie, Evidence, 4 November 2009, p 23

84 Ms Cregan, Evidence, 29 September 2009, p 2

85 Ms Rachel Merton, Chief Executive Officer, Brain Injury Association of NSW, Evidence, 29 September 2009, p 21

86 Submission 29, Carers NSW, p 8

87 Submission 17, p 2

- the functional approach involves the declaration of incapacity with respect to a specific issue or issues, but not necessarily with respect to other issues.[88]

4.40 PWD and NSW MHCC argued that the problem of legal incapacity being based on the 'status' approach should be addressed wherever it remains in NSW legislation[89] and suggested that any test for capacity should explicitly incorporate safeguards including the following:

> A person is not to be considered unable to manage his or her financial affairs:
>
> - merely on the basis of his or her impairment or disability;
> - merely because of the person's age or appearance;
> - merely because the person has a condition or exhibits behaviour that may lead others to make unjustifiable assumptions about his or her capacity.[90]

4.41 Blake Dawson's Pro Bono Team also support a 'functional approach' and oppose a 'status' or 'outcomes' approach:

> We do not support a 'status' approach to decision-making which determines the need for a substitute decision-maker on the basis of the form or severity of a person's mental illness or intellectual disability…Nor do we support an "outcomes" approach, which considers the result or quality of a decision rather than the person's capacity to make the decision.[91]

4.42 On the other hand, Ms Danis suggested that the legislative definition of capacity should relate incapacity to a disability, proposing the United Kingdom's legislative definition as one that tied these concepts together:

> The United Kingdom legislation says that a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of or a disturbance in the functioning of the mind or brain. There is a tying of the disabling factor to the fact that it might be bringing about an incapacity at that moment in time. That would assist.[92]

4.43 Carers NSW argued that defining people in terms of what they can't do is limiting:

> When people are defined in terms of what they cannot do, instead of what they are able to do which is inferred in the term 'people lacking capacity', it limits them to what they are lacking as well as suggesting that their situation is static.[93]

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88 Submission 4, p 11

89 Submission 4, p 18

90 Submission 4, p 23

91 Submission 25, pp 5-6

92 Ms Danis, Evidence, 29 September 2009, p 62

93 Submission 29, p 8

4.44 Similarly, Alzheimer's Australia argued that current definitions referred to '*in*capacity' and served to 'limit a person's autonomy to make decisions, rather than maximizing a person's capacity and protecting their right to make decisions for themselves where possible.'[94]

Specific suggestions for a definition of 'capacity'

4.45 The Committee received specific suggestions for the wording of a legislative definition of capacity based on a number of sources.

United Kingdom's Mental Capacity Act 2005

4.46 In relation to specific suggestions for the wording of a legislative definition of capacity, Mr Kirkland put forward the definition in the United Kingdom's *Mental Capacity Act 2005* and the further information provided in that Act's explanatory notes as a good example.[95] Section two of the *Mental Capacity Act 2005* (UK) provides the following definition, focussing on the particular matter at hand and the particular point in time a decision is required:

> For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.[96]

4.47 The UK Act further states that:

> For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
>
> (a) to understand the information relevant to the decision,
>
> (b) to retain that information,
>
> (c) to use or weigh that information as part of the process of making the decision, or
>
> (d) to communicate his decision (whether by talking, using sign language or any other means).[97]

4.48 The UK Act provides the further provision in relation to point (b) above:

> The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.[98]

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94 Submission 17, p 3

95 Answers to questions on notice taken during evidence 29 September 2009, Mr Kirkland, Question 2(a), pp 3-4

96 *Mental Capacity Act 2005* (UK), s 2 (1)

97 *Mental Capacity Act 2005* (UK), s 3 (1)

4.49 The explanatory notes for the *Mental Capacity Act 2005* provide additional explanation in relation to the definition, again emphasising the domain specific and fluctuating nature of capacity:

> This sets out the Act's definition of a person who lacks capacity. It focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates, not on any theoretical ability to make decisions generally. It follows that a person can lack capacity for the purposes of the Act even if the loss of capacity is partial or temporary or if his capacity fluctuates. It also follows that a person may lack capacity in relation to one matter but not in relation to another matter.[99]

Alberta's Adult Guardianship and Trustee Act 2008

4.50 The *Adult Guardianship and Trustee Act 2008* (Canada) provides the following definition of capacity:

> "capacity" means, in respect of the making of a decision about a matter, the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of
>
> (i) a decision, and
>
> (ii) a failure to make a decision

Blake Dawson lawyers

4.51 Ms Cregan offered a definition utilised by Blake Dawson and developed in collaboration with People With Disability Australia. That definition, in relation to the making of a particular decision, is as follows:

> … the ability to understand the information relevant to making the decision; use and weigh that information as part of the decision-making process; appreciate the reasonably foreseeable consequences of making a decision and of not making any decision; to make the decision voluntarily, and to communicate the decision whether through speech, writing, sign language or other means; and decision includes a single decision or the decisions required by the transaction, matter or function for which it is proposed an alternative decision maker will be appointed.

Committee comment

4.52 The Committee agrees with inquiry participants who argue that a single overarching definition of capacity is required in NSW legislation to facilitate a consistent approach to substitute decision-making.

4.53 With regard to the aim of consistency the Committee notes the remarks of the Attorney General in his Second Reading Speech for the NSW Trustee and Guardian Bill 2009. In that speech, the Attorney General stated that the replication of a set of general principles from the

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98 *Mental Capacity Act 2005* (UK), s 3 (3)

99 *Mental Capacity Act 2005* (UK), Explanatory Notes, 21

Guardianship Act 1987 in the NSW Trustee and Guardian Bill 2009 would promote 'greater consistency in decision-making across these related areas of law…and [give] greater protection to the human rights of people with disabilities to live with dignity and as much autonomy as possible.'[100]

4.54 The Committee believes a single clear legislative definition would further assist in achieving this aim.

4.55 The Committee notes the specific suggestions for the wording of a legislative definition from inquiry participants, and in particular the definitions contained in the United Kingdom's *Mental Capacity Act 2005* and Alberta's *Adult Guardianship and Trustee Act 2008* with their emphasis on the particular time the decision has to be made and the ability of the person to understand and communicate information relevant to that particular decision.

4.56 The Committee considers the evidence summarised above gives rise to a number key elements that such a definition should contain. It should:

- acknowledge that capacity varies in two dimensions; 1) from domain to domain, and 2) from time to time.
- as far as possible refer to 'capacity' rather than '*in*capacity'
- reflect a 'functional' approach by avoiding the tying of incapacity to an underlying disability.

4.57 The Committee therefore recommends that the legislative definition in NSW should define 'capacity' with reference to the ability to understand, retain, utilise and communicate information relating to the particular decision that has to be made, at the particular time the decision is required to be made, to foresee the consequences of making or not making the decision and to separate the concepts of 'incapacity' and 'disability'.

100 *NSWPD (Legislative Council)*, 23 June 2009, p 16487

Recommendation 1

That the NSW Government pursue legislation establishing a single definition of 'capacity' applicable to legislation related to substitute decision-making for people lacking capacity.

That the legislative definition acknowledge the fact that a person's decision-making capacity varies from domain to domain and from time to time and defines 'capacity' in relation to a particular decision with reference to, but without being limited to, the following:

- the ability to understand information relevant to the decision
- the ability to retain that information for a period that allows the decision to be made within an appropriate timeframe
- the ability to utilise that information in the decision-making process
- the ability to foresee the consequences of making or not making the decision
- the ability to communicate the decision to others

That legislation should in addition ensure that a person is not considered incapable of making a particular decision simply on the basis of their having a disability.

Chapter 5 General principles and the United Nations Convention on the Rights of Persons with Disabilities

This chapter examines some of the key principles underpinning the practice of substitute decision-making for people lacking capacity. There has been what's described as a 'paradigm shift' in the area of disability in recent years, in terms of an emphasis on capacity rather than incapacity, ability rather than disability, and rights rather than protection. This shift has brought to the fore the social model of disability, which incorporates the principle of presumption of capacity, the principle of least restriction and the promotion on assisted decision-making. This chapter examines these interrelated concepts, the way in which they are encapsulated in the recently ratified United Nations Convention on the Rights of Persons with Disabilities, and the implications for legislation in NSW.

Paradigm shift

5.1 Some inquiry participants referred to a 'paradigm shift' in recent decades in relation to people with disabilities that has culminated in the principles articulated in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which came into force on 3 May 2008 and was ratified by Australia on 16 July 2008.

5.2 The Disabilities Studies and Research Centre at the University of New South Wales submission quoted the Chairman of the Ad Hoc Committee that developed the UNCRPD, Ambassador MacKay, who described the Convention as 'embodying a "paradigm shift" away from a social welfare response to disability to a rights-based approach', and the United Nations High Commissioner for Human Rights who described it as 'enshrining a paradigm shift in attitudes' that rejects the 'view of persons with disabilities as objects of charity, medical treatment and social protection' and as affirms them as person who are the 'subjects of rights, able to claim those rights as active members of society.'[101]

5.3 The NSW Public Guardian submission stated that the UNCRPD 'moves us toward a society in which all people with disabilities are active citizens and focuses our attention on ability rather than disability', describing this shift as 'not about the welfare of people with disabilities but about the civil law's response to issues relating to capacity and incapacity.'[102]

5.4 The NSW Public Guardian submission also described this shift with reference to the *Guardianship Act 1987* and the fact that the Act fails to incorporate several elements of the shift:

> The Guardianship Act is now 22 years old. The society we live has changed a great deal since the Act was first introduced. At that time, it was considered landmark legislation but by today's standards it fails to take into account such things as human rights legislation, international conventions, de-institutionalization and new ways of thinking about supported and substituted decision-making. This is also reflected in the

101 Submission 10, Disability Studies and Research Centre, University of NSW, p 2

102 Submission 7, NSW Public Guardian, p 6

> disability sectors' emphasis on the limitations of substitute decision-making and the shift towards assisted decision-making within a human rights framework.[103]

5.5 The Committee received evidence throughout the inquiry in relation to some key and interrelated elements of this paradigm shift, such as the social model of disability, the presumption of capacity, the principle of least restriction and the growing emphasis on assisted decision-making. These elements are examined in the following sections.

The 'social model' of disability

5.6 Professor Ronald McCallum, Professor of Industrial Law at Sydney Law School and the recently elected Chair for 2010 of the United Nations Committee on the Rights of Persons with Disabilities, stated that the UNCRPD adopted the 'social model of disability.' Professor McCallum explained the progression from the 'medical model' in the early part of the twentieth century through the 'social welfare model' of the 1970's to the currently accepted social model of disability:

> For the first two thirds of the twentieth century and earlier the prevalent model looking after persons with disability was the medical model. The notion was that we should try to cure as many persons with disability as we can and, if not, they should be looked after. Many were institutionalised in those days. By the 1970s we had moved forward, certainly in this country, to what we might call the social welfare model. Welfare was provided to enhance the lives of persons with disabilities, and many of us were encouraged and, indeed, assisted by Federal, State and on some occasions municipal governments to gain employment.[104]

5.7 Professor McCallum stated that in the last 15 years the social model of disability had become the 'premier model', and that it involved an attempt to remove the barriers that prevented persons with disabilities from living independent lives in the community:

> This is a recognition that the barriers that limit the lives of we persons with disabilities are in large part constructed by society; they are negative or limited attitudes or stereotypes. The social model seeks to dispel those stereotypes and attitudes and allow we persons with disabilities to lead our own lives, to be educated, to gain employment, to be spouses and/or partners, and to rear families.
>
> After all it is really only through employment and family life that we gain our full place as citizens.[105]

5.8 The joint submission from People with Disability Australia and the NSW Mental Health Coordinating Council (PWD and NSW MHCC) also referred to the social model of disability, describing it as model that viewed disability as 'the result of persons with impairments

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103 Submission 7, p 5

104 Professor Ronald McCallum, Professor of Industrial Law, Sydney Law School, Evidence, 4 November 2009, pp 2-3

105 Professor McCallum, Evidence, 4 November 2009, p 3

attempting to interact with a barrier-filled social environment'. The UNCRPD sought to identify and remove 'barriers to persons with disability experiencing equality with others.'[106]

5.9 Professor Ian Hickie, Executive Director of the Brain and Mind Research Institute at the University of Sydney, described the social model of disability as being 'fundamental to the current United Nations approach.' Professor Hickie described the model as incorporating the 'assumption that people are going to live in society and have social rights or expectations' and that therefore society 'should actually have processes that assist people to participate rather than…exclude people and then they have had to bring some kind of rights-based action.'[107]

5.10 In the context of mental health, Professor Hickie stated that the model represented an acceptance that even people with severe mental illness will live in the community:

> It really does reflect the change over the past 40 years in approach to mental health worldwide, the acceptance that living in the community is the norm, even with severe mental illness, and expectation about social participation, and therefore all of our financial, employment, education and health systems all should have a socially progressive, or inclusive approach. They should make it easier for people to participate or have an expectation of participation rather than an expectation of exclusion.[108]

5.11 Ms Diane Robinson, President of the NSW Guardianship Tribunal, noted that throughout the history of guardianship and mental health legislation 'there has always been a tension between a welfare model and a rights-based model' – or social model of disability – and that at their extremes, neither model was helpful:

> The worst aspects of a welfare model are, of course, that you get a very patronising, paternalistic approach where people are not heard or seen, and the worst aspects of a rights-based model is that it can be excessively legalistic and people can have rights but they do not have the facility or the capacity to access them or make them into anything real and substantial.[109]

5.12 Ms Robinson cautioned against focussing on such models, noting that while they could be useful they were sometimes 'a little bit simplistic.' Instead, Ms Robinson recommended a case-by-case approach which adopted the best aspects of both models:

> …rather than focusing on these different models what we should be looking for is some balance whereby we use the best aspects of both and come to a situation where we can individualise the approach for people—look at people on a case-by-case basis and get an individualised approach and the best outcomes for people on that basis.[110]

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106 Submission 4, People with Disability Australia Inc and NSW Mental Health Coordinating Council, p 8

107 Professor Ian Hickie, Executive Director, Brain and Mind Research Institute, University of Sydney, Evidence, 4 November 2009, p 25

108 Professor Hickie, Evidence, 4 November 2009, p 25

109 Ms Diane Robinson, President, NSW Guardianship Tribunal, Evidence, 28 September 2009, p 52

110 Ms Robinson, Evidence, 28 September 2009, p 52

5.13 The *NSW Trustee and Guardian Act 2009* contains a principle in section 39 that is consistent with the social model of disability:

> [Protected persons] should be encouraged, as far as possible, to live a normal life in the community.[111]

Presumption of capacity

5.14 Several inquiry participants supported a presumption of capacity in relation to substitute decision-making, that is, adopting as a starting point the presumption that the person has the capacity to make decisions, and holding to that view unless and until there is evidence to the contrary.

5.15 The submission from the Disability Studies and Research Centre at the University of NSW stated that the alternative – the presumption of incapacity – strips an individual of their legal personhood:

> Traditional approaches to legal capacity and guardianship have been based on presumptive approaches where people with disability are deemed to lack capacity. If you are deemed lack capacity then your legal personhood is stripped away - your destiny is placed in the hands of others.[112]

5.16 Ms Sue Field, the New South Wales Trustee and Guardian Fellow in Elder Law at the University of Western Sydney explained the significance of a presumption of capacity was that the presumption then had to be rebutted:

> …you must always start with a presumption that everyone has capacity and because it is a presumption it can be rebutted, so we start off in this venue that we all have capacity. Someone would then have to rebut that and look for triggers in our behaviour or whatever it may be that would alert them to the fact that capacity may not be present.[113]

5.17 The Public Interest Advocacy Centre (PIAC) submission argued that the presumption of capacity should be central to the legislation related to substitute decision-making:

> PIAC recommends that all legislation related to determining capacity, appointing guardians or trustees, and establishing bodies to review those decisions have as its objective: that unless critical circumstances prove the contrary, consumers should be presumed to retain individual agency and the capacity to act in their own best interests. Individuals should, to the extent of their capacity, guide and be involved in all decisions that intimately affect their wellbeing.[114]

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111 The *NSW Trustee and Guardian Act 2009* (NSW), s 39 (c)

112 Submission 10, p 3

113 Ms Susan Field, New South Wales Trustee and Guardian Fellow in Elder Law, University of Western Sydney, Evidence, 28 September 2009, p 41

114 Submission 22, Public Interest Advocacy Centre Ltd, p 6

5.18 In this regard, Mr Andrew Buchanan, Chairperson of the Disability Council of NSW observed that the example of the United Kingdom's *Mental Capacity Act 2005* showed that it was 'possible, entirely practical and, in our judgment, wholly desirable for lawmakers such as yourselves to discuss and enact enabling legislation built upon a presumption of capacity.'[115]

5.19 Ms Anne Cregan, Pro Bono Partner at Blake Dawson lawyers, noted that a presumption of capacity was in line with Australia's obligations under the UNCRPD and the principles provided by the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009* and was 'important for a person to be able to maintain his or her autonomy.'[116]

5.20 However, the submission from the Pro Bono Team at Blake Dawson also noted that in practice the presumption of capacity had the potential to 'conflict with the obligation on government to protect people with disabilities from exploitation as required by Article 16 of the UNCRPD.'[117] It provided an example to illustrate this potential conflict in which a mentally ill man failed to honour a property sale contract and did not defend the proceedings bought against him by the purchaser. The matter proceeded *ex parte* and the court, relying on the presumption of the man's capacity, enforced the sale and awarded costs to the purchaser.[118]

5.21 Associate Professor Cameron Stewart, Director of Centre for Health, Governance, Law and Ethics at the New South Wales Law School, University of Sydney, explained that in regards to NSW legislation, the presumption of capacity begins in the *Minors (Contracts and Property) Act 1970* which presumes a person is competent to make certain decisions about purchasing things, contracts of employment and medical treatment. Associate Professor Stewart further explained that in practice the *Guardianship Act 1987* contained a presumption of capacity since it made provisions only for people who were not competent and was therefore only triggered by evidence of lack of competence, although this presumption was not explicitly expressed in the Act.[119]

5.22 Ms Robinson similarly noted that although the presumption of capacity was 'not actually stated in the legislation' the Guardianship Tribunal had 'always operated on the basis that there is a presumption of capacity. People are assumed to be capable until they prove to be incapable.' Whilst acknowledging that the principles of the *Guardianship Act 1987* could be improved, Ms Robinson stated that 'I do not know that it would make that great a difference to the way the system actually operates.'[120]

5.23 With regard to the *NSW Trustee and Guardian Act 2009*, Professor Terrence Carney from the Sydney Law School noted that it remedied a problem with the *Protected Estates Act 1983* which

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115 Mr Andrew Buchanan, Chairperson, Disability Council of NSW, Evidence, 28 September 2009, p 44

116 Ms Anne Cregan, Pro Bono Partner, Blake Dawson Lawyers, Evidence, 29 September 2009, p 2

117 Submission 25, Blake Dawson Pro Bono Team, p 5

118 Submission 25, p 18

119 Associate Professor Cameron Stewart, Director, Centre for Health, Governance, Law and Ethics, New South Wales Law School, University of Sydney, Evidence, 5 November 2009, pp 34-35

120 Ms Robinson, Evidence, 28 September 2009, p 54

presumed a person with a mental illness, if detained, was incapable of managing their property. This presumption has been reversed in the *NSW Trustee and Guardian Act 2009*.[121]

5.24 Hon Greg James, President of the Mental Health Review Tribunal, likewise noted that under the *Protected Estates Act 1983* the Tribunal had to make a financial management order for persons admitted as involuntary patients, placing an unfair burden on the patient. This burden has been lifted by the *NSW Trustee and Guardian Act 2009*:

> The onus was on the patient, who had no ability to stand in the way of an order or get an accountant or lawyers to assist, to show why an order should not be made. That was preposterous, and that has been reversed under the new legislation.[122]

5.25 The presumption of capacity in relation to the proceedings of the Mental Health Review Tribunal, insofar as it exists, is contained in Part 4.3 of the *NSW Trustee and Guardian Act 2009* which states that the Tribunal must, when conducting a mental health inquiry, or reviewing a patient's case:

> (a) consider whether the person is capable of managing his or her own affairs, and
>
> (b) if satisfied that the person is not capable of managing his or her own affairs, order that the estate of the person be subject to management under this Act.[123]

The presumption of capacity in other jurisdictions

5.26 The Committee received evidence relating to a legislative presumption of capacity in other Australian and overseas jurisdictions.

Queensland

5.27 Queensland's *Guardianship and Administration Act 2000* was recommended by The Intellectual Disability Rights Service submission, which stated that NSW legislation needed to 'incorporate the more expansive, comprehensive and human-rights centred general principles' it contained.[124] The Queensland Act states very simply that:

> An adult is presumed to have capacity for a matter[125]

121 Professor Terrence Carney, Sydney Law School, Evidence, 28 September 2009, p 33

122 Hon Gregory James QC, President, Mental Health Review Tribunal, Evidence, 4 November 2009, p 44

123 *NSW Trustee and Guardian Act 2009* (NSW), ss 44 and 45

124 Submission 3, Intellectual Disability Rights Service, p 4

125 *Guardianship and Administration Act 2000* (Qld), Schedule 1, Part 1 (1)

Western Australia

5.28 Ms Pauline Bagdonavicius, the Western Australian Public Advocate, told the Committee that in terms of the application of the *Guardianship and Administration Act 1990* (WA) there was a presumption of capacity.[126] The WA Act states:

> Every person shall be presumed to be capable of :
>
> (i) looking after his own health and safety;
>
> (ii) making reasonable judgments in respect of matters relating to his person;
>
> (iii) managing his own affairs; and
>
> (iv) making reasonable judgments in respect of matters relating to his estate, until the contrary is proved to the satisfaction of the State Administrative Tribunal.[127]

United Kingdom

5.29 PWD and NSW MHCC advised in their submission that '[t]he law ought to incorporate a presumption of capacity for all adults', and directed the Committee's attention to the United Kingdom's *Mental Capacity Act 2005.*[128] The UK Act states:

> A person must be assumed to have capacity unless it is established that he lacks capacity.[129]

Alberta, Canada

5.30 Ms Brenda Lee Doyle, Provincial Director of the Office of the Public Guardian in Alberta, Canada stated that the presumption of capacity was the first of the four guiding principles of the *Adult Guardianship and Trustee Act 2008*.[130] Under 'Principles' the Alberta Act states:

> [A]n adult is presumed to have the capacity to make decisions until the contrary is determined.[131]

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126 Ms Pauline Bagdonavicius, Public Advocate, Western Australian Office of the Public Advocate, Evidence, 5 November 2009, p 63

127 *Guardianship and Administration Act 1990* (WA), 4 (2) (b)

128 Submission 4, p 20

129 *Mental Capacity Act 2005* (UK), s 1 (2)

130 Ms Brenda Lee Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada, Evidence, 5 November 2009, p 3

131 *Adult Guardianship and Trustee Act SA 2008* cA-4.2, s 2 (a)

Committee comment

5.31 The Committee strongly supports a presumption of capacity as one of the key principles that should underpin legislation in NSW relating to substitute decision-making.

5.32 The Committee believes that legislation based on the presumption of capacity will facilitate domain-specific substitute decision-making arrangements in accordance with the Committee's recommended legislative definition of capacity (Recommendation 1), and is consistent with the social model of disability which seeks to remove barriers to persons with disabilities participating in society and living independently in the community.

5.33 Furthermore, the Committee believes that the presumption of capacity is consistent with the concept of the least restrictive approach, assisted decision-making and the principles of the UNCRPD, all of which are discussed in more detail in the following sections of this chapter.

5.34 The Committee notes that while some inquiry participants claim the presumption of capacity operates in practice in NSW, it is not explicitly stated in NSW legislation related to substitute decision-making, in particular the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*. For example, the Committee notes that Part 4.3 of the *NSW Trustee and Guardian Act 2009*, which seeks to reverse the presumption in the repealed *Protected Estates Act 1983*, is an insubstantial statement of the presumption of capacity, in that it requires the Mental Health Review Tribunal to 'consider' whether the person is capable, but not to 'presume' that they are.

5.35 The Committee believes that NSW legislation related to substitute decision-making should be explicit in adopting the principle of the presumption of capacity.

5.36 Therefore, the Committee recommends the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to explicitly require a presumption of capacity as the starting point for any considerations. This recommendation is made at the end of this chapter.

Assessing capacity

5.37 Presuming capacity leads naturally to the question of capacity assessment - that is, if a person is initially presumed to have decision-making capacity, by what means could it subsequently be determined that they lack capacity?

5.38 Some inquiry participants identified the importance of a standardised assessment tool.[132] Carers NSW, for example, stated that there was 'evidence to suggest that across NSW the tests for capacity are not always consistent' and that 'legislation that applies to a person's capacity to make decisions and manage their own affairs should articulate a standardised and regulated working definition for capacity and how a person's capacity is assessed.' Carers NSW quoted the 2007 report from the House of Representatives Standing Committee on Legal and

[132] See for example Submission 17, Alzheimer's Australia NSW, p 4; Submission 34, Physical Disability Council of NSW, p 3

Constitutional Affairs, *Older people and the law*, which recommended a 'nationally consistent approach to the assessment of capacity.'[133]

5.39 PWD and NSW MHCC stated in their submission that there 'exists in the community, and among the relevant professions, a high degree of confusion and very poor practice with respect to the assessment of capacity.'[134] They further stated that 'any examination of the legal capacity of a person with disability must be undertaken by an appropriate independent body according to a proper process that accords the person fundamental procedural rights related to a "fair trial"'.[135]

5.40 In relation to the *Capacity Toolkit* published by the NSW Attorney General's Department, Ms Cregan offered that 'in the absence of a consistent test for capacity, the capacity tool kit does provide good guidelines.'[136]

5.41 Ms Field stated that it was also important to consider the skills of the person administering the test and that many assessment tools were utilised, 'some with greater skill than others and some perhaps with greater accuracy than others.' Ms Field suggested that providing guidelines, rather than a specific test, might be a better method for assessing capacity, but that guidelines 'probably take a bit longer to follow and do not give you necessarily a definitive score which some people would prefer to hang their hat on.'[137]

5.42 Professor Hickie highlighted the importance of assessing capacity as opposed to *in*capacity and the availability of appropriate means to conduct that assessment:

> We are much better able to document with neuropsychological testing, with clinical evaluation, what capacities people have… I think that issue of continuously assessing people's capacity is a much more helpful one and allows us to interact much more productively with the education system, the employment systems, and other social support systems in various ways by highlighting what people can do…
>
> I think we have the tools increasingly to assist us in those areas.[138]

5.43 Ms Doyle described the two-stage capacity assessment process that operates in Alberta. The first stage involves a doctor screening for temporary or reversible conditions that may be affecting capacity. The second stage is a two-hour interview comprising a cognitive and functional assessment of decision-making capacity conducted by a health care professional. Health professionals permitted to conduct the assessment interview include doctors, psychologists, registered nurses, registered psychiatric nurses, occupational therapists and registered social workers, all of whom have completed a three-day training course and passed an exam in order to be designated as qualified by the Minister.[139]

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133 Submission 29, Carers NSW, pp 8-9

134 Submission 4, p 19

135 Submission 4, p 21

136 Ms Cregan, Evidence, 29 September 2009, p 7

137 Ms Field, Evidence, 28 September 2009, p 37

138 Professor Hickie, Evidence, 4 November 2009, p 27

139 Ms Doyle, Evidence, 5 November 2009, pp 6-7

5.44 Ms Doyle explained that during consultations when developing the *Adult Guardianship and Trustee Act 2009* many seniors expressed concern that their capacity may be assessed at a time when they were not at their best. One function of the doctor's screening for temporary or reversible conditions is to ensure that assessment does not take place while the person's capacity is affected by medication, delirium due to infection, or some other temporary condition. Furthermore, assessors are 'trained in looking at triggers for when is the right time for capacity assessment' and if during the assessment the person appears to be not functioning well 'they have the right to discontinue the assessment at that time and continue it another time.'[140]

5.45 Ms Anne-Marie Elias, Policy and Communications Manager at the NSW Council on the Ageing, cautioned against 'judging a person's decision and confusing that with a person' capacity.' Ms Elias further stated:

> I guess there is a very fine line; are we judging the person's decision or are we judging their capacity? I think they are two very different things and sometimes we may not like or agree with a decision someone has made but if a person has capacity we have to respect that decision even if we do not believe it is in their best interests.[141]

5.46 In this regard, the United Kingdom's *Mental Capacity Act 2005* states:

> A person is not to be treated as unable to make a decision merely because he makes an unwise decision.[142]

5.47 The issue of person's right to make bad decisions is discussed in greater detail in the following section on assisted decision-making.

Committee comment

5.48 The Committee acknowledges the evidence from inquiry participants to the effect that there is no single standardised tool in NSW with which to assess decision-making capacity, and that this has lead to a certain degree of inconsistency and confusion.

5.49 However the Committee notes the difficulty in developing a standardised tool that would be equally effective across the variety of contexts in which decision-making capacity is raised as an issue, including persons with dementia, persons suffering acute or chronic mental illness and persons with acquired brain injury.

5.50 The Committee also notes that if Recommendation 1 relating to a legislative definition of capacity is implemented, then this definition along with the *Capacity Toolkit* will provide guidelines for those assessing decision-making capacity. The Committee believes that guidelines in this form will provide greater flexibility for assessors and the ability to tailor assessment to the individual circumstances of the person being assessed.

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140 Ms Doyle, Evidence, 5 November 2009, pp 6-8

141 Ms Anne-Marie Elias, Policy and Communications Manager, NSW Council on the Ageing, Evidence, 29 September 2009, p 16

142 *Mental Capacity Act 2005* (UK), s 1 (4)

5.51 Notwithstanding this, the Committee believes the appropriate focus of capacity assessment is the capacity to make a decision, not a judgment about the decision itself, and that this focus should be made explicit in NSW legislation related to substitute decision-making.

5.52 Therefore, the Committee recommends that the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to include a statement to the effect that a person is not to be presumed to lack capacity simply because they make a decision that is, in the opinion of others, unwise. This recommendation is made at the end of this chapter.

The principle of least restriction

5.53 A number of inquiry participants referred to the principle of the 'least restriction' – in other words, the principle that any substitute decision-making measures should restrict the autonomy of the person subject to those measures as little as possible.

5.54 The NSW Public Guardian submission stated that in Australia guardianship orders are not to be made if there is a 'less drastic way of addressing the needs of the individual', explaining that:

> This response is based on the principle of "least restrictive alternative" which says that any procedure used for the benefit of a person with a disability should not intrude unnecessarily into the life of the person.
>
> … All guardianship systems state that it is only appropriate to appoint a guardian for 'people whose lack of ability to make a decision poses an immediate social crisis, and if the crisis is not capable of being resolved by less intrusive measures.'[143]

5.55 The Public Interest Advocacy Centre recommended that relevant NSW legislation incorporate the principle that '[t]he freedom of decision and freedom of action of individuals who are or may become the subject of orders should be restricted as little as possible.'[144]

5.56 Similarly, PWD and NSW MHCC argued that the law in relation to the exercise of legal capacity 'ought to provide for the least possible interference with the autonomy of the person consistent with the attainment of their other human rights.' They further stated in their submission that any 'restriction or limitation must be a 'proportionate' response to the issue, restricting or limiting human rights only to the extent that it is necessary to do so' and that a specific "proportionality test" ought to be incorporated into legislation for this purpose.'[145]

5.57 The issue of proportionality was emphasised by Ms Rosemary Kayess, Associate Director of the Community and Development Disabilities Studies and Research Centre, University of New South Wales. Ms Kayess highlighted the importance of threshold elements in order to establish the ongoing appropriateness of an intervention and avenues of appeal for persons under substitute decision-making orders:

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143 Submission 7, p 12

144 Submission 22, p 6

145 Submission 4, p 21

> It is being able to demonstrate the level or proportionality of intervention, so it would become a threshold element. It would be the demonstration of where the threshold cut-off is for this type of support mechanism. There would need to be appealable avenues if people thought that people were no longer coping under a particular structure…The legislative framework would need to be able to establish how the threshold mechanisms would operate, who would have power to establish those threshold mechanisms and where the right to appeal would be based.[146]

5.58 The *NSW Trustee and Guardian Act 2009* includes the principle of least restriction as one of its principles, stating as follows:

> [T]he freedom of decision and freedom of action of [protected persons] should be restricted as little as possible.[147]

5.59 However, Ms Kayess stated that 'in the case of the principle of the least restrictive alternative, New South Wales has the highest level of guardianship in Australia. Just those simple figures suggest that it is not embracing of the least restrictive alternative.'[148]

The principle of least restriction in other jurisdictions

5.60 Ms Doyle stated that the 'heart' of Alberta's *Adult Guardianship and Trustee Act 2009* was the principle that 'autonomy is to be maintained through least intrusive and least restrictive measures.'[149]

5.61 The United Kingdom's *Mental Capacity Act 2005* also adopts the principle of least restriction, stating as follows:

> Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.[150]

Assisted decision-making

5.62 The concept of assisted decision-making – also referred to as 'supported' decision-making - was strongly supported by a majority of inquiry participants.[151] 'Assisted' decision-making was

146 Ms Rosemary Kayess, Associate Director, Community and Development Disabilities Studies and Research Centre, University of New South Wales, Evidence, 28 September 2009, p 65

147 *NSW Trustee and Guardian Act 2009* (NSW), s 39 (b)

148 Ms Kayess, Evidence, 28 September 2009, p 66

149 Ms Doyle, Evidence, 5 November 2009, p 4

150 *Mental Capacity Act 2005* (UK), s 1 (6)

151 See for example Submission 7, pp 5-6; Submission 5a, NSW Guardianship Tribunal, p 4; Ms Imelda Dodds, Acting Chief Executive Officer, NSW Trustee and Guardian, Evidence, 28 September 2009, p 12; Submission 21, Brain Injury Association of NSW, p 2; Submission 35, NSW Disability Discrimination Legal Centre, p 2; Ms Cregan, Evidence, 29 September 2009, p 2; Ms Elias, Evidence, 29 September 2009, p 13; Mr Benjamin Fogarty, Principal Solicitor, Intellectual Disability Rights Service, Evidence, 29 September 2009, p 32

contrasted with 'substitute' decision-making as a less intrusive arrangement under which the person retained more autonomy and independence. Under as assisted decision-making arrangement, a person was assisted in making decisions themselves, rather than having that right transferred to someone else who then makes a decision on their behalf, as is implied by the term 'substitute' decision-making.

5.63 Assisted decision-making emerged from the evidence presented to the Committee as a key practical measure and a concept that unified the principles discussed in this chapter. It arises from the principles of decision-specific intervention, removing barriers to social integration, the presumption of capacity, and the principle of least restriction in that it provides an intervention that allows a person to exercise their decision-making capacity to the greatest extent they are able.

5.64 Assisted decision-making is also consistent with the view of a person's capacity as being on a spectrum. It represents an important element in the corresponding spectrum of responses required, lying between zero intervention and a substitute decision-making order.

5.65 Mr Graeme Smith, the NSW Public Guardian, explained the distinction between assisted and substitute decision-making:

> Assisted decision-making is different from substitute decision-making because assisted decision-making is characterised by providing a range of supports for a person to come to their own decision. At the end of the day it is their decision and nobody else's decision. In substitute decision-making, where the issue of best interest is central, that decision is being made by somebody on another person's behalf.[152]

5.66 Some inquiry participants, while acknowledging the importance of assisted decision-making, also noted that provisions for substitute decision-making remained necessary. For example the NSW Guardianship Tribunal stated that people whose decision-making capacity is severely affected will require the protection substitute decision-making affords:

> [S]ome people have significant cognitive disabilities, for example advanced dementia, severe brain injury or significant intellectual disability, which prevent them from being able to make their own decisions. They require substitute decision-making to ensure their rights are protected and their needs are met.[153]

5.67 The Disability Studies and Research Centre at the University of NSW submission stated that the fact that capacity lies on a spectrum 'reflects a diversity of levels at which people can engage in the process utilising a variety of modes' and requires mechanisms and safeguards proportional to the individual's needs:

> The challenge is to provide frameworks that provide mechanisms for support that are proportional and tailored to individuals needs and incorporate safeguards that proportional to the modes of support.[154]

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152 Mr Graeme Smith, Public Guardian, Evidence, 28 September 2009, p 22

153 Submission 5a, p 4

154 Submission 10, p 4

Assisted decision-making under NSW legislation

5.68 The Committee received evidence that while there was some scope for assisted decision-making measures to be implemented under existing NSW legislation, it was limited.

5.69 Ms Kayess was critical of NSW guardianship laws as failing to promote assisted decision-making and being behind the times:

> …in regard to the failure to ensure the effective promotion and support of alternatives to substitute decision-making, the crowning glory of our guardianship regimes and their progressive moves are looking slightly old and are being shown for what they truly are—just another form of substitute decision-making…The issue of supported decision-making and the need to move beyond the binary system of capacity or lack of capacity…is way behind us and we should be taking more proactive steps to establish alternative mechanisms.[155]

5.70 The NSW Trustee and Guardian submission explained that the principles contained in section 39 of the *NSW Trustee and Guardian Act 2009* relating to the making of financial management orders were developed in the 1980s, a time when 'the concept of substitute decision-making was pre-eminent', whereas '[t]oday there is much greater emphasis on assisted decision-making in the first instance and reliance upon substituted decision-making as a last resort.' While these principles required the NSW Trustee and Guardian or a private financial manager to adopt the principle of least restriction and consider the person who would be subject to the financial management order, 'it is not so expressly put that wherever possible the person should be assisted to make the decision for themselves if they are capable of doing so at the time.'[156]

5.71 The NSW Trustee and Guardian submission stated that the principles in section 39 of the *NSW Trustee and Guardian Act 2009* could be improved by integrating the principle of assisted decision-making and that this would be consistent with the UNCRPD which states that 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.'[157]

5.72 The NSW Trustee and Guardian submission also stated that section 71 of the *NSW Trustee and Guardian Act 2009* 'provides an important vehicle to give effect to the intention of assisted decision-making' by allowing a person subject to a financial management order 'to actively manage as much of the estate as they are able to do so at any one time.'[158]

5.73 In relation to the *Guardianship Act 1987*, the submission from the NSW Public Guardian asserted that '[t]he Guardianship Act in NSW does not provide mechanisms within which supported or assisted decision-making, as contemplated by the UNCRPD, could have effect.'[159]

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155 Ms Kayess, Evidence, 28 September 2009, p 66

156 Submission 13, NSW Trustee and Guardian, p 11

157 Submission 13, p 11

158 Submission 13, pp 11-12

159 Submission 7, p 12

5.74 Similarly, the NSW Disability Discrimination Legal Centre submission stated that 'it appears to us that NSW Guardianship law is focused on substituted decision-making and does not adequately facilitate or recognise supported decision-making arrangements.'[160]

5.75 Professor McCallum noted that the *Guardianship Act 1987* 'was written at the time of the social welfare model and, perhaps, does not understand the primacy that we should now put on assisted decision-making.'[161]

5.76 PWD and NSW MHCC advised that the law in relation to the exercise of legal capacity 'ought to give precedence to supported decision-making arrangements over substitute decision-making arrangements. It ought to mandate and actively promote alternatives to substitute decision-making.'[162] They recognised in their submission the provisions in the *Guardianship Act 1987* for 'persons responsible' who can provide consent for certain medical and dental treatment, but describe this role as being 'framed in terms of providing informal substitute consent, rather than in terms of support for the person to exercise capacity.'[163]

5.77 Mr Phillip French, member of and adviser to PWD, recommended that legislation provide for a spectrum of interventions that included supporting the person to make the decision for themselves:

> What we think the legislation should do is provide for the recognition and provision of a wide range of supports that vary in their intensity, which at one end might involve the provision of information and support to an individual to understand the decision they need to take, the implications of that decision, and then the person being capable of making the decisions for themselves in the proper sense of that, through to situations where a person may require a decision to be made on their behalf by another person.[164]

5.78 The NSW Council for Intellectual Disability submission recommended that an additional principle should be added to those found in the *Guardianship Act 1987* which would 'squarely state that, as far as possible, an impairment in decision-making capacity should be met by support and informal arrangements rather than by appointment of a guardian or financial manager.'[165]

5.79 Ms Cregan noted the difficulty in legislating for assisted decision-making since the 'essence of assisted decision-making is that it is the person's own decision' whereas courts or tribunals operating under legislation are effectively 'deciding how much of a person's own ability to make decisions is taken away from them.'[166]

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160 Submission 35, p 2

161 Professor McCallum, Evidence, 4 November 2009, p 5

162 Submission 4, p 21

163 Submission 4, p 16

164 Mr Phillip French, Member and Adviser, People with Disability Australia Inc, Evidence, 29 September 2009, p 50

165 Submission 6, NSW Council for Intellectual Disability, p 1

166 Ms Cregan, Evidence, 29 September 2009, pp 4-5

5.80 Ms Cregan questioned whether legislating for assisted decision-making would actually provide the 'middle ground' in the spectrum of responses from zero intervention to a substitute decision-making order that it was intended to. Ms Cregan suggested that this middle ground could be best achieved by applying substitute decision-making to specific aspects of a person's life:

> I am not convinced as a matter of practice that that gives you that room in the middle. I think where you get that room in the middle is to have a guardian appointed over some functions or some decisions and not other decisions for a person, as can happen with a financial management order. That is a more effective and workable way of achieving that middle ground. Rather than a person being under guardianship or not under guardianship, a person is appointed to make lifestyle decisions or a person is appointed to make accommodation and lifestyle or medical decisions, or whatever it happens to be rather than the middle ground of assisted decision-making.[167]

Assisted decision-making in Alberta, Canada

5.81 The Committee received evidence relating to assisted decision-making provisions in legislation from Alberta, Canada.

5.82 Ms Doyle described the spectrum of responses provided under Alberta's *Adult Guardianship and Trustee Act 2008*, the first two elements of which are 'supported decision-making' and 'co-decision-making'.

5.83 Supported decision-making, explained Ms Doyle, was provided for 'a capable adult who can make their own decisions but they just need a little support.' The supporter has limited authority. 'They can communicate, they can visit, they can attend appointments, they can advocate and they can access information. But they have no decision-making powers.'[168]

5.84 In relation to supported decision-making, Alberta's *Adult Guardianship and Trustee Act 2008* provides:

> An adult may, in a supported decision-making authorization, authorize a supporter to exercise some or all of the following powers in respect of a decision to be made by the adult referred to in the authorization:
>
> (a) to access, collect or obtain or assist the adult in accessing collecting or obtaining from any person any information that is relevant to the decision and to assist the adult in understanding the information;
>
> (b) to assist the adult in making the decision
>
> (c) to communicate or assist the adult in communicating the decision to other persons.[169]

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167 Ms Cregan, Evidence, 29 September 2009, pp 4-5

168 Ms Doyle, Evidence, 5 November 2009, p 4

169 *Adult Guardianship and Trustee Act SA 2008* cA-4.2, s 4 (2)

5.85 Co-decision-making, explained Ms Doyle, required a court order based on a formal capacity assessment that determined the person was significantly impaired 'but still able to make decisions with another person.' Under co-decision-making 'that the co-decision maker and the assisted adult will make decisions together.'[170]

5.86 Alberta's *Adult Guardianship and Trustee Act 2008* requires that a co-decision-making order can only be made if less intrusive measures, such as supported decision-making have been considered and deemed not likely to meet the needs of the person.[171] A co-decision-making order requires the person to make decisions with the co-decision maker if those decisions relate to personal matters that are identified in the order.[172] In regard to the authority and duties of the co-decision-maker, the Act provides:

> Subject to any conditions, limits or requirements set out in the co-decision-making order, a co-decision-maker shall
>
> (a) assist the assisted adult to access, collect or obtain from any person the information that is relevant to the personal matters with respect to which the assisted adult is required to make decisions with the co-decision-maker, and
>
> (b) discuss the relevant information with the assisted adult and assist the assisted adult in making those decisions.[173]

The right to make 'bad' decisions

5.87 In relation to assisted decision-making, some inquiry participants addressed the circumstances in which the person makes, or wishes to make, a decision that is, in the opinion of the assisting decision-maker, unwise.

5.88 The NSW Public Guardian supplementary submission highlighted the importance of defining the 'purpose and parameters of assisted decision-making' which differed from substitute decision-making:

> An appointed guardian has a statutory mandate to make decisions in the best interests of a person with a disability. Is an assisted decision maker helping a person to make the decision in accordance with his or her views and wishes or to make what the assisted decision maker may see as the 'best or right decision'? Many in the disability sector would argue that genuine autonomy includes the right to make poor choices or bad decisions.[174]

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170 Ms Doyle, Evidence, 5 November 2009, p 4

171 *Adult Guardianship and Trustee Act SA 2008* cA-4.2, s 13 (4) (a) (iii)

172 *Adult Guardianship and Trustee Act SA 2008* cA-4.2, s 17 (1)

173 *Adult Guardianship and Trustee Act SA 2008* cA-4.2, s 18 (2)

174 Submission 5a, p 4

5.89 Mr Smith emphasised that 'A person who imposes their own decision on the person they are meant to be assisting is not engaging in assisted decision-making. **They are engaging in unauthorised substitute decision-making**.'[175]

5.90 Ms Field also cautioned against imposing value judgments on the actions of others, even when those actions involved, for example, gambling or giving away the last of their money. Ms Field stated, '[w]e need to think very carefully what our views are in a situation—our moral values as well—and not impose them on other people.'[176]

5.91 Ms Dodds described the issue as 'probably one of the most challenging, ethical debates that one can ever have. It is around balancing competing principles, really. There is no simple answer to that…'[177]

5.92 Ms Dodds suggested that there was a point at which at which the right of the assisted decision-maker to make a bad decision was overridden by the assisting decision-maker's obligation to protect them from harm:

> But if a person is very unwell at the point at which they want to make a certain decision that the financial manager, private or statutory, considers to be extremely unwise and not to be in their best interests and to possibly place them at greater harm, then the competing ethical principles around that are, surely, I would argue, to not cause harm, to protect from harm. That may be when the right to make a bad decision needs to be overridden.[178]

5.93 Professor McCallum, stated that 'there will be very few instances where you would want to intervene' whilst at the same time acknowledging that a limit may be reached in circumstances where there 'serious medical issues or living in squalor or disease or…moral danger.'[179]

5.94 Mr Stephen Newell, Principal Solicitor and Manager of the Legal Service with The Aged-care Rights Service, also supported the right to make bad decisions, limited by considerations of whether that decision would affect third parties.[180]

Committee comment

5.95 The Committee acknowledges the importance of assisted decision-making in meeting the need for a spectrum of responses commensurate with the spectrum of decision-making capacity that people exhibit.

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175 Answers to questions on notice taken during evidence 28 September 2009, Mr Graeme Smith, Public Guardian, Question 1 (To all witnesses), p 6 [emphasis in original]

176 Ms Field, Evidence, 28 September 2009, p 40

177 Ms Dodds, Evidence, 28 September 2009, p 15

178 Ms Dodds, Evidence, 28 September 2009, p 15

179 Professor McCallum, Evidence,4 November 2009, pp 8-9

180 Mr Stephen Newell, Principal Solicitor and Manager, Legal Service, The Aged-care Rights Service, Evidence, 5 November 2009, p 15

5.96 The Committee notes the limited extent to which NSW legislation, primarily the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, promotes the principle of assisted decision-making.

5.97 The Committee agrees with inquiry participants who call for relevant NSW legislation to explicitly adopt the principle of assisted decision-making and to require bodies making orders to give precedence to assisted decision-making arrangements over substitute decision-making orders where appropriate. The Committee notes that this approach is consistent with the presumption of capacity and the principle of least restriction and maximises the extent to which a person can retain autonomy and independence.

5.98 Therefore, the Committee recommends that the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to include an explicit statement to the effect that the legislation supports the principle of assisted decision-making. This recommendation is made at the end of this chapter.

5.99 The Committee also notes the absence in NSW legislation of provisions for specific assisted decision-making interventions or instruments. In this regard the Committee was interested in the provisions in Alberta's *Adult Guardianship and Trustee Act 2008* for a 'supported decision-making authorisation' and a 'co-decision-making order' which give the relevant bodies in that province the ability to not only support assisted decision-making in principle and support such arrangements where they already exist, but to actually implement assisted decision-making interventions.

5.100 The Committee did not receive sufficient evidence to make a specific recommendation in regard to legislated assisted decision-making interventions in NSW. However, the Committee believes the provisions for people lacking decision-making capacity in NSW would be improved if bodies such as the Guardianship Tribunal and the Mental Health Review Tribunal had specific assisted decision-making interventions available to them. This option should be further investigated.

5.101 The Committee believes that further investigation should address the parameters of assisted decision-making – in particular the limit beyond which the responsibility of the assisting decision-maker to prevent harm would override their responsibility to assist the person and not act as a substitute decision-maker. In this regard, the Committee notes that certain common sense limits already exist in relation to persons regardless of their decision-making capacity, in that a person would not assist another person who had full decision-making capacity to make decisions that result in harm to that person, harm to a third party, or the commission of a criminal act.

5.102 Therefore, the Committee recommends that the NSW Government consider amending NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to provide for the relevant courts and tribunals to make orders for assisted decision-making arrangements and to prescribe the criteria that must be met for such orders to be made, and that such consideration address the parameters of assisted decision-making, in particular the limit at which the assisting decision-maker's obligation to prevent harm overrides their responsibility to assist. This recommendation is made at the end of this chapter

The United Nations Convention on the Rights of Persons with Disabilities

5.103 As noted at the beginning of this chapter, the Committee received evidence that the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), ratified by Australia on 16 July 2008, encapsulates a paradigm shift in thinking about persons with disabilities and incorporates principles relevant to substitute decision-making as discussed in this chapter - namely, the presumption of capacity, the principle of least restriction, and the importance of assisted decision-making.

5.104 A number of inquiry participants emphasised the importance of the UNCRPD and its relevance to substitute decision-making, drawing the Committee's attention in particular to Articles 5 and 12 of the Convention. Inquiry participants explained the obligations NSW had under the Convention and the ways in which NSW legislation could be harmonised with the principles contained in the Convention. These issues are examined in the following sections.

The importance of the UNCRPD

5.105 Mr Buchanan proposed that the UNCRPD was a 'landmark human rights treaty' that should guide legislators:

> We have the United Nation's convention to guide us. There is here a genuine paradigm shift occurring. You are part of it, which may be a daunting prospect, but with the convention it assists us to see more clearly the way ahead and the decisions we must take…
>
> …
>
> I think the council's view is that the Convention on the Rights of People with Disabilities describes a landmark human rights treaty. We think this means that everyone needs to see the convention as something special. It defines a moment of fundamental change and our laws need to be considered within that new context.[181]

5.106 Professor Duncan Chappell from the Faculty of Law at the University of Sydney described the Convention as representing a 'a profound shift in thinking at the international level about how we deal with issues of disability.' Professor Chappell further stated that the Convention 'is going to stimulate, if it has not already, much of the dialogue about where we should go with this.'[182]

5.107 The Disability Studies and Research Centre at the University of NSW noted in their submission that the Convention was 'the first binding human rights instrument to explicitly address disability', one which 'has been hailed as a great landmark in the struggle to reframe the needs and concerns of persons with disability in terms of human rights.'[183]

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181 Mr Buchanan, Evidence, 28 September 2009,pp 45-46

182 Professor Duncan Chappell, Faculty of Law, University of Sydney, Evidence, 5 November 2009, p 37

183 Submission 10, pp 1-2

5.108 PWD and NSW MHCC described the Convention as 'a "core" human rights instrument situated at the same level as other core treaties, such as the International Covenant on Civil and Political Rights.'[184]

Relevant articles

5.109 Whilst inquiry participants drew the Committee's attention many articles within the UNCRPD, the most emphasis was placed on Article 5 and in particular Article 12.

Article 5

5.110 Article 5 of the UNCRPD, entitled 'Equality and non-discrimination' states:

> (1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
>
> (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
>
> (3) In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
>
> (4) Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention[185]

5.111 Professor McCallum told the Committee that Article 5, along with Article 8, were consistent with the social model of disability in assisting people to take their 'full place as citizens' through 'employment and family life'.[186]

5.112 The submission from PWD and NSW MHCC also argued that Australia's human rights obligations under the Convention, in particular Articles 5 and 12, are the necessary reference point for the Committee's inquiry.[187] They noted the particular impact of clause (4) of Article 5 which provides that differential treatment of persons with a disability aimed at producing a positive effect does not constitute discrimination:

> It is important to appreciate that differential treatment related to the provision of adjustments and modifications necessary for persons with disability to enjoy or exercise fundamental rights and freedoms, or as a result of a positive measure aimed at achieving de facto equality for persons with disability do not constitute discrimination,

184 Submission 4, p 7

185 United Nations Convention on the Rights of Persons with Disabilities, <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> Article 5, accessed 10 December 2009

186 Professor McCallum, Evidence, 4 November 2009, p 3

187 Submission 4, p 5

> and by extension are not 'arbitrary.' In fact, they are positively required by the CRPD [United Nations Convention on Rights of Persons with Disabilities].[188]

5.113 Professor Chappell also noted that the Convention provided that 'discrimination of a type that is intended to benefit those who are suffering from a particular disability…is justified',[189]

Article 12

5.114 Article 12 of the UNCRPD, entitled 'Equal recognition before the law' states the following:

> (1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
>
> (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
>
> (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
>
> (4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests
>
> (5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.[190]

5.115 Professor McCallum, who recently elected Chair for 2010 of the United Nations Committee on the Rights of Persons with Disabilities, told the Committee that '[t]he committee on which I sit, and will soon chair, regards Article 12 as being at the very centre of the convention.'[191]

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188 Submission 4, p 15

189 Professor Chappell, Evidence, 5 November 2009, p 37

190 United Nations Convention on the Rights of Persons with Disabilities, <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> Article 5, accessed 10 December 2009

191 Professor McCallum, Evidence, 4 November 2009, p 4

5.116 The Disabilities Studies and Research Centre at the University of NSW submission stated that Article 12 is symbolic of the recent paradigm shift and refers to the core human rights of persons with disabilities:

> The formulation of Article 12 is symbolic of the paradigm shift that has been taking place in the disability field over the past 15 years or so. And it cuts to the core of human rights, dignity and equality, the notion that all human beings are ends in themselves and not means to other ends. People with disability have traditionally been viewed as 'objects' to be pitied or managed or worse - and not as 'subjects' deserving equal respect.[192]

5.117 Ms Kayess said that '[t]he strength of the article is that the presumption is capacity, and that the mechanism by which support is balanced is the proportionality—proportionality in the level of intervention and proportionality in the safeguards.'[193]

5.118 The NSW Disability Discrimination Legal Centre submission also referred to the continuum of capacity implicit in Article 12.[194]

5.119 Professor McCallum told the Committee that Article 12, in particular clause (4), highlighted the importance of assisted decision-making, but also made allowances for substitute decision-making:

> It really says that where we persons with disabilities need assistance in making relevant decisions, the appropriate mechanism is supported decision-making. In other words, that we have a network of persons whom we know, family members and others, who can support us in making decisions. But it is also clear that article 12 (4) contemplates, in very limited circumstances, forms of substitute decision-making.[195]

5.120 Similarly, Ms Therese Sands, Executive Director of the Leadership Team at People with Disability Australia, stated that Article 12 focussed on assisted decision-making but provided, as a last resort, for substitute decision-making:

> … in terms of really pointing to Article 12 in the convention, it is just a recognition that we are talking about a system that concentrates very specifically on assisted decision-making in the true sense of the word, but that at one end of the spectrum there would be people who may require, as a last resort and perhaps with the least restrictive principles attached, substitute decision-making and safeguards attached to that.[196]

5.121 The National Council on Intellectual Disability submission suggested that there was the potential for controversy in relation to Article 12 and the issue of substitute decision-making. 'Article 12 of the UN Convention on the Rights of Persons with Disability does not explicitly mention substitute decision-making,' explained the submission, 'and this is being read as the

192 Submission 10, p 3

193 Ms Kayess, Evidence, 28 September 2009, p 62

194 Submission 35, p 2

195 Professor McCallum, Evidence, 4 November 2009, p 4

196 Ms Therese Sands, Executive Director - Leadership Team, People with Disability Australia Inc, Evidence, 29 September 2009, p 53

Convention prohibiting it.' The submission argued that it was important to maintain a distinction between assisted decision-making and circumstances in which another person makes the decision, 'even if the decision maker takes into account (from their knowledge and experience of the person) the person with intellectual disability preferences.' In these circumstances, 'the phrase "substitute decision maker" is useful and should be retained.'[197]

Harmonisation of NSW legislation with the UNCRPD

5.122 A number of inquiry participants stated that NSW was bound by the UNCRPD and that its laws should be consistent with its principles.

5.123 Professor McCallum emphasised that 'the polity of Australia, its Federal, State and municipal governments, are bound by this convention and are bound by article 12 (4).'[198]

5.124 PWD and NSW MHCC noted that although the Commonwealth Government ratified the Convention, Article 4 of the Convention meant that 'its provisions apply to all parts of federal states, such as Australia, without limitation or exception.'[199]

5.125 Mr Buchanan argued that the UNCRPD placed a responsibility on the Committee to evaluate NSW legislation in light of the standards it sets:

> That places upon you, as lawmakers in a legislative body within a Federal system of government, not just a responsibility but a duty to rethink the status quo and to examine whether or not existing laws in New South Wales meet the challenges set by the United Nations convention and where it becomes apparent that our State laws may have slipped a little behind the times, so to speak, to take legislative action to return New South Wales once again to the forefront of legislating…[200]

5.126 The NSW Guardianship Tribunal submission stated that although the guiding principles of the *Guardianship Act 1987* remained appropriate, '[w]ith Australia's ratification of the UN Convention it is now appropriate that all disability legislation, such as the NSW *Guardianship Act*, be reviewed and revised if necessary.'[201]

5.127 The NSW Trustee and Guardian recommended that the preamble to the *NSW Trustee and Guardian Act 2009* be amended to include the following statement:

> In the operation of this Act the CEO and all persons with delegated authorities must in the performance of their duties observe the rights conferred by the UN Convention on Rights of Persons with Disabilities on those persons whose affairs come under the management of the NSW Trustee and Guardian. This Act recognises the rights in the Convention but specifically requires persons who oversee the operation of this Act to observe the specific rights in Article 12 of the Convention.[202]

197 Submission 8, National Council on Intellectual Disability, pp 1-2

198 Professor McCallum, Evidence, 4 November 2009, p 44

199 Submission 4, p 8

200 Mr Buchanan, Evidence, 28 September 2009, p 44

201 Submission 5a, p 5

202 Submission 13, p 14

5.128 Professor Ian Hickie, the Executive Director of the Brain and Mind Research Institute at the University of Sydney, emphasised the significance of the UNCRPD for social services across Australia, describing it as 'potentially an extremely useful way of going forward'. Professor Hickie pointed out that 'many of our legal systems at the moment are inconsistent with the general direction of the new approach.'[203]

5.129 PWD and NSW MHCC went further, stating in their submission that NSW laws were currently in breach of Australia's international human rights obligations:

> NSW is now in the situation where its laws, institutional arrangements and practices in this area either positively breach, are substantially inconsistent with, or fail to fulfil, Australia's international human rights obligations with respect to persons with disability and their right to equality before the law.[204]

5.130 Their submission argued that NSW laws with respect to legal capacity and financial management violate articles 5 and 12 of the UNCRPD because 'they are laws of specific application to persons with disability':

> Under international human rights law, any permissible limitations to human rights must be 'prescribed by law' and any law prescribing a limitation to a human right must be of general application. The law cannot operate in an arbitrary way. For example, it cannot discriminate against a particular segment of the population, such as persons with impairment or disability.[205]

5.131 Mr French explained that both the *Mental Health Act 2007* and the *Guardianship Act 1987* 'require as a threshold issue determination of impairment or disability before the other stages of the inquiry can proceed.' Mr French argued that the determination of disability 'is not relevant to the issue about whether the person needs support in order to exercise legal capacity.' Mr French stated that the law should be applied generally and although it would be utilised primarily by people with a disability, disability itself should not be a threshold requirement:

> They should be laws of general application so they apply to all the population in the same way. They would of course…disproportionately be utilised by people with disability because they are one major segment of the population who require such assistance. But they would not require an inquiry into impairment as the threshold element of the test.[206]

Committee comment

5.132 The Committee acknowledges the views of inquiry participants highlighting the significance of the UNCRPD and the fact that it encapsulates the paradigm shift in thinking about people with disabilities that is represented by the social model of disability, the presumption of capacity, the principle of least restriction and the importance of assisted decision-making.

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203 Professor Hickie, Evidence, 4 November 2009, pp 27-28

204 Submission 4, p 3

205 Submission 4, p 12

206 Mr French, Evidence, 29 September 2009, p 49

5.133 The Committee notes the particular emphasis placed on Articles 5 and 12 of the UNCRPD as a clear expression of these principles.

5.134 The Committee also notes the view of some inquiry participants that NSW laws should comply with the principles of the UNCRPD and that in some respects they currently do not comply.

5.135 The Committee agrees that the UNCRPD is of great significance and has particular relevance to legislation relating to substitute decision-making for people lacking capacity. The Committee also agrees that, in accordance with the Commonwealth Government's ratification of the UNCRPD, NSW laws should be consistent with the principles it contains.

5.136 The Committee believes that NSW laws relating to substitute decision-making should be reviewed in light of the standards set by the UNCRPD, and where necessary, amendments made to increase consistency with the UNCRPD. Therefore, the Committee will be guided by the principles incorporated into the UNCRPD, in particular:

- the presumption of capacity
- the principle of least restriction, and
- the promotion of assisted decision-making.

5.137 The Committee will apply these principles throughout this report where they relate to the particular aspects of legislation being considered.

5.138 In this regard, the Committee notes the views of People with Disability Australia Inc and NSW Mental Health Coordinating who argue that laws applying arbitrarily to persons with disability and requiring a threshold determination of disability are in violation of the UNCRPD. In this regard the Committee notes that the definition of capacity it has recommended in Chapter 5 seeks to disconnect the notion of incapacity from disability. It follows that provisions contained in legislation adopting this definition should not require a determination of a disability to be accessed.

5.139 The Committee notes that section 3 of the *Guardianship Act 1987* defines a 'person in need of a guardian' as 'a person who, because of a disability, is totally or partially incapable of managing his or her person.' The Committee recommends that the phrase 'because of a disability' be removed from this section of the Act.

Recommendation 2

That the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to explicitly require a presumption of capacity as the starting point for any considerations.

Recommendation 3

That the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to include a statement to the effect that a person is not to be presumed to lack capacity simply because they make a decision that is, in the opinion of others, unwise.

Recommendation 4

That the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to include an explicit statement to the effect that the legislation supports the principle of assisted decision-making.

Recommendation 5

That the NSW Government consider amending NSW legislation in which the issue of capacity in relation to decision-making is raised, including but not limited to the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009*, to provide for the relevant courts and tribunals to make orders for assisted decision-making arrangements and to prescribe the criteria that must be met for such orders to be made.

That such consideration address the parameters of assisted decision-making, in particular the limit at which the assisting decision-maker's obligation to prevent harm overrides their responsibility to assist.

Recommendation 6

That the NSW Government pursue an amendment to section 3 of the *Guardianship Act 1987* which removes the phrase 'because of a disability' from the definition of a *person in need of a guardian* contained in that section.

Chapter 6 Making substitute decision-making orders – the Guardianship Tribunal

This chapter examines the role of the Guardianship Tribunal in making substitute decision-making orders, the legislative provisions under which the Tribunal operates and the way in which the Tribunal determines the need for and reviews the two primary substitute decision-making instruments available to it - guardianship orders and financial management orders. The following chapter examines the same issues in relation to the Mental Health Review Tribunal.

Throughout the current and following chapter the Committee has made recommendations that seek, where possible, to increase consistency between the Guardianship Tribunal and the Mental Health Review Tribunal in relation the procedures followed to make and review financial management and guardianship orders, and to increase the consistency with which these procedures accord with the principles incorporated in the United Nations Convention on the Rights of Persons with Disabilities, in particular the presumption of capacity, the principle of least restriction, and the promotion of assisted decision-making arrangements.

The role of the Guardianship Tribunal

6.1 The Guardianship Tribunal is established under the *Guardianship Act 1987*. The Tribunal plays a role in protecting and empowering people lacking decision-making capacity and facilitates substitute decision-making through determining applications for guardians and financial managers.[207]

6.2 Ms Diane Robinson, President of the Guardianship Tribunal, explained that in addition the Tribunal acts as a 'safety net' in relation to enduring powers of attorney and enduring guardianship appointments by reviewing these arrangements 'to ensure that they are working appropriately', and that it makes 'a range of medical decisions when people cannot make those decisions by themselves.'[208]

6.3 The Guardianship Tribunal's submission lists the specific areas in which it may make orders:

- appointment of guardians to make personal or lifestyle decisions
- appointment of financial managers to make financial decisions
- reviews of guardianship and financial management appointments
- reviews of enduring guardianship appointments
- reviews of enduring powers of attorney
- medical consent when a person is incapable of providing informed consent
- consent to special medical treatment

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207 Guardianship Tribunal website, <http://www.gt.nsw.gov.au/>, accessed 6 January 2010

208 Ms Diane Robinson, President, NSW Guardianship Tribunal, Evidence, 28 September 2009, p 52

- decisions about the involvement of people with disabilities in clinical trials.[209]

6.4 In 2008 the Tribunal dealt with 8,466 cases, of which 6,011 were new cases and the rest reviews of existing arrangements.[210]

6.5 The Tribunal sits as a panel of three members, one from each of three categories:

(1) lawyers

(2) professional members, including psychiatrists, psychologists, geriatricians, social workers, registered nurses and others involved in the assessment and treatment of people with disabilities, and

(3) community members, including some who themselves have a disability, and some who are carers or family members of people with disabilities.[211]

6.6 The Tribunal provides written reasons for every decision it makes.[212]

Conduct of Guardianship Tribunal proceedings

6.7 This section covers various aspects of Guardianship Tribunal proceedings, such as the manner in which proceedings are conducted, persons who may be parties to proceedings, representation at hearings, issues relating to procedural fairness and confidentiality, and the pre-hearing investigation process, in particular the role of the Tribunal's Co-ordination and Investigation Unit.

6.8 To determine if an order is warranted the Tribunal conducts proceedings in 'an investigative/inquisitorial manner rather than in an adversarial manner'. The Tribunal will 'usually identify key issues and explore them with participants at the hearing, rather than always expecting parties to present and argue a case.'[213]

6.9 The *Guardianship Act 1987* provides the following provisions for Tribunal proceedings, allowing the Tribunal to gather evidence as it sees fit and obliging it to conduct proceedings in as non-legalistic a manner as possible:

(1) The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit.

(2) Proceedings before the Tribunal shall be conducted with as little formality and legal technicality and form as the circumstances of the case permit.[214]

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209 Submission 5a, NSW Guardianship Tribunal, pp 1-2

210 Ms Robinson, Evidence, 28 September 2009, p 55

211 Ms Robinson, Evidence, 28 September 2009, p 53

212 Ms Robinson, Evidence, 28 September 2009, p 56

213 NSW Guardianship Tribunal, Practice Note No. 1 of 2009, 'Legal Practitioners and Guardianship Tribunal Proceedings, p 1

214 *Guardianship Act 1987* (NSW), s 55

6.10 The NSW Council for Intellectual Disability (NSW CID) supported Tribunal procedures being as 'straightforward and non-legalistic as possible' arguing that this made them 'understandable to people with disability and [the] people in their lives' and that it promoted a 'problem solving and conciliatory approach'. The NSW CID urged the Committee to be cautious about proposals that would make Tribunal processes more 'intricate and legalistic.'[215]

Parties to Tribunal proceedings

6.11 A variety of people may be 'parties' to Guardianship Tribunal proceedings under the *Guardianship Act 1987*. Depending on the particular order or review to which an application relates, these parties include:

- the applicant
- the person to whom the application relates
- the person's spouse, if the relationship is close and continuing
- the person's carer
- a person appointed by the person under a power of attorney
- the Public Guardian or other appointed guardian including enduring guardians,
- the NSW Trustee and Guardian or other appointed financial manager.[216]

6.12 The Tribunal may also join any other person as a party to proceedings according to section 57A of the *Guardianship Act 1987*, 'whether because of the person's concern for the welfare of the person the subject of the proceedings or for any other reason'.[217]

Representation at Tribunal hearings

6.13 A legal practitioner may be present at Tribunal hearings in three capacities, as detailed in the Tribunal's practice note, 'Legal Practitioners and Guardianship Tribunal Proceedings':

(1) A legal practitioner may attend the hearing without leave of the Tribunal as a party's McKenzie Friend by providing support but not representation.

(2) A legal practitioner may attend the hearing with leave of the Tribunal as a party's legal representative and act as their advocate on their instructions.

(3) A legal practitioner may be appointed by the Tribunal as a separate representative of the subject person and make submissions about the person's best interests.[218]

6.14 Ms Robinson suggested that the system could be improved with additional resources to fund separate representatives for all persons for whom an order is being sought, noting that the

215 Submission 6, NSW Council for Intellectual Disability, p 1

216 *Guardianship Act 1987* (NSW), s 3F

217 *Guardianship Act 1987* (NSW), s 57A

218 NSW Guardianship Tribunal, Practice Note No. 1 of 2009, p 2

Legal Aid Commission was not able to provide separate representation in all matters. Ms Robinson acknowledged that significant resources would be required to provide separate representation in all matters but that it 'would be positive and practical if we could provide more [separate] representation through the Legal Aid Commission.'[219]

6.15 Ms Robinson also stated that the person for whom an order is being sought may have a range of advocates appearing on their behalf at Tribunal hearings, from family members to Senior Counsels:

> You can have as many people as you wish. We frequently say, and very genuinely mean, this is your hearing, you can bring your entire family. We would accommodate that. You could have one or two. Some people bring solicitors and barristers. We have senior counsel appearing sometimes. You can have a range of representation and support as you wish.[220]

Procedural fairness and confidentiality

6.16 Some inquiry participants raised the issue of procedural fairness during Tribunal hearings, which would normally require the disclosure to all parties to proceedings of reports and medical information relating to the person for whom an order is being sought, and expressed concern that such disclosure may not necessarily be in the best interests of the person.

6.17 Mr Jim Simpson, Senior Advocate for the NSW CID, gave as an example a report on a person who has developed a 'comfortable and confiding relationship' with the social worker writing the report, which may therefore contain information about familial events and personal medical history that has been provided on the basis that it did not get back to the family. In such situations, explained Mr Simpson, procedural fairness would require the report be divulged to family members who were a party to proceedings, and although the Tribunal in practice tires to 'accommodate' such situations, legislation was needed to explicitly provide for the Tribunal to withhold such reports:

> Procedural fairness, in its strict sense, may mean that the tribunal has to divulge that report to a family member who is a party to the proceedings. Sometimes that might be necessary because those issues might be central as to whether or not a guardianship is needed. But in other cases it may be fairly plain to the tribunal that it needs to go down certain path anyway, and it just does not need to get into that. It is not so much a matter of tribunal practice, as the tribunal tries to accommodate those sorts of situations; it is more a matter of the legislation needing to make it clear that the tribunal can do that where the person's interests require the tribunal to withhold certain information or to put it to one side.[221]

6.18 The NSW CID submission further elaborated on this argument, stating that it may not be in the best interests of the person for whom an order is being sought for there to be full disclosure of evidence to the applicant where the evidence may be inflammatory and damage existing relationships:

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219 Ms Robinson, Evidence, 28 September 2009, p 55

220 Ms Robinson, Evidence, 28 September 2009, p 59

221 Mr Jim Simpson, Senior Advocate, New South Wales Council for Intellectual Disability, Evidence, 29 September 2009, p 40

> …it is arguably not in the interests of the person with disability for another party to have full knowledge of evidence. For example, there can be inflammatory evidence, disclosure of which will damage relationships that are important to the person's welfare but which the Tribunal does not see as altering its view of the situation. Disclosure may adversely affect the welfare of the person without assisting the Tribunal to make the right decision in the case.[222]

6.19 The NSW CID submission recommended that the *Guardianship Act 1987* should contain an explicit statement to the effect the procedural fairness applies only to the extent that it is not against the best interests of the person:

> It would be preferable if there was an explicit statement in the Act that the rules of procedural fairness apply but that those rules are qualified to the extent that the Tribunal sees as necessary in the interests of the person with a disability.[223]

6.20 The Law Society of NSW submission noted a practical difficulty in Tribunal proceedings when the disclosure of information was rightly resisted on the basis of confidentiality and suggested that the Tribunal could grant leave for parties to obtain information from identified sources:

> The practical difficulty that often faces parties in proceedings before the Tribunal is adequate access to information, particularly where, quite properly, the holder of the information is required to resist the production of the information on grounds of confidentiality or privacy. Perhaps there should be a process whereby, when proceedings have been brought in the Tribunal, the Tribunal could grant leave for the parties to obtain information from identified sources which will be authorised by the Tribunal to produce such information. Medical records are a good illustration.[224]

Committee comment

6.21 In relation to procedural fairness and the argument advanced by some inquiry participants that full disclosure of information to all parties to proceedings may not in all circumstances serve the best interests of the person for whom the order is sought, the Committee notes that the General Principle in section 4 (a) of the *Guardianship Act 1987* requires all persons exercising functions under the Act to give paramount consideration to the 'welfare and interests' of persons with disabilities.

6.22 The Committee notes that this existing principle could be interpreted as limiting the requirement under procedural fairness for full disclosure of evidence to all parties to proceedings where such disclosure is not deemed to be in the person's best interest, but that it does not explicitly provide for this.

6.23 The Committee agrees with the inquiry participants who argued that the ability of the Tribunal to accommodate such situations would be improved by explicit provision in the *Guardianship Act 1987* for full disclosure under procedural fairness to be limited in this way.

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222 Submission 6, p 3

223 Submission 6, p 3

224 Submission 26, Law Society of NSW, p 3

6.24 However, the Committee did not receive enough evidence on this matter to recommend a legislative amendment. In particular, the Committee did not receive evidence about the frequency with which the Tribunal is required to address this issue or the full ramifications of making legislative provision for the departure from a tenet of court and tribunal proceedings as fundamental as procedural fairness.

6.25 Therefore, the Committee recommends that the NSW Government investigates the ramifications of and considers making an amendment to the *Guardianship Act 1987* to provide that the Tribunal may order certain aspects of evidence not be disclosed to parties to proceedings where such disclosure would not assist the Tribunal in reaching its determination and is not in the best interests of the person.

Recommendation 7

That the NSW Government consider an amendment to the *Guardianship Act 1987* to provide that the Tribunal may order certain aspects of evidence not be disclosed to parties to proceedings where such disclosure would not assist the Tribunal in reaching its determination and is not in the best interests of the person.

Pre-hearing procedures

6.26 The Guardianship Tribunal allocates significant resources to assist people develop solutions that do not require the appointment of a substitute decision-maker in recognition of the fact that many people lacking capacity can manage in the community with the help of family, friends and service providers.

6.27 These resources are focussed on pre-hearing processes that may result in an alternative to the Tribunal appointing a substitute decision-maker, or result in the withdrawal of the application with the consent of the Tribunal. An application sets in train a legal process and can be withdrawn only with the consent of the Tribunal.[225]

6.28 The first step in making an application involves contact with the Tribunal's Enquiry Service which provides information relating to guardianship, financial management, consent to medical and dental treatment and review of enduring powers of attorney and enduring guardianships. The second step is making the application. Anyone with a genuine concern for a person they consider lacks decision-making capacity may apply to the Guardianship Tribunal for a substitute decision-making order to be made. The third step involves gathering information about the application by the Tribunal's Co-ordination and Investigation Unit.[226]

The Tribunal's Co-ordination and Investigation Unit

6.29 The Guardianship Tribunal's supplementary submission explained that the activities of the Co-ordination and Investigation Unit form part of 'a number of pre-hearing diversionary strategies to deal with unnecessary or inappropriate applications' and states that investigation

225 NSW Guardianship Tribunal website, accessed 7 January 2010

226 NSW Guardianship Tribunal website, accessed 7 January 2010

officers seek to resolve issues without the need for a guardianship order, including by referral to external agencies:

> Investigation officers assess every application and explore whether there are any means of resolving the issues raised in the application in an informal manner without the need for a guardian to be appointed…
>
> The investigation staff have an extensive knowledge and experience of the disability service system. They are able to suggest different service options or ways of resolving issues without a guardianship order. This may involve referring parties to external agencies or assisting them in the informal resolution of disputes.[227]

6.30 The Guardianship Tribunal's supplementary submission also noted that the Tribunal 'has a statutory obligation to conciliate matters in accordance with section 66 of the *Guardianship Act 1987*. Section 66 provides that:

> The Tribunal shall not make a decision in respect of an application made to it until it has brought, or used its best endeavours to bring, the parties to a settlement.[228]

6.31 The Guardianship Tribunal's supplementary submission argued that the Tribunal's diversionary strategies work well, providing figures from the 2006/2007 financial year in which 30% of applications for new guardianship orders were 'resolved informally or diverted prior to a hearing.' Of applications that proceeded to hearing, 59% resulted in guardianship orders being made.[229]

6.32 Mr Mark Orr suggested that the Tribunal's efforts to resolve issues without proceeding to a hearing could be augmented through the use of alternative dispute resolution (ADR) as used in the family law jurisdiction. Mr Orr, while not doubting that the Tribunal endeavoured to bring parties to settlement, questioned 'whether the Tribunal itself is best placed to be the sole place where this is formally considered', arguing that the utility of ADR in the area of substitute decision-making 'has never been fully tested in NSW.'[230]

6.33 Ms Robinson explained that part of the role of the Co-ordination and Investigation Unit was to identify, in the course of gathering information about applications, if a person was being exploited or if the applicant was seeking to exploit the person for whom the order was being sought. If and when such information came to light, explained Ms Robinson, the Tribunal could fast track an application and make an order to facilitate a protective measure such as a caveat on a person's property where there was a danger it may be 'sold from underneath them.'[231]

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227 Submission 5a, p 3

228 *Guardianship Act 1987* (NSW), s 66 (1)

229 Submission 5a, p 3

230 Submission 15, Mr Mark Orr, p 11

231 Ms Robinson, Evidence, 28 September 2009, p 58

Committee comment

6.34 The Committee supports the Guardianship Tribunal's use of 'pre-hearing diversionary strategies' to ensure guardianship orders are only made as a last resort in accordance with the principle of least restriction.

6.35 The Committee notes the success of the Tribunal's strategies based on the figures presented from 2006/2007 which indicate that of applications for new guardianship orders 30% were diverted pre-hearing and 41% of those that proceeded to hearing did not result in a guardianship order – or in other words, just under 60% of new applications did not result in a guardianship order being made.

Guardianship orders

6.36 This section examines the legislative provisions under which the Guardianship Tribunal determines the need for and reviews guardianship orders.

Factors considered in making a guardianship order

6.37 Section 14 (1) of the *Guardianship Act 1987* provides that:

> If, after conducting a hearing into any application made to it for a guardianship order in respect of a person, the Tribunal is satisfied that the person is a person in need of a guardian, it may make a guardianship order in respect of the person.[232]

6.38 As noted in Chapter 5, the *Guardianship Act 1987* defines a *person in need of a guardian* as 'a person who, because of a disability, is totally or partially incapable of managing his or her person.'[233]

6.39 Section 14 (2) of the *Guardianship Act 1987* further provides that when considering whether or not to make a guardianship order the Tribunal shall have regard to:

> (a) the views (if any) of:
>
> (i) the person, and
>
> (ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and
>
> (iii) the person, if any, who has care of the person,
>
> (b) the importance of preserving the person's existing family relationships,

232 *Guardianship Act 1987* (NSW), s 14 (1)

233 *Guardianship Act 1987* (NSW), s 3 (1); Note the Committee's recommendation in Chapter 5 to remove the phrase 'because of a disability' from this definition.

(c) the importance of preserving the person's particular cultural and linguistic environments, and

(d) the practicability of services being provided to the person without the need for the making of such an order.[234]

6.40 The NSW CID submission observed that the above considerations essentially mean that '[o]nce the Guardianship Tribunal is satisfied that a person has a disability and is partially incapable of managing his or her person, it needs to decide whether to make a guardianship order.'[235] The NSW CID submission further observed that this requires considering the adequacy of informal arrangements, consistent with the principles of the UNCRPD:

> In practice, this usually comes down to the question of 'need for an order' as opposed to the person's limited capacity for decision-making being met by informal support from families, advocates and service providers. This approach accords with the UN convention as interpreted by Australia.[236]

6.41 However, the NSW CID submission argued that section 14 (2) of the *Guardianship Act 1987* 'is not clear that this practice is correct', and that an Administrative Appeals Tribunal (ADT) decision requiring the consideration and weighing up of the factors in section 14 (2) 'cuts across the human rights principle that a person's decision-making rights should only be taken away as a last resort.'[237]

6.42 Mr Simpson, Senior Advocate with the NSW CID, explained that while the factors in section 14 (2) were relevant, the ADT decision requiring their consideration could lead to a guardianship order being made despite the existence of adequate informal arrangements:

> … the ADT said that, at the end of the day, instead of coming down to the question of whether there is a need to make an order rather than less informal approaches being adequate, the tribunal has to address each of those factors in section 14 (2) and any other relevant factors, attach a weight to each, balance them up and come to a decision. That is convoluted and, at times, would call for an order despite the fact that informal arrangements are adequate and the person's rights do not really need to be taken away.[238]

6.43 Furthermore, the NSW CID submission argued, the factors in section 14 (2) are 'basically restatements of factors covered by the general principles in section 4' with the addition that the Tribunal consider the views of the person's spouse or carer, who 'are in any event parties to the proceedings and so entitled to be heard.'[239]

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234 *Guardianship Act 1987* (NSW), s 14 (2)

235 Submission 6, p 1

236 Submission 6, p 1

237 Submission 6, p 2

238 Mr Simpson, Evidence, 29 September 2009, p 42

239 Submission 6, p 1

6.44 The NSW CID submission recommended that section 14 (2) be replaced by the requirement that the Tribunal consider only the 'need' for a guardianship order, and that other factors would in any case be considered under provision elsewhere in the Act:

> It would be both clearer and consistent with Australia's human rights obligations to replace s 14 (2) with a simple requirement that the Tribunal be satisfied that there is a need for a guardianship order to be made. The Tribunal would still need to consider the principles in s4 where relevant and parties would have a right to be heard, but in the end the question would be whether there is a need for an order as opposed to informal support with decision-making.[240]

6.45 On the other hand, some inquiry participants recommended factors be added to those in section 14 (2).

6.46 Ms Nihal Danis, Senior Solicitor with the Mental Health Advocacy Service, Legal Aid NSW stated that there was 'no harm' in submissions suggesting that section 14 (2) should be replaced, noting that as it stood it ran the risk of not putting the person's autonomy rights before the Tribunal as its number one consideration. However, Ms Danis felt a requirement that the Tribunal should be mindful of the human rights of the person should be added to section 14 (2).[241]

6.47 Mr Herd suggested 'section 14 (2) of the Act would benefit from the addition of a reference to the United Nations Convention on the Rights of Persons with Disabilities' and that the UNCRPD 'sets out all kinds of factors that should be considered when making [a guardianship order].'[242]

6.48 Professor Carney stated that the four factors in section 14 (2) were important but that 'they reflect a rather paternalistic and older-fashioned view of the role of guardianship.'[243] Professor Carney noted that the *Guardianship Act 1987* was drafted when certain key current principles, such as supported decision-making, were not considered, and that the factors in section 14 (2) should be revised in light of those principles, as has occurred in other jurisdictions:

> …the idea of supported decision-making, for instance, or the idea of co-decision-making, just were not part of the agenda when the legislation was being framed and the principles to govern particular parts of the legislation were put together. When you look at the list in some other jurisdictions that have introduced legislation more recently, you find that supported decision-making, minimal interruption with informal arrangements and principles of that kind, have been added. While I would not want to see a list of 20, yes I do think that it is time to revisit the quartet that appear in section 14 (2).[244]

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240 Submission 6, p 2

241 Ms Nihal Danis, Senior Solicitor, Mental Health Advocacy Service, Legal Aid NSW, Evidence, 29 September 2009, p 58

242 Mr Douglas Herd, Executive Officer, Disability Council of NSW, Evidence, 28 September 2009, pp 46-47

243 Professor Terrence Carney, Sydney Law School, Evidence, 28 September 2009, p 32

244 Professor Carney, Evidence, 28 September 2009, p 32

6.49 Ms Robinson told the Committee that although the provisions in section 14 (2) could be improved, it was not essential, observing that there were additional provisions elsewhere in the Act that provided guidance, such as the principles in section 4 and the requirements in section 15 that the Tribunal not make a plenary order when it could make a time limited order and that it not appoint the Public Guardian when it could appoint a private guardian. Ms Robinson stated that the Tribunal operated on a 'least restrictive alternative' and that it only ever appointed a guardian 'when it [was] absolutely needed as a last resort.'[245]

6.50 Ms Robinson also reasoned that if the Tribunal was bound to consider a long list of factors it would be too prescriptive and may impinge on the its overall discretion and ability to consider individual cases on their merits:

> …we are not bound by a list of factors that we can consider, because that, I think, would be too prescriptive and would not allow us to look at each individual person's needs. As long as we have an overall discretion based on need and the object and principles of the Act, I think that is appropriate.[246]

Committee comment

6.51 The Committee notes that the Tribunal, when determining the need for a guardianship order under the *Guardianship Act 1987* is, after satisfying itself according to section 14 (1) of the Act that 'the person is a person in need of a guardian', required to then refer to section 3 ('Definitions') of the act to ascertain that 'a person in need of a guardian' is 'a person who, because of a disability, is totally or partially incapable of managing his or her person.'

6.52 The Committee considers this an unnecessarily cumbersome way of proceeding. The definition of 'a person in need of a guardian' as being 'a person incapable of managing his or her person' should be incorporated into the provisions of section 14 of the *Guardianship Act 1987* so that the primary considerations relating to determining the need for a guardianship order are all contained in the same section of the Act.

6.53 The Committee also notes that in Chapter 5 it has recommended the definition of 'a person in need of a guardian' be amended to omit the phrase 'because of a disability.'

6.54 The Committee notes the provision in section 14 (2) of the *Guardianship Act 1987* that the Tribunal shall have regard to the views of the person, the person's spouse and the person's carer when considering whether or not to make a guardianship order. The Committee acknowledges the argument from some inquiry participants that consideration of the views of this group has the potential to lead the Tribunal to sometimes make a guardianship order despite the existence of adequate informal arrangements.

6.55 However, the Committee notes that section 55 of the *Guardianship Act 1987* provides that the Tribunal 'may inform itself on any matter in such manner as it thinks fit' and considers that in the context of determining the need for a guardianship order it is fitting that the Tribunal obtain the views of this group of people.

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245 Ms Robinson, Evidence, 28 September 2009, pp 52-53

246 Ms Robinson, Evidence, 28 September 2009, p 53

6.56 Notwithstanding this, the Committee notes that section 14 of the *Guardianship Act 1987* does not explicitly require the Tribunal to consider the adequacy of existing informal arrangements, but only, at section 14 (2) (d), to consider the 'practicability of services being provided to the person without the need for the making of such an order.'

6.57 The Committee believes the section 14 should contain a provision explicitly requiring the Tribunal to consider the adequacy of existing informal arrangements. Such a provision would be consistent with the principles incorporated in the UNCRPD which the Committee, at the conclusion to Chapter 5, explicitly adopted in relation to this inquiry, namely, the presumption of capacity, the principle of least restriction and the promotion of assisted decision-making.

6.58 The Committee believes that the principle that a guardianship order is only made as a last resort would be further reinforced by a provision in section 14 of the *Guardianship Act 1987* that the Tribunal consider the 'need' for a guardianship order. This would also be consistent with section 25G of the *Guardianship Act 1987* relating to determining the need for a financial management order, addressed in detail later in this chapter.

6.59 Finally, the Committee acknowledges the view of some inquiry participants that section 14 of the *Guardianship Act 1987* should contain a provision requiring the Tribunal to consider the human rights of the person for whom the guardianship order is being sought when considering whether or not to make the order. In this respect, the Committee again notes the provisions in section 25G of the Act relating to financial management orders, requiring the Tribunal to consider whether the making of the order is in the person's best interests. The Committee believes that the same provision should exist in relation to determining the need for a guardianship order.

6.60 Therefore, the Committee recommends that section 14 of the *Guardianship Act 1987* containing the provisions under which the Tribunal determines the need for a guardianship order, be amended to:

- incorporate the definition of a person in need of a guardian as being a person who is not capable of managing his or her person, removing the need for the additional step of referring back to section 3 of the Act
- require that the Tribunal be satisfied there is a need for a guardian to be appointed
- require that the Tribunal be satisfied that a guardianship order would be in the person's best interests.

6.61 The Committee notes that the above amendment could be affected by modelling section 14 (1) of the *Guardianship Act 1987* on section 25G of the *Guardianship Act 1987*, to provide that the Tribunal may make a guardianship order in respect of a person only if the Tribunal has considered the person's capability to manage his or her person and is satisfied that:

(a) the person is not capable of managing his or her person, and

(b) there is a need for another person to be appointed as guardian, and

(c) it is in the person's best interests that the order be made.[247]

6.62 The Committee further recommends that section 14 (2) of the *Guardianship Act 1987* be amended to explicitly require the Tribunal to consider the adequacy of existing informal arrangements when determining the need for a guardianship order.

Recommendation 8

That the NSW Government pursue an amendment of the *Guardianship Act 1987* by modelling section 14 (1) on section 25G to provide that:

The Tribunal may make a guardianship order in respect of a person only if the Tribunal has considered the person's capability to manage his or her person and satisfied that:

- the person is not capable of managing his or her person, and
- there is a need for another person to be appointed as guardian, and
- it is in the person's best interests that the order be made.

Recommendation 9

That the NSW Government pursue an amendment of the *Guardianship Act 1987* so that, when considering the need for another person to be appointed as guardian, the Tribunal is to consider the adequacy of existing informal arrangements.

Duration and review of guardianship orders

6.63 This section looks at the duration of guardianship orders and the conditions under which they are reviewed, including the suggestion from some inquiry participants that reviews should be triggered by evidence of regained capacity rather than according to a pre-determined time schedule.

6.64 In relation to the duration of guardianship orders, the *Guardianship Act 1987* provides that the Tribunal may make an initial guardianship order for a maximum of one year or renew an order for a maximum of three years. However, in cases where the Tribunal is satisfied the person has permanent a permanent disability and is unlikely to 'become capable of managing his or her person' it may make an initial order for a maximum of three years and renew an order for maximum of five years.[248]

6.65 Ms Colleen Pearce, the Public Advocate of Victoria, observed that guardianship orders are generally of shorter duration in Victoria than in NSW and that increasingly the view in Victoria was that the statutory guardian should move in and out of people's lives quite quickly, consistent with the principle of restricting a person's rights as little as possible:

247 *Guardianship Act 1987* (NSW), s 25G

248 *Guardianship Act 1987* (NSW), ss 18 (1A), (1B) and (1C)

> If we are looking at it in a rights-based framework…appointments for guardianship should be decision specific…we should move in and out as quickly as possible. We are very keen on orders that expire, so that we do not have to go back to the tribunal. I think compared to New South Wales we probably have a similar number of people under guardianship but ours are there for less time already and we are conscious that we are taking away an individual's right.[249]

6.66 The majority of evidence received in relation to the review of orders related to financial management orders, which can be made without a time limit. Some inquiry participants did however specifically address the issue of reviewing guardianship orders.

6.67 In relation to the review of guardianship orders, the *Guardianship Act 1987* provides that:

> (1) The Tribunal may, on its own motion, review any guardianship order.
>
> (2) The Tribunal must review each guardianship order:
>
> (a) at the request of any person entitled to request a review of the order, and
>
> (b) at the expiration of the period for which the order has effect.[250]

6.68 Section 25B of the *Guardianship Act 1987*, 'Persons entitled to request review', provides that:

> The following persons are entitled to request a review of a guardianship order:
>
> (a) the guardian,
>
> (b) the person under guardianship ,
>
> (c) the Public Guardian,
>
> (d) any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person under guardianship.[251]

6.69 Professor Ronald McCallum, Professor of Industrial Law at Sydney Law School, proposed that 'we need to have review of every guardianship order, certainly no longer than every 12 months.'[252]

6.70 Ms Brenda Lee Doyle, Provincial Director of Office of the Public Guardian in Alberta, Canada, stated that Albertan legislation provided for guardianship orders to be limited to specific decisions, for example decisions that needed to be made in relation to cancer treatment, and that once the person recovered they automatically resumed their status as a capable person:

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249 Ms Colleen Pearce, Public Advocate of Victoria, Evidence, 5 November 2009, p 55

250 *Guardianship Act 1987* (NSW), s 25

251 *Guardianship Act 1987* (NSW), s 25B

252 Professor Ronald McCallum, Professor of Industrial Law, Sydney Law School, Evidence, 4 November 2009, p 5

> The idea is that someone can assess for that particular decision and someone can step in to make that decision. So, if it was cancer treatment, then a specific decision-maker would be appointed just for that decision. The idea is that once a person recovers, they still have their legal status as a capable person and you do not have to undo anything in the court, but they receive the treatment that they need.[253]

6.71 Ms Doyle further explained that Albertan legislation provided that the initial capacity assessment included an indication as to if and when the person may regain capacity, and that this information was used to set a review date:

> Under the capacity assessment process, the capacity assessor has to have in their report whether or not they believe that the adult would regain their capacity. If they do, when do they believe their capacity should be reassessed? That is looked at as part of every court application and then if there is a recommended review date, the judge, as part of the legislation, will put that that is when the court order has to be reviewed.[254]

6.72 In addition, Ms Doyle explained, if appointed decision-makers 'notice that the person has regained capacity or looks like they have regained capacity, then they can trigger a capacity assessment and take it back to court.'[255]

6.73 Professor Ian Hickie, Executive Director of the Brian and Mind Research Institute, University of Sydney, also suggested that review of guardianship orders could be based on evidence of regained capacity rather than after a pre-determined time period. Professor Hickie argued that modern testing procedures allowed for a change in capacity to be used as a trigger for review:

> I think in most review mechanisms people go for time rather than the capacity they are looking for. In the current environment, the more modern environment, particularly making use of things like neuropsychological measurement in more sophisticated ways, one can document what the situation is when a person is unwell and whether that situation has substantially changed requiring a review by an appropriate body. A way of dealing with that is to have evidence of improved capacity, having people undertake the appropriate testing, et cetera, which would then potentially trigger a review, demonstrating that a person had resumed reasonable capacity for the style and the decisions you are talking about.[256]

6.74 Mr Stephen Newell, Principal Solicitor and Manager, Legal Service, The Aged-care Rights Service, agreed with the proposition that orders could be reviewed on the basis of 'medical trigger points' rather than according to a pre-determined time frame, but expressed some concern for people who may not have people around them who would notice a change in their capacity and therefore trigger a review:

> The only reason I would question a little bit not having the automatic review is that in situations when people do not have people fussing over them, they would be

253 Ms Brenda Lee Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada, Evidence, 5 November 2009, p 12

254 Ms Doyle, Evidence, 5 November 2009, p 12

255 Ms Doyle, Evidence, 5 November 2009, p 12

256 Professor Ian Hickie, Executive Director, Brian and Mind Research Institute, University of Sydney, Evidence, 4 November 2009, p 25

> neglected and left in the system… [I]f there was somebody who did not have an advocate or a family member or whatever to say, "Excuse me, this is happening, he or she is better now or has reached this point", then it would not happen because there would not be an automatic review.[257]

Committee comment

6.75 The Committee notes that the Guardianship Tribunal currently operates under provisions that would lead to the regular review of guardianship orders, given that the maximum amount of time an order can be made or renewed is one year and three years respectively, or in the case of a person considered to have a permanent disability, three years and five years respectively. The Tribunal has the discretion to make or renew orders for periods less than these prescribed maximums. Furthermore, the Tribunal can, on its own motion or at the request of someone else, review a guardianship order before its expiration date.

6.76 Notwithstanding this, the Committee notes the recommendation from some inquiry participants that guardianship orders be reviewed at least annually. This would accord with the principles incorporated in the UNCRPD and adopted by the Committee, namely, the presumption of capacity and the least restrictive principle.

6.77 However, the Committee did not receive sufficient evidence on this matter to make a specific recommendation. In particular, the Committee did not receive evidence on the resource implications for the Guardianship Tribunal of a requirement to review all guardianship orders at least annually.

6.78 The Committee also notes the proposal from some inquiry participants that guardianship orders not be time limited but instead that the trigger for their review be regained capacity as determined by reassessment.

6.79 However, again the Committee did not receive sufficient evidence to make a specific recommendation in this regard. The Committee notes that a move from time-based reviews to reviews triggered by regained capacity would require extensive guidelines as to how and by whom an indication of regained capacity was to be reported and how and by whom regained capacity would be assessed.

6.80 Therefore, the Committee recommends that the NSW Government further investigate the adequacy of existing provisions for the review of guardianship orders and in particular consider the possibility of annually reviewing guardianship orders or establishing a new protocol whereby the review of guardianship orders is triggered by evidence of regained capacity.

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257 Mr Stephen Newell, Principal Solicitor and Manager, Legal Service, The Aged-care Rights Service, Evidence, 5 November 2009, p 18

Recommendation 10

That the NSW Government consider the adequacy of existing provisions for the review of guardianship orders and in particular consider the possibility of annually reviewing guardianship orders or establishing a new protocol whereby the review of guardianship orders is triggered by evidence of regained capacity.

Financial Management Orders

6.81 The preceding sections of this chapter have examined some aspects of the way the Guardianship Tribunal operates in general. This section examines the way in which the Tribunal determines and subsequently reviews the need for one of the specific orders available to it: financial management orders.

Factors considered in making a financial management order

6.82 Section 25G of the *Guardianship Act 1987*, 'Grounds for making financial management order' provides that the Tribunal may make a financial management order only if after considering the person's capability to manage his or her own affairs it is satisfied that:

(a) the person is not capable of managing those affairs, and

(b) there is a need for another person to manage those affairs on the person's behalf, and

(c) it is in the person's best interests that the order be made.[258]

6.83 The Blake Dawson Pro Bono Team submission noted that 'need', as it is used in s 25G (b), is not defined. It noted the relevance of informal arrangements that may exist in relation to a person for whom an order is being sought, and that if effective informal arrangements existed this could be interpreted as reducing the 'need' for a financial management order.[259] Their submission noted that in practice the Guardianship Tribunal takes this approach, and requires that existing informal arrangements are not working before proceeding with making a financial management order:

> The Tribunal, in our experience, interprets 'need' as requiring that existing arrangements are not working, or, as it has been put by many carers and parents we have spoken with, that 'the Tribunal will only get involved if there is a crisis'. The Tribunal's website states that the Tribunal will not make an order if the person already has informal arrangements in place that are working in the best interests of the person. The questions it asks people considering making an application include 'Are there decisions that need to be made now that cannot be made by someone informally?'[260]

258 *Guardianship Act 1987* (NSW), s 25G

259 Submission 25, Blake Dawson Pro Bono Team, pp 12-13

260 Submission 25, p 13

6.84 However, the Blake Dawson Pro Bono Team submission stated that while it agreed that informal arrangements should be considered, the lack of a financial management order for a person incapable of managing their affairs can lead to problems in three areas, as follows:

> (a) without the appointment of a financial manager there is often no independent oversight of the informal financial management. Given the vulnerability of people with impaired capacity to exploitation independent oversight is often desirable;
>
> (b) it can be difficult to determine whether or not the person understood the decision made with assistance and whether or not the decision was an exercise of the person's free will; and
>
> (c) informal decision-making depends on the consent of the person with impaired capacity and is often undertaken for a person who lacks ability to consent.[261]

6.85 In relation to the third point, the Blake Dawson Pro Bono Team submission stated that the parents and carers of people who lack the ability to give consent 'are very concerned that they do not have any legal authority to manage the financial affairs of the person they care for and cannot obtain such authority unless there is a crisis.' It concludes that 'where a person lacks capacity to manage their financial affairs on an ongoing basis and lacks capacity to give the consent required for informal arrangements, that should be sufficient to demonstrate the need for an order under s 25G(2) of the *Guardianship Act*.'[262]

6.86 The NSW CID submission similarly stated that the meaning of 'need' in section 25G (b) of the *Guardianship Act 1987* was 'unclear' and that it was arguable that 'one should look at the adequacy of informal arrangements such as a power of attorney in considering the issue of need'.[263] The NSW CID submission argued that section 25G (b) and (c) should be replaced:

> It would be both clearer and consistent with Australia's human rights obligations to replace s 25G (b) and (c) with a simple requirement that the Tribunal be satisfied that there is a need for a financial management order to be made.[264]

6.87 Professor Terrence Carney from the Sydney Law School stated that section 25G (c) was a 'nonsense proposition' and that it should be removed. 'It does not indicate,' argued Professor Carney, 'what factors, what reasoning process one should enter into.'[265] Professor Carney also argued that the 'best interests' criterion was paternalistic, old fashioned unhelpful:

> …the problem with the 'best interests' is also of course that it is paternalism writ large. In constructing legislation, but this legislation in particular, the main tension is between autonomy of the individual and somebody else's view of what is best for, say

261 Submission 25, p 13

262 Submission 25, p 13

263 Submission 6, p 2

264 Submission 6, p 2

265 Professor Carney, Evidence, 28 September 2009, p 32

> Terry Carney. 'Best interests' is squarely at the far paternalistic end. It has that old-fashioned ring to it, apart from being an unhelpful criterion.[266]

6.88 The Blake Dawson Pro Bono Team submission noted that while section 14 (2) of the *Guardianship Act 1987* in relation to the making of a guardianship order provides that the Tribunal consider the views of the person, the person's spouse and the person's carer, there are no such provisions in relation to financial management orders. The submission recommended that the same provisions should apply and that the Tribunal should be required to consider the views of this group of people when determining the need for a financial management order.[267]

6.89 Ms Dodds, while observing that in practice the views of this group of people was, where possible, taken into account by the Tribunal, also agreed that the two sections of the *Guardianship Act 1987* should be harmonised:

> I think whenever there is an apparent inconsistency where the Act says one thing in one area but not in another, even when the practice is occurring, it is no doubt better to put it into the legislation.[268]

6.90 Mr Paul Marshall, Manager, Quality Service and Community Relations, NSW Trustee and Guardian, added that when orders were made without involvement of family members, the role of the NSW Trustee and Guardian was made more difficult:

> …in situations where an order is made and there has not been involvement in the hearing process by all family members or all interested family members, it does make our role as the financial manager more difficult because we then tend to be the recipient of concerns people have about the process by which the order was made…[269]

6.91 The Blake Dawson Pro Bono Team submission also noted that when determining the need for a guardianship order section 14 (2) (d) of the *Guardianship Act 1987* required that the Tribunal have regard to 'the practicability of services being provided to the person without the need for the making of such an order' the same provision did not exist in relation to financial management orders. The submission recommended that the same provisions should apply and that the Tribunal should be required to consider whether services can be provided to the person without a guardianship order being made.[270]

Committee comment

6.92 The Committee acknowledges the argument that even where informal arrangements are seen to be working, the benefits of having a financial management order in place include: 1) independent oversight; 2) clarity for family members and carers of people lacking the ability to

266 Professor Carney, Evidence, 28 September 2009, p 32

267 Submission 25, p 9

268 Ms Imelda Dodds, Acting Chief Executive Officer, NSW Trustee and Guardian, Evidence, 28 September 2009, p 8

269 Mr Paul Marshall, Manager, Quality Service and Community Relations, NSW Trustee and Guardian, Evidence, 28 September 2009, p 8

270 Submission 25, pp 9-10

give consent that they have the legal authority to manage that person's affairs, and; 3) such legal authority exists without there having to be a crisis precipitating an application to the Guardianship Tribunal.

6.93 The Committee acknowledges the recommendation from the Blake Dawson Pro Bono Team that the 'need' for a financial management order should be taken to exist in circumstances where a person lacks capacity to manage their financial affairs on an ongoing basis and lacks capacity to give the consent required for informal arrangements.

6.94 However, the Committee considers that as it stands, section 25G (b) of the *Guardianship Act 1987* requiring the Tribunal be satisfied that 'there is a need for another person to manage those affairs on the person's behalf' before making a financial management order, gives the Tribunal the discretion to consider any difficulties created for family members and carers when determining the need for such an order, and importantly, gives the Tribunal the discretion to consider a wide range of other factors impossible to foresee in advance. The Committee considers that defining 'need' more strictly in relation to financial management orders would unnecessarily restrict the Tribunal's discretion to consider this wide range of factors.

6.95 In addition, the Committee considers that making a financial management order in circumstances where informal arrangements are seen to be working is against the principle of least restriction and the principle that financial management orders are made only as a last resort.

6.96 The Committee agrees with inquiry participants who argue that there is an inconsistency between the provisions in section 14 (2) and section 25G of the *Guardianship Act 1987* and that these sections should be harmonised. Section 14 (2) requires the Tribunal, when determining the need for a guardianship order, to consider the views of the person, the person's spouse and their carer, and the practicability of services being delivered to the person without the need for a guardianship order. Section 25G does not require the same considerations in relation to determining the need for a financial management order.

6.97 The Committee agrees that the Tribunal, when considering the need for either a guardianship order or financial management order, should have regard to the factors set out in section 14 (2) of the *Guardianship Act 1987*. The Committee notes that at Recommendation 9 it has recommended an amendment to the *Guardianship Act 1987* to explicitly require the Tribunal to consider, in addition to those factors currently in section 14 (2), the adequacy of existing informal arrangements when determining the need for a guardianship order.

6.98 Therefore, the Committee recommends that the *Guardianship Act 1987* be amended to provide that the Tribunal, when determining the need for a financial management order, shall have regard to the following:

(a) the views (if any) of:

(i) the person, and

(ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and

(iii) the person, if any, who has care of the person,

(b) the importance of preserving the person's existing family relationships,

(c) the importance of preserving the person's particular cultural and linguistic environments, and

(d) the practicability of services being provided to the person without the need for the making of such an order.

6.99 The Committee further recommends an amendment to the *Guardianship Act 1987* to explicitly require the Tribunal to consider, in addition to those factors currently in section 14 (2), the adequacy of existing informal arrangements when determining the need for a financial management order.

Recommendation 11

That the NSW Government pursue an amendment of the *Guardianship Act 1987* to provide that the Tribunal, when determining the need for a financial management order, shall have regard to the following:

(a) the views (if any) of:

(i) the person, and

(ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and

(iii) the person, if any, who has care of the person,

(b) the importance of preserving the person's existing family relationships,

(c) the importance of preserving the person's particular cultural and linguistic environments, and

(d) the practicability of services being provided to the person without the need for the making of such an order.

Recommendation 12

That the NSW Government pursue an amendment to the *Guardianship Act 1987* to explicitly require the Tribunal to consider the adequacy of existing informal arrangements when determining the need for a financial management order.

Appointing a financial manager

6.100 Having determined the need for a financial management order, the Guardianship Tribunal proceeds to appointing a financial manager for the person for whom the order has been sought. Section 25M of the *Guardianship Act 1987* provides that in respect of the person's estate, the Tribunal may:

> (b) appoint a suitable person as manager of that estate, or
>
> (c) commit the management of that estate to the NSW Trustee[271]

Appointing a private manager

6.101 A 'suitable person' or organisation other than the NSW Trustee and Guardian appointed as financial manager was referred to throughout the inquiry as a 'private' financial manager. A private financial manager can be an individual, such as a friend or family member of the person under management, or a commercial trustee corporation.[272]

6.102 The Blake Dawson Pro Bono Team submission noted that the requirement that a financial manager, other than the NSW Trustee and Guardian, be 'suitable' is a less thorough assessment than that provided in section 17 (1) of the *Guardianship Act 1987* in relation to prospective guardians, other than the Public Guardian.[273] Section 17 (1) provides that to appoint a guardian, other than the Public Guardian, the Tribunal must be satisfied that:

> (a) the personality of the proposed guardian is generally compatible with that of the person under guardianship
>
> (b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship , and
>
> (c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.[274]

6.103 The Blake Dawson Pro Bono Team submission argued that 'in the same way guardians are closely involved in the life of a person under guardianship, a financial manager will have frequent and direct contact with the person whose estate they manage and substantial control over their day-to-day lives', and recommended that the same criteria be applied to financial managers as is applied to guardians.[275]

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271 *Guardianship Act 1987* (NSW), s 25M (1)

272 Mr Ross Ellis, Executive Director, Trustee Corporations Association of Australia, Evidence, 4 November 2009, p 15

273 Submission 25, p 10

274 *Guardianship Act 1987* (NSW), s 17 (1)

275 Submission 25, p 10

6.104 Ms Robinson stated that in practice the Guardianship Tribunal assessed the suitability of prospective financial managers for the role by rigorously testing the evidence presented to it, including information gathered by the Co-ordination and Investigation Unit:

> We are making the decision about the suitability of a person for appointment based on evidence presented, and we are rigorously testing that evidence…I would be asking you about your experience and your knowledge of [the person for whom the order is being made] and his views, whether your finances are intermingled with his in any way and what your plans are for his estate. We would ask you a whole range of questions to make sure that you would be able to undertake this role.
>
> [The Co-ordination and Investigation Unit] will have spoken to other people around you and around the person with the disability and if there is anything that is really untoward hopefully they would have identified that and that would be apparent to us.[276]

6.105 The NSW Trustee and Guardian oversees private financial managers. A detailed discussion of this oversight function is presented in Chapter 9.

Committee comment

6.106 The Committee agrees with the Blake Dawson Pro Bono Team that the *Guardianship Act 1987* should provide that the Tribunal apply the same criteria when assessing the suitability of either a prospective guardian or financial manager, and notes that these criteria do not apply to either the Public Guardian or the NSW Trustee and Guardian.

6.107 Therefore, to promote consistency between the process followed when appointing either a guardian or financial manager, the Committee recommends that the *Guardianship Act 1987* be amended to provide that the Tribunal, when determining the suitability of a prospective financial manager, other than the NSW Trustee and Guardian, consider the factors provided in section 17(1) of the Act, and not find that person suitable unless it is satisfied that:

(a) the personality of the proposed financial manager is generally compatible with that of the person under the financial management order,

(b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed financial manager and those of the person under the financial management order, and

(c) the proposed financial manager is both willing and able to exercise the functions conferred or imposed by the proposed financial management order.

276 Ms Robinson, Evidence, 28 September 2009, p 57

Recommendation 13

That the NSW Government pursue an amendment to the *Guardianship Act 1987* to require that the Tribunal shall not be satisfied a prospective financial manager, other than the NSW Trustee and Guardian, is suitable unless it is satisfied that:

(a) the personality of the proposed financial manager is generally compatible with that of the person under the financial management order

(b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed financial manager and those of the person under the financial management order and

(c) the proposed financial manager is both willing and able to exercise the functions conferred or imposed by the proposed financial management order.

Appointing the NSW Trustee and Guardian

6.108 Ms Dodds explained that the NSW Trustee and Guardian is the statutory financial manager who is appointed as the financial manager of last resort, adding that the preference for a private manager to be appointed was good practice:

> …it is…commonsense and good practice that if there is someone in the person's life who is willing and able to be responsible for that they should be appointed as a private financial manager.[277]

6.109 Ms Dodds further stated that although in practice the NSW Trustee and Guardian was considered the financial manager of last resort, this was not explicitly stated in the *Guardianship Act 1987,* as was the case in relation to guardianship where the Public Guardian is expressly described as the guardian of last resort. Ms Dodds stated that it would be preferable if the *Guardianship Act 1987* was consistent in describing both the NSW Trustee and Guardian and the Public Guardian as the financial manager and guardian respectively of last resort.[278]

6.110 Mr Mark Orr likewise suggested the Committee consider the fact that the *Guardianship Act 1987* does not require the NSW Trustee and Guardian to be appointed as the financial manager of last resort.[279]

6.111 Ms Anne Cregan, Pro Bono Partner at Blake Dawson Lawyers, also supported the *Guardianship Act 1987* being explicit on this point, subject to legislation also providing for consideration of the person subject to the order's best interests, in order to weigh the merits of a private manager who is available but not entirely suitable against those of the statutory manager of last resort.[280]

277 Ms Dodds, Evidence, 28 September 2009, p 6

278 Ms Dodds, Evidence, 28 September 2009, p 6

279 Submission 15, p 5

280 Ms Anne Cregan, Pro Bono Partner, Blake Dawson Lawyers, Evidence, 29 September 2009, p 4

Committee comment

6.112 The Committee agrees that the NSW Trustee and Guardian should be considered the financial manager of last resort if it is determined that the person for whom the order is sought is incapable of managing his or her own affairs.

6.113 The Committee also agrees that the *Guardianship Act 1987* should clearly state that the NSW Trustee and Guardian only be considered as the financial manager as a last resort after the appointment of a private manager has been considered.

6.114 The Committee is satisfied that if its Recommendation 13 is implemented the *Guardianship Act 1987* will provide for an assessment of the suitability of private managers sufficient to allow the Guardianship Tribunal to consider the best interests of the person for whom the order is being made in terms of weighing the suitability of an available private manager with the suitability of the NSW Trustee and Guardian as manager of last resort.

6.115 Therefore, the Committee recommends that the *Guardianship Act 1987* be amended to explicitly state that the NSW Trustee and Guardian is to be considered the financial manager of last resort and appointed only after consideration of the availability and suitability of a private manager has been made.

Recommendation 14

That the NSW Government pursue an amendment to the *Guardianship Act 1987* to clarify that the NSW Trustee and Guardian is to be considered the financial manager of last resort and appointed only after consideration of the availability and suitability of a private manager, whether that be a friend or family member or a commercial trustee corporation, has been made.

Duration and review of financial management orders

6.116 Section 25N of the *Guardianship Act 1987* provides that:

> The Tribunal may order that a financial management order be reviewed within a specified time.[281]

6.117 Section 25N further provides that:

> The Tribunal:
>
> (a) may, at any time on its own motion , and
>
> (b) must, on an application under section 25R for revocation or variation of the order,
>
> review a financial management order.

281 *Guardianship Act 1987* (NSW), s 25N (1)

6.118 Section 25R of the *Guardianship Act 1987* provides that:

> The following persons are entitled to apply for an order revoking or varying a financial management order:
>
> (a) the protected person concerned,
>
> (b) the NSW Trustee,
>
> (c) the manager of the estate, or part of the estate, of the protected person,
>
> (d) any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the protected person.[282]

6.119 Some inquiry participants expressed concern that financial management orders made by the Guardianship Tribunal could be made without a time limit or the requirement for periodic review, unlike guardianship orders that can be made for a maximum of five years,[283] and supported a provision for the automatic review of financial management orders.[284] It was variously proposed to the Committee that financial management orders should be automatically reviewed annually,[285] at least every two years,[286] at least every three years,[287] or at least every five years.[288]

6.120 Mr Herd argued that orders extending beyond five years did not comply with the 'least restrictive' principle contained in the United Nations Convention on the Rights of Persons with Disabilities.[289]

6.121 Similarly, the Blake Dawson Pro Bono Team, in its submission, proposed that automatic review of financial management orders was consistent with the least restrictive principle and would give 'people who believe they can manage their finances the opportunity to argue to retain their autonomy from time-to-time…'[290]

6.122 Some inquiry participants stated that the fact that a person's capacity or the circumstances that contributed to the order being made in the first place can change supported the need for automatic review of orders such as financial management orders.

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282 *Guardianship Act 1987* (NSW), s 25R

283 See for example Submission 25, p 7; Mr Herd, Evidence, 28 September 2009, p 46

284 Ms Danis, Evidence, 29 September 2009, p 57; Mr Simpson, Evidence, 29 September 2009, p 38; Mr Benjamin Fogarty, Principal Solicitor, Intellectual Disability Rights Service, Evidence, 29 September 2009, p 32; Submission 22, Public Interest Advocacy Centre Ltd, p 6; Submission 6, p 2

285 Submission 34, Physical Disability Council of NSW, p 3

286 Submission 3, Intellectual Disability Rights Service, p 14

287 Submission 25, p 14

288 Mr Simpson, Evidence, 29 September 2009, p 41

289 Mr Herd, Evidence, 28 September 2009, p 46

290 Submission 25, p 15

6.123 Ms Rachel Merton, Chief Executive Officer of the Brain Injury Association of NSW, told the Committee that cognitive ability can change over time and that while an order may be made at a time when the person has limited cognitive ability, 'a few months later, or a year later, they may have recovered quite significantly to be able to take part in their own decisions.'[291]

6.124 Similarly, Ms Janene Cootes, Executive Officer, Intellectual Disability Rights Service, noted that although a person's disability may not change, 'their capacity to learn and develop new skills is crucial.' Ms Cootes further noted that the person's circumstances may change and additional support may become available:

> Somebody may be in a situation where informal assistance with financial matters is not available, but they might then move to a different situation where there is good informal and trustworthy support. It is not only the person's capacity that is at issue but also their circumstances.[292]

6.125 Mr Simpson acknowledged that with intellectual disability a person's capacity may not change significantly, but argued that if a financial management order was initially made to protect a person from exploitation, it may be that after some time the person seeking to exploit is no longer in the person's life and that 'informal arrangements are adequate to support the person with his or her money'.[293]

6.126 Mr Herd acknowledged that in some cases automatic review of financial management orders would be unnecessary, for example in cases where the person had sustained a brain injury with little prospect of recovering capacity or suffered from dementia. '[T]he family of that young man with the brain injury,' suggested Mr Herd, 'does not need to be reminded of the trauma every 5 to 10 years…because we know that there is not going to be recovery.' Mr Herd gave a further example, suggesting that a person with dementia '[does] not need to be hauled in every 18 months for the compulsory capacity-making assessment and confronted with, yes you are somebody with a 12-year history of dementia.'[294]

6.127 However, Mr Herd argued that the review process could be sophisticated enough to focus only on cases where there was improvement:

> I think the systems we devise need to be sophisticated enough to test where appropriate to ensure that the rights of the people are protected and that if there is improvement or change, that that can be recognised and a decision can be rescinded, but not so onerous, frequent or intrusive as to keep bringing people back to the point of injury or loss because human beings just do not need that in their lives.[295]

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291 Ms Rachel Merton, Chief Executive Officer, Brain Injury Association of NSW, Evidence, 29 September 2009, p 22

292 Ms Janene Cootes, Executive Officer, Intellectual Disability Rights Service, Evidence, 29 September 2009, p 32

293 Mr Simpson, Evidence, 29 September 2009, p 41

294 Mr Herd, Evidence, 28 September 2009, pp 49-50

295 Mr Herd, Evidence, 28 September 2009, p 50

6.128 The NSW Guardianship Tribunal submission responded to the proposals from other inquiry participants for automatic review of financial management orders by bringing to the Committee's attention the following points:

- every person whose estate is being managed under a financial management order has the right to request that the order be reviewed. A review may result in the order being revoked or varied or the appointed manager being replaced.
- these requests can also be made by the appointed financial manager, the NSW Trustee or any other person who has a genuine concern for the welfare of the person whose estate is being managed.
- when the Tribunal makes a financial management order, it may specify that the order be reviewed by the Tribunal within a certain period. This enables the Tribunal to review the need for a financial management order after a specified period of time. This may happen if there are only certain areas which need the assistance of a manager, for example selling a property or finalising litigation.[296]

6.129 However, the joint submission of People With Disability Australia and the NSW Mental Health Coordinating Council, while acknowledging the provisions for review of financial management orders nevertheless stated that in practice they 'are generally not subject to review.' Their submission noted that 'current arrangements essentially require the person subject to the order to seek the termination or revocation of the estate management order' and that although the NSW Trustee and Guardian can order a review, in practice it 'rarely if ever does so.'[297]

6.130 Similarly, Ms Cootes stated that instances where the Tribunal itself orders a review of a financial management order were 'much more the exception than the rule.' Ms Cootes argued that whereas under the current system 'the Tribunal justifies reviewing rather than justifies not reviewing', a reversal of this onus was preferable, and that the Tribunal, 'if it does not order a review, should have to say why, so that that made the Tribunal think about the issue…'

6.131 Insofar as the person subject to the order themselves initiating a review, Ms Cootes stated that 'it is very difficult for our clients to initiate a review because of their disability… [f]or many of them who might want and need a review it will not occur if it depends on their initiating it.'[298]

6.132 Ms Merton made a similar point in relation to orders made by the courts, where the process for review was particularly 'complex' resulting in people remaining under orders even when their decision-making capacity had improved:

> If someone has an order through the courts it is such a difficult process to get that reversed or reviewed. So people find themselves stuck in these situations when at a later point they can make decisions, or people around them can assist them to make decisions, but they are still under the order. Either they do not realise that they can go

296 Submission 5a, pp 5-6

297 Submission 4, People with Disability Australia Inc and NSW Mental Health Coordinating Council, pp 11-12

298 Ms Cootes, Evidence, 29 September 2009, p 33

> and have the order reviewed or challenged, or they just find the process too intimidating or difficult to go through.[299]

6.133 Ms Robinson stated that the Guardianship Tribunal operated 'on a needs basis' in relation to reviewing financial management orders, and under the current system reviewed approximately one third of the financial management orders it made. One argument against automatic review of financial management orders, noted Ms Robinson, was that an unnecessary review exposed the person under the order to a legal process many found distressing. When they come to the Tribunal, explained Ms Robinson, many people with disabilities 'think they have done something wrong. They think they are in strife.'[300]

6.134 Similarly, the NSW Trustee and Guardian contended that any legislation requiring automatic reviews would need to accommodate the fact that not all people under management require review and for some it would be 'burdensome and distressing':

> If we were to move to a legislated scheme of mandated reviews it would be important to recognise that not all orders would require a set review and indeed the process of the same could be unnecessarily burdensome and distressing on parties…
>
> We would recommend that legislation not be so prescriptive that it becomes emotionally and financially costly.[301]

6.135 However, Ms Robinson acknowledged that automatic reviews would have the advantage of 'making sure that the order is there only for as long as is necessary', and stated that she would not be opposed to the automatic review of financial management orders provided the Tribunal was provided with the additional resources required to undertake the reviews.[302]

6.136 The NSW Trustee and Guardian pointed out that it too would require additional resources to produce reports for the automatic review of financial management orders. It estimated the additional resources required under two scenarios:

> In Scenario 1. all financial management orders for both new and existing clients would be reviewed initially at the end of the first 2 years and then each following 2 years until such time as the Order was discontinued. We estimate that an average (ie, combined Direct Management plus Private Management) of 6,381 Review Reports would be required to be produced to the Court and Tribunals each year over the next 5 years. This would result in an extra 15 full time staff being required just to undertake the work necessary to prepare reports for hearing.
>
> In Scenario 2. all new financial management orders would be reviewed initially after the first 2 years and then subsequently after another 5 years if not discontinued earlier. We estimate that an average of 1,786 review reports would be required to be produced to the Court and Tribunals each year over the next 5 years (commencing from year 3).

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299 Ms Merton, NSW, Evidence, 29 September 2009, p 22

300 Ms Robinson, Evidence, 28 September 2009, p 58

301 Answers to questions on notice taken during evidence 28 September 2009, Ms Imelda Dodds, Acting Chief Executive Officer, NSW Trustee and Guardian, Question 12, p 10

302 Ms Robinson, Evidence, 28 September 2009, p 58

> This results in an additional 4.2 full time staff required just to undertake the work necessary to prepare reports for hearing.[303]

6.137 The Intellectual Disability Rights Service submission stated that automatic review of financial management orders would require the Guardianship Tribunal 'being properly funded and resourced for this task, so that reviews will be meaningful and procedurally fair.'[304]

6.138 The NSW Council for Disability submission also stated that if automatic reviews of financial management orders were to be implemented 'it is essential that the Guardianship Tribunal be fully resourced for the task. Otherwise, the reviews would not be meaningful processes and/or the Tribunal's already overstretched resources would be spread too thinly.'[305]

6.139 In relation to the increased costs of automatically reviewing financial management orders, Mr Herd suggested that such reviews may allow authorities ' to intervene more appropriately in the lives of people who may be receiving an inappropriate service' and allow people to become less dependent on costly services:

> We can imagine interventions over the period of their lives that might allow them more independent living, enable them to take an increasingly large part of some decision-making processes in their lives, and therefore be less dependent on a service system that will become more and more expensive as the years go by.[306]

Committee comment

6.140 The Committee notes that although financial management orders can be made without a time limit, legislative provisions do currently exist for the Tribunal, when making a financial management order, to specify the time within which the order must be reviewed.

6.141 The Committee further notes that various parties can apply for the review of a financial management order, including the person subject to the order, the NSW Trustee and Guardian, the appointed manager if other than the NSW Trustee and Guardian, and any other person who in the opinion of the Tribunal has a genuine concern for the welfare of the person subject to the order.

6.142 In this regard, the Committee notes that on the evidence of Ms Diane Robinson, the President of the NSW Guardianship Tribunal, the Tribunal currently reviews approximately one third of the financial management orders it makes, and that further reviews would require further resources.

6.143 The Committee understands that the primary concern of inquiry participants in relation to the review of financial management orders appears to be that there are circumstances where the person themselves must instigate the review, and that in practice there are a number of reasons why the person may not be willing or able to instigate the review.

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303 Answers to questions on notice taken during evidence 28 September 2009, Ms Dodds, Question 12, p 11

304 Submission 3, p 14

305 Submission 6, p 2

306 Mr Herd, Evidence, 28 September 2009, p 46

6.144 The Committee also acknowledges that reviewing financial management orders accords with the principle of least restriction in that it allows the order to be tailored to the potentially changing circumstances and capacity of the person subject to the order.

6.145 The Committee notes that according to the modelling conducted by the NSW Trustee and Guardian, automatically reviewing financial management orders would require significant additional resources.

6.146 The Committee recommends that the NSW Government investigate the appropriateness of amending the *Guardianship Act 1987* to require the automatic review of financial management orders by the Guardianship Tribunal with particular regard to the resource implications for the Tribunal of the additional reviews such an amendment would require it to undertake.

Recommendation 15

That the NSW Government consider amending the *Guardianship Act 1987* to require the automatic review of financial management orders by the Guardianship Tribunal.

That the NSW Government consider in particular the additional burden such an amendment may place on the resources of the Guardianship Tribunal.

Revocation of financial management orders

6.147 The potential outcome of a review of a financial management order by the Guardianship Tribunal is the revocation of that order. Section 25P of the *Guardianship Act 1987* provides that the Tribunal may revoke a financial management order only if:

> (a) the Tribunal is satisfied that the protected person is capable of managing his or her affairs, or
>
> (b) the Tribunal considers that it is in the best interests of the protected person that the order be revoked (even though the Tribunal is not satisfied that the protected person is capable of managing his or her affairs).[307]

6.148 The Intellectual Disability Rights Service submission stated that the requirements for the revocation of a financial management order are 'far too onerous' compared to the requirements for the making of the order in the first place. While the requirements for revocation essentially mirror two of the three requirements for the initial order – that the person is not capable of managing his or her affairs, and that it is in their best interests that the order be made – the IDRS submission argued that it is unfair the 'need' for the order is not considered in the context of revocation:

> IDRS considers it starkly unfair that there is no alternative limb in section 25P(2) for there no longer being a 'need' for a person's affairs to be managed by another person available to a person to seek revocation, while there is a 'need' limb in section 25G to place the person under a financial management order.[308]

307 *Guardianship Act 1987* (NSW) s 25P (2)

308 Submission 3, p 15

6.149 The IDRS submission proposed that a 'need' criterion be added to those considered in the context of revocation:

> IDRS strongly submits that section 25P(2) should include a 'no longer a need' alternative limb, with wording like: c) it is satisfied that there is no longer a need for another person to manage the affairs (currently under management) on the person's behalf.[309]

6.150 Mr Herd also argued that '[t]he ability to rescind a decision or the facility to rescind a decision or reverse it…ought to be no less difficult than getting into the situation in the first place.'[310]

6.151 The Blake Dawson Pro Bono Team submission noted that 'for a financial management order to be revoked it must be proven that the person is capable of managing their own affairs' but that 'almost impossible for a person who has not managed their finances for the period of the order to prove they can manage their finances.'[311]

6.152 Ms Robinson also noted that 'it is hard to get an order revoked on the current legal standards because you have to prove capacity. If you have been under an order it is hard to prove capacity.'

6.153 In this regard Ms Robinson observed that the Tribunal will often adjourn the matter to allow the person to gain some experience in managing their estate:

> Often we adjourn and we suggest they go away and ask the trustee or whoever is managing them to give them a little go on their own. They might come back after six months and they have had a trial run and then they have good, solid evidence that they can manage.[312]

6.154 Section 71 of *NSW Trustee and Guardian Act 2009* provides for the manager of the estate to:

> …authorise the managed person to deal with so much of the estate as the manager considers appropriate…[313]

6.155 However, the Blake Dawson Pro Bono Team submission stated that although '[u]nder s 71 (2) of the [*NSW Trustee and Guardian Act 2009*] the Trustee may authorise a person to manage part of their estate…in the experience of our clients the [former Office of the Protective Commissioner] was cautious in providing such opportunities.'[314]

6.156 The IDRS submission recommended that the provision under section 71 of the *NSW Trustee and Guardian Act 2009* allowing the manager of the estate to hand back management of part of the estate to the person 'needs to be promoted and more readily accessible for people under

309 Submission 3, p 15

310 Mr Herd, Evidence, 28 September 2009, p 50

311 Submission 25, p 14

312 Ms Robinson, Evidence, 28 September 2009, p 59

313 *NSW Trustee and Guardian Act 2009* (NSW), s 71 (2)

314 Submission 25, p 14

financial management orders. This could be achieved by making it a process that must be considered and offered by the Guardianship Tribunal at the (automatic periodic) reviews.'[315]

6.157 The Blake Dawson Pro Bono Team submission pointed out that the medical evidence generally required to support regained capacity can be expensive to obtain:

> …generally medical evidence of capacity is required. It is expensive to obtain medical reports and the person under management is often reliant on the manager whose appointment they are challenging to provide the funds to obtain the report.[316]

6.158 In this regard, Mr Paul O'Neill, Business Development Manager, Trust Company Limited, stated that a person whose funds were being managed under a financial management order can be provided with some of those funds in order to obtain the appropriate medical evidence:

> We would use their funds to enable them to see the appropriate medical specialists to be reassessed so that if there was a determination by the two doctors that are required, we would then look at whether there maybe is an ability or a realistic chance of an approach to the Guardianship Tribunal, for instance, for a determination of capacity. [317]

6.159 The Public Interest Advocacy Centre (PIAC) submission stated that 'individuals seeking a review must overcome lack of support to make their own decisions, lack of access to legal advice and an independent advocate, and gain support from the body or person who controls their finances and other life decisions' and that the difficulty of the review process meant that 'estate management orders without an expiry date are rarely revoked and usually operate on a perpetual basis.' The PIAC submission further stated that in the 2007/2008 financial year, 35% of the 370 financial management orders reviewed by the Guardianship Tribunal were revoked.[318]

Committee comment

6.160 The Committee notes that under section 25P of the *Guardianship Act* 1987, in order for a financial management order to be revoked the Tribunal must effectively be satisfied that two of the three conditions under which the order was originally made no longer exist: that is, the person is now capable of managing their affairs, and that is no longer in their best interests that the order be in place.

6.161 The Committee notes that there is no legislative requirement that the Tribunal consider the third condition under which the order was originally made, that there remains a 'need' for the a person to manage the affairs of the person subject to the order.

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315 Submission 3, p 16

316 Submission 25, p 14

317 Mr Paul O'Neill, Business Development Manager, Trust Company Limited, Evidence, 4 November 2009, p 14

318 Submission 22, pp 2-3

6.162 The Committee agrees with the Intellectual Disability Rights Service that there should be a 'need' criterion added to those considered in the context of revocation, to mirror the criteria considered in the context of making the order in the first place.

6.163 Therefore, the Committee recommends that section 25P of the *Guardianship Act 1987* be amended to provide that the Tribunal may revoke a financial management order if it is satisfied there is no longer a need for a person to manage the affairs of the person subject to the order.

6.164 The Committee notes that if such an amendment is made, the Tribunal will have the discretion to consider any experience the person may have had in managing a part of their estate under section 71 of the *NSW Trustee and Guardian Act 2009*.

Recommendation 16

That the NSW Government pursue an amendment to section 25P of the *Guardianship Act 1987* to provide that the Tribunal may revoke a financial management order if it is satisfied there is no longer a need for a person to manage the affairs of the person subject to the order.

Chapter 7 Making substitute decision-making orders – The Mental Health Review Tribunal

The preceding chapter examined the role of the Guardianship Tribunal in making substitute decision-making orders in NSW. This chapter considers the same issues in relation to the Mental Health Review Tribunal (MHRT), in respect to the legislative provisions under which it operates and the way it determines the need for financial management orders. Again, the Committee has sought to make recommendations to promote consistency between the Guardianship Tribunal and the Mental Health Review Tribunal and to ensure where possible that orders are made in accordance with the principles of presumption of capacity, least restriction and assisted decision-making.

The role of the MHRT

7.1 The Hon Gregory James QC, President of the Mental Health Review Tribunal (MHRT) explained that the primary role of the MHRT is 'to determine the care, detention and treatment of all patients in mental health facilities or in the community of New South Wales who need to be treated involuntarily.'[319]

7.2 The legislation that governs the work of the MHRT is the *Mental Health Act 2007* and the *Mental Health (Forensic Provisions) Act 1990*, and in relation to the making of financial management orders, the *NSW Trustee and Guardian Act 2009*.

7.3 The majority of the orders made by the MHRT are Community Treatment Orders which 'require that a person accept prescribed medication, therapy, counselling and rehabilitation in accordance with a treatment plan supplied by a community based mental health facility.' The MHRT also determines applications for Electro Convulsive Therapy and consents to surgical procedures and can appoint financial managers for people unable to manage their affairs due to mental illness.[320]

7.4 The MHRT also makes determinations about the care, treatment and detention of forensic patients, that is 'patients who have been found unfit to be tried by a court and ordered to be detained or patients who have been found not guilty of criminal offences on the grounds of mental illness.'[321]

7.5 The MHRT submission observed that there was an overlap between guardianship and mental health legislation to the extent that 'a person may be subject to guardianship orders and may require treatments (including mental health treatments) whilst detained in a mental health facility or subject to an order for community treatment.'[322] However, the MHRT submission observed that there was also a fundamental difference between these two areas:

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319 Hon Gregory James QC, President, Mental Health Review Tribunal, Evidence, 4 November 2009, p 43

320 Submission 33, Mental Health Review Tribunal, p 3

321 Submission 33, pp 3-4

322 Submission 33, pp 1-2

> There is a fundamental tension between the objectives of the guardianship provisions and the mental health provisions in that the former focuses on the best interests and welfare of the subject person whereas under the mental health provisions there is a need to balance the interests of the subject person with the need to protect the safety of the patient and the general community.[323]

7.6 The MHRT sits as a panel of three members, one from each of three categories:

(1) lawyers

(2) psychiatrists, and

(3) a suitably qualified person from the caring professions.[324]

7.7 In the 2007/2008 financial year the MHRT conducted 9,517 hearings comprised of 8,440 civil patient hearings, 764 forensic patient hearings, and 313 *Protected Estate Act* hearings.[325]

7.8 The MHRT is not required to provide written reasons for its decisions although written reasons can be requested.[326]

Financial management orders

7.9 The following sections examine various aspects of the MHRT's involvement with financial management orders, including the fact that it must consider such orders in certain circumstances, the making of orders applicable to part of an estate, the appointment of private managers, and the review of financial management orders.

7.10 The *NSW Trustee and Guardian Act 2009* provides that the MHRT, after conducting a mental health inquiry or reviewing a forensic patient's case and making an order for the detention of the person in a mental health facility, or on the application of 'any person who has, in the opinion of the MHRT, a sufficient interest in the matter', must:

(a) consider whether the person is capable of managing his or her own affairs, and

(b) if satisfied that the person is not capable of managing his or her own affairs, order that the estate of the person be subject to management under this Act.[327]

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323 Submission 33, p 8

324 NSW Mental Health Review Tribunal Website, accessed 13 January 2009 <http://www.mhrt.nsw.gov.au/index.htm>; Mr James, Evidence, 4 November 2009, p 43

325 NSW Mental Health Review Tribunal Annual Report 2007/2008, p 6.

326 Submission 4, People with Disability Australia Inc and NSW Mental Health Coordinating Council, p 17

327 *NSW Trustee and Guardian Act 2009* (NSW), ss 44-46

7.11 The MHRT submission argued against the requirement that consideration of the person's capability to manage their affairs 'must' follow their detention in a mental health facility, submitting that such consideration should only occur if there is a perceived 'need' for it. It argued that the current requirement that such consideration routinely follow their detention in a mental health facility is inconsistent with the principle of presumption of capacity.[328]

7.12 Consequently, the MHRT submission submitted that the *NSW Trustee and Guardian Act 2009* should be amended to remove the requirement that consideration of a person's capacity to manage their own affairs should routinely follow the decision to detain them in a mental health facility arising from a mental health inquiry or review of a forensic patient's case, and that '[s]uch amendment would remove the last vestiges of the presumption of incapacity arising from mental illness.'[329]

Committee comment

7.13 The Committee agrees with the Mental Health Review Tribunal's submission when it argues that the requirement under sections 44 and 45 of the *NSW Trustee and Guardian Act 2009* that a person's capability to manage their own affairs be routinely considered following their detention in a mental health facility arising from a mental health inquiry or review of a forensic patient's case is inconsistent with the principle of the presumption of capacity.

7.14 The Committee considers that the requirement in sections 44 and 45 of the *NSW Trustee and Guardian Act 2009* are likely a hangover from the presumption of incapacity that existed in the repealed *Protected Estates Act 1983*.

7.15 Therefore, consistent with its commitment to the principle of presumption of capacity, the Committee recommends that the *NSW Trustee and Guardian Act 2009* be amended so that the MHRT is not required to automatically consider a person's need for a financial management order when the Tribunal conducts a mental health inquiry following a person's detention in a mental health facility or conducts a review of a forensic patient's case, unless evidence of a need for such an order arises during the inquiry or review.

Recommendation 17

That the NSW Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* so that the Mental Health Review Tribunal is not required to automatically consider a person's need for a financial management order when the Tribunal conducts a mental health inquiry following a person's detention in a mental health facility or conducts a review of a forensic patient's case, unless evidence of a need for such an order arises during the inquiry or review.

328 Submission 33, p 7

329 Submission 33, p 7

Factors considered in making a financial management order

7.16 The Blake Dawson Pro Bono Team submission pointed out an inconsistency in the matters which must be proven before a financial management order can be made by the Guardianship Tribunal on the one hand, and the Supreme Court and the MHRT on the other hand. Whilst the *Guardianship Act 1987* provides that the Guardianship Tribunal must be satisfied that a) the person is not capable of managing their affairs; and b) there is a need for another person to manage those affairs on the person's behalf; and c) it is in the person's best interests that the order be made,[330] the *NSW Trustee and Guardian Act 2009* provides that the Supreme Court and Mental Health Review Tribunal must be satisfied only that the person is not capable of managing his or her affairs.[331]

7.17 The Blake Dawson Pro Bono Team submission submits that the *NSW Trustee and Guardian Act 2009* should be amended to include the two additional criteria found in section 25G of the *Guardianship Act 1987*. 'Such a reform,' the submission argued, 'would promote consistency in determining whether or not a financial management order should be made' and would give effect to the general principles in section 39 of the Act',[332] in particular, that:

> It is the duty of everyone exercising functions under this Chapter with respect to protected persons or patients to observe the following principles:
>
> (a) the welfare and interests of such persons should be given paramount consideration,
>
> (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible[333]

7.18 The MHRT agreed there was an inconsistency in the legislative provisions but that 'the common law requires that the MHRT and the Courts must also consider whether in all the circumstances there is a need for an order' and that '[t]he Tribunal does consider whether there are appropriate informal arrangements for financial management'.[334] The MHRT further stated that it 'must also consider whether the making of an order is in the best interest of the person.'[335]

7.19 The MHRT stated that 'the inconsistency in the statutory tests for financial management appears to be an historical hangover.'[336]

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330 *Guardianship Act 1987* (NSW) s 25G

331 *NSW Trustee and Guardian Act 2009* (NSW) ss 41 (1), 44 (b), 45 (b) and 46 (1)

332 Submission 25, Blake Dawson Pro Bono Team, pp 8-9

333 *NSW Trustee and Guardian Act 2009* (NSW), s 39

334 Answers to questions on notice taken during evidence 4 November 2009, Hon Greg James QC, President, Mental Health Review Tribunal, Question 2, p 3, citing DW v JMW (1983) NSWLR 61

335 Answers to questions on notice taken during evidence 4 November 2009, Mr James, Question 2, p 3, citing RAP v AEP and Anor (1982) NSWLR 508 and Holt (1993) 31 NSWLR227

336 Answers to questions on notice taken during evidence 4 November 2009, Mr James, Question 2, p 3

7.20 Ms Diane Robinson, President of the Guardianship Tribunal, similarly stated that the inconsistency was 'understandable historically', explaining as follows:

> Historically the mental health legislation was such that immediately upon you being admitted to a psychiatric hospital your estate was automatically vested in what was then the Master in Lunacy, now the New South Wales Trustee. There was no hearing, there was no discussion, it was automatic.[337]

7.21 Ms Robinson also noted that case law provided guidance in relation to the provisions in the *NSW Trustee and Guardian Act 2009*:

> What it means to be incapable is explained not in the legislation but in the case law. An enormous number of cases explain what that means. So, in a sense, we are all operating under the same system. It is in the case law what we are looking at.[338]

7.22 Ms Robinson concluded that although the provisions in the two Acts were 'not that dissimilar', if the *NSW Trustee and Guardian Act 2009* was harmonised with the *Guardianship Act 1987* it would 'standardise things.'[339]

Committee comment

7.23 The Committee agrees with inquiry participants that there is an inconsistency between the provisions in the *NSW Trustee and Guardian Act 2009* – relating to the Supreme Court and the MHRT – and the *Guardianship Act 1987* – relating to the Guardianship Tribunal, in relation to matters about which the respective court and tribunals must be satisfied before making a financial management order.

7.24 The inconsistency appears to have the effect that the Supreme Court and MHRT are not required under the *NSW Trustee and Guardian Act 1987* to consider the 'need' for the financial management order, nor the best interests of the person for whom the order is being sought.

7.25 In this regard, the Committee notes that principles (a) and (b) in section 39 of the *NSW Trustee and Guardian Act 2009* require that everyone exercising functions under the Act give paramount consideration to the welfare and interests of the person for whom the order is being sought, and restrict their decisions and actions as little as possible. The Committee also acknowledges that in practice, case law requirements mean that similar considerations to those provided in section 25G of the *Guardianship Act 1987* are made in all jurisdictions.

7.26 However, in order to ensure the principle of least restriction is foremost in the minds of persons making financial management orders, and to promote consistency across jurisdictions, the Committee believes there should specific provisions in the relevant sections of the *NSW Trustee and Guardian Act 2009* reminding and requiring persons determining applications for financial management orders to consider the 'need' for the order and whether the order is in the best interests of the person for whom the order is being sought, such as are found in section 25G of the *Guardianship Act 1987*.

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337 Ms Diane Robinson, President, NSW Guardianship Tribunal, Evidence, 28 September 2009, p 59

338 Ms Robinson, Evidence, 28 September 2009, p 59

339 Ms Robinson, Evidence, 28 September 2009, p 59

7.27 Therefore, the Committee recommends that the *NSW Trustee and Guardian Act 2009* be harmonised with the *Guardianship Act 1987* in terms of the matters about which the relevant bodies must be satisfied before a financial management order can be made, namely that they must be satisfied that there is a need for the order and that it is in the best interests of the person that the order be made.

Recommendation 18

That the NSW Government pursue an amendment of the *NSW Trustee and Guardian Act 2009* to require bodies considering financial management orders in respect of a person under that Act be satisfied that there is a need for the order and that the making of an order is in the person's best interests, and that the amendment be consistent with the wording in section 25G of the *Guardianship Act 1987*.

Excluding part of an estate from a financial management order

7.28 The Attorney General, in his letter referring the inquiry to the Committee, suggested the Committee could consider an amendment to the *NSW Trustee and Guardian Act 2009* 'to allow the relevant Court of Tribunal to exclude parts of an estate from financial management (similar to section 25E of the *Guardianship Act 1987*).'[340]

7.29 Section 25E (2) of the *Guardianship Act 1987* provides that:

> The [Guardianship] Tribunal may exclude a specified part of the estate from the financial management order.[341]

7.30 Currently, section 40 of the *NSW Trustee and Guardian Act 2009*, applicable to the Supreme Court and the Mental Health Review Tribunal, provides that:

> An order may be made under this Chapter for the management of the whole or part of the estate of a person.[342]

7.31 Section 71 of the *NSW Trustee and Guardian Act 2009* further provides for the appointed manager of a person's estate to hand back to that person the management of part of the estate:

> …the manager may, by instrument in writing, authorize the managed person to deal with so much of the estate as the manager considers appropriate and specifies in the instrument.[343]

7.32 There was support from a number of inquiry participants for a provision allowing the relevant court or tribunal to make a financial management order that applied only to a part of a

340 Correspondence from the Hon John Hatzistergos, Attorney General, to Chair, 30 June 2009

341 *Guardianship Act 1987* (NSW), s 25E (2)

342 *NSW Trustee and Guardian Act 2009* (NSW), s 40

343 *NSW Trustee and Guardian Act 2009* (NSW), s 71 (2)

person's estate, leaving other parts under the person's control. This support was based primarily on the fact that such a provision accorded with the least restrictive principle and promoted a degree of autonomy and independence in the person's life.[344]

7.33 However, as the Blake Dawson Pro Bono Team submission observed, section 40 of the *NSW Trustee and Guardian Act 2009* already provides for this end to be achieved by the Supreme Court and MHRT when making financial management orders, by allowing them to make an order for part of a person's estate. The Blake Dawson Pro Bono Team submission contended that the choice presented, therefore, is between deciding which parts of an estate to *exclude* as opposed to deciding which parts of an estate to *include*:

> Under s 25E of the *Guardianship Act*, the starting point is that the whole of the estate will be managed except the parts of the estate the Tribunal then excludes. In contrast, under s 40 of the TGA [Trustee and Guardian Act 2009], the Court or Tribunal is required to decide which part or parts of a person's estate will be committed to management or whether the whole estate is to be so committed. Under s 25E the Tribunal is looking at what to **exclude** from management but under s 40 the Court or Tribunal is looking at what to **include**.[345]

7.34 The Blake Dawson Pro Bono Team submission argued that the provision in section 40 of the *NSW Trustee and Guardian Act 2009* – requiring a decision as to which parts of an estate to **include** in a financial management order – is in fact the preferable alternative, on the basis that it 'is more consistent with a presumption of capacity and with applying the least restrictive alternative than the approach under s 25E [of the *Guardianship Act 1987*]'.[346]

7.35 Mr Peter Whitehead, National Manager, Fiduciary Solutions, Perpetual Limited, also observed that the approach of making an order for part of an estate – as provided in section 40 of the *NSW Trustee and Guardian Act 2009* – is consistent with the principle of the presumption of capacity:

> There can be a perception, when you are seeking an order for part of an estate to be managed, that you have made a judgement that the person already has capacity to retain self-management of certain assets, which is a very positive input into how you proceed.[347]

7.36 Mr Ross Ellis, Executive Director, Trustee Corporations Association of Australia also agreed with this perception and added that although the outcome of both approaches might be the same, the approach of deciding which parts of an estate to include '[was]consistent with the United Nations Convention on the Rights of Persons with Disabilities.'[348]

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344 Professor Terrence Carney, Sydney Law School, Evidence, 28 September 2009, p 32; Submission 24, Trustees Corporations Association of Australia, pp 2-3; Submission 19, The Aged-Care Rights Service, p 7; Submission 15, Mr Mark Orr, p 3; Submission 2, Legal Aid NSW, pp 2-3

345 Submission 25, p 7. *Emphasis added*

346 Submission 25, p 7

347 Mr Peter Whitehead, National Manager, Fiduciary Solutions, Perpetual Limited, Evidence, 4 November 2009, p 11

348 Mr Ross Ellis, Executive Director, Trustee Corporations Association of Australia, Evidence, 4 November 2009, p 12

7.37 The Blake Dawson Pro Bono Team submission recommended that it be section 25E (2) of the *Guardianship Act 1987* that is amended to accord with the provisions in section 40 of the *NSW Trustee and Guardian Act 2009*, namely that '[t]he tribunal may make an order for the management of the whole or part of the estate of a person.'[349]

Committee comment

7.38 The Committee acknowledges the difference in the provisions of section 40 of the *NSW Trustee and Guardian Act 2009* – applicable to the Supreme Court and the MHRT - and section 25E (2) of the *Guardianship Act 1987* – applicable to the Guardianship Tribunal - in relation to making financial management orders. The Committee notes that both Acts allow the same end to be achieved, committing part of a person's estate to management and leaving other parts under the control of the person.

7.39 In this regard, the Committee also notes the provision in section 71 of the *NSW Trustee and Guardian Act 2009* which provides for the appointed manager of a person's estate to hand back to that person the management of part of the estate.

7.40 The Committee notes the subtle but significant difference in the decision-making process the different provisions engender in the mind of the person making the financial management order. Section 40 of the *NSW Trustee and Guardian Act 2009* – which provides for an order to made for part of an estate – requires the person to take as their starting point that none of the estate is under management, and then proceed to consider which parts of the estate should be committed to management. Section 25E (2) of the *Guardianship Act 1987* – which provides for an order to made which excludes part of an estate – requires the person to take as their starting point that the entire estate is under management, and then proceed to consider which parts of the estate should be excluded from management.

7.41 The Committee considers that the latter approach is more liable to result in parts of an estate being placed under management unnecessarily. The Committee agrees with those inquiry participants who argued that the former approach, under section 40 of the *NSW Trustee and Guardian Act 2009*, is more consistent with the principle of the presumption of capacity and more likely to result in orders according with the principle of least restriction.

7.42 Therefore, the Committee recommends that section 25E (2) of the *Guardianship Act 1987* be amended to mirror the provision in section 40 of the *NSW Trustee and Guardian Act 2009*, namely that '[t]he tribunal may make an order for the management of the whole or part of the estate of a person.'

Recommendation 19

That the NSW Government pursue an amendment of section 25E (2) of the *Guardianship Act 1987* to mirror the provision in section 40 of the *NSW Trustee and Guardian Act 2009*, namely that 'the tribunal may make an order for the management of the whole or part of the estate of a person.'

[349] Submission 25, Blake Dawson Pro Bono Team, p 7

Ability to appoint a private financial manager

7.43 Currently, when the MHRT orders that the estate of person be subject to management under the *NSW Trustee and Guardian Act 2009*, the estate is automatically committed to the management of the NSW Trustee and Guardian.[350] That is, the MHRT does not have the power to appoint someone other than the NSW Trustee and Guardian as financial manager.

7.44 The Attorney General, in his letter referring the inquiry to the Committee, suggested the Committee could consider an amendment to the *NSW Trustee and Guardian Act 2009* 'to allow the MHRT to appoint a private manager.'[351]

7.45 The Blake Dawson Pro Bono Team submission suggested that the requirement that the MHRT only appoint the NSW Trustee and Guardian as financial manager appeared to be carried over from the repealed *Protected Estates Act 1983* and as such was 'a hold-over from the out-dated and now repealed law that the estate of a person detained in a mental health facility was automatically subject to financial management.'[352]

7.46 The proposal that the MHRT be allowed to appoint a private manager received support from a number of inquiry participants, among whose arguments was that it increased the flexibility of the MHRT and was in accordance with the NSW Trustee and Guardian only being appointed as the financial manager of last resort.[353]

7.47 However, the MHRT and its President Mr James were against the proposal, primarily on the grounds that the Guardianship Tribunal was better resourced to determine the suitability of private managers.

7.48 The MHRT argued that it should not have the power to appoint a private financial manager due to the fact that in some cases it has limited relevant information and limited time and resources to gather that information:

> …the Tribunal has in some cases very limited information upon which to make such orders. Persons are detained in urgent circumstances and the great majority are detained for less than three weeks. It is commonly the case that facilities do not have allied staff, such as social workers or therapists who are able to make the necessary enquiries to determine the full extent of a person's estate and the bona fides of a proposed private manager.[354]

7.49 By contrast, the MHRT argued, the Guardianship Tribunal has such resources in the form of its Coordination and Investigation Unit:

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350 *NSW Trustee and Guardian Act 2009* (NSW), s 52

351 Correspondence from the Hon John Hatzistergos, Attorney General, to Chair, 30 June 2009

352 Submission 25, p 11

353 Submission 13, NSW Trustee and Guardian, p 7; Submission 26, Law Society of NSW, p 2; Submission 2, p 4; Submission 24, p 3; Submission 22, Public Interest Advocacy Centre Ltd, p 5; Submission 15, pp 4-5; Submission 14, Council on the Ageing (New South Wales), p 2; Submission 25, p 11

354 Submission 33, p 8. See also, Answers to questions on notice taken during evidence 4 November 2009, Question 5, p 6

> The Guardianship Tribunal is specifically resourced to conduct full and detailed examination of these issues. It has a large investigatory unit which routinely gathers information from the relevant parties and presents that information to Tribunal panels for their consideration. The Unit is also able to corroborate information and examine the views, opinions and bona fides of proposed managers and relevant interested parties. [355]

7.50 Mr James stated that 'we do not oppose the idea of there being private managers, it is really more a matter that we do not have the capacity to work out something'[356], arguing that the MHRT was suited only to making financial management orders in simple matters:

> Whatever virtues there are in the Mental Health Review Tribunal doing protected estates orders, they exist only in relation to small estates, easy factual circumstances for the making of orders, and people who are mentally ill. Regarding the idea of us having a jurisdiction further beyond that…really, we have no capacity to do the financial investigations.[357]

7.51 Similarly, Professor Terrence Carney from Sydney Law School, whilst stating a preference for private managers, argued that 'it should be the responsibility of the [Guardianship Tribunal] to appoint, *not* the MHRT.'[358] Professor Carney further contended that it was not a good idea 'to give the Mental Health Review Tribunal a job in which it does not have any great expertise. The expert on determining functional need for management of person or property is the Guardianship Tribunal.'[359]

Referral power to Guardianship Tribunal in 'private manager' cases

7.52 The MHRT submission argued that for the same reasons it advanced against the proposal it be empowered to appoint private managers, it should instead be granted a referral power to the Guardianship Tribunal 'in cases where it is sought to appoint a private person as the manager of a patient's estate or where the estate of the subject person is complex.'[360]

7.53 The MHRT contended that such a referral power would be 'an efficient and appropriate use of existing resources' pointing out the following risks that existed under the current system:

> Currently the MHRT can only refer such cases to the Guardianship Tribunal [GT] on an informal basis. This means that there is no clear lawful basis for such referral and an informal system increased the risks of it not being done at all, or not being done expeditiously.
>
> Informal referral increases the chances of administrative or clerical oversight. If there is a failure to make an application to the GT the subject person's estate could be at risk.

355 Submission 33, p 8

356 Mr James, Evidence, 4 November 2009, p 46

357 Mr James, Evidence, 4 November 2009, p 47

358 Answers to questions on notice taken during evidence 28 September 2009, Professor Terrence Carney, Sydney Law School, Question 11, p 1. Emphasis in original

359 Professor Carney, Evidence, 28 September 2009, p 33

360 Submission 33, p 8

> There is also a degree of uncertainty as there are no agreed or formal criteria for when referral should take place and whether any conditions should be attached to it.
>
> Such a course relies on the goodwill of the applicants to ensure that the matter is presented to the GT.[361]

7.54 The MHRT stated that both the *NSW Trustee and Guardian Act 2009* and the *Guardianship Act 1987* would need to be amended to allow the MHRT to refer such matters to the Guardianship Tribunal.[362]

Committee comment

7.55 The Committee acknowledges the MHRT's lack of resources and expertise relative to the Guardianship Tribunal to properly investigate applications for the appointment of a private financial manager and the typically short time frame in which it would be required to conduct such an investigation.

7.56 The Committee notes the support for a legislative amendment allowing the MHRT to appoint a private financial manager from inquiry participants who may nevertheless not have been aware of or considered the resources available to MHRT to execute this responsibility satisfactorily, or may not have considered the option of a referral power.

7.57 The Committee considers that adequately resourcing the MHRT to properly investigate applications for the appointment of a private financial manager would unduly replicate the resources that already exist in the form of the Guardianship Tribunal's Coordination and Investigation Unit.

7.58 Furthermore, the Committee believes that formalising a referral power from the MHRT to the Guardianship Tribunal that already exists and is utilised informally should not result in a significant increase in demand for the resources of the Guardianship Tribunal.

7.59 Therefore, the Committee recommends that the provision in the *NSW Trustee and Guardian Act 2009* that the estate of a person ordered to management by the MHRT under the Act, remain, and that the Act be amended to enable the MHRT to refer cases in which the appointment of a private financial manager is sought, or in which the estate is complex, to the Guardianship Tribunal.

Recommendation 20

That the Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* and the *Guardianship Act 1987* to enable the Mental Health Review Tribunal to refer to the Guardianship Tribunal for determination cases in which the appointment of a private manger is sought for the estate of a person the Mental Health Review Tribunal is satisfied is not capable of managing his or her affairs, or in cases where such a person's estate is complex.

361 Answers to questions on notice taken during evidence 4 November 2009, Question 5, pp 6-7

362 Answers to questions on notice taken during evidence 4 November 2009, Question 5, p 7

Reviewing financial management orders

7.60 This section examines review of financial management orders made by the MHRT, focussing on two aspects; the review of financial management orders upon the person being discharged from a mental health facility or ceasing to be under guardianship, and the proposal to allow the Supreme Court or MHRT to vary or revoke an order.

Automatic review of financial management orders on release from mental health facility or termination of guardianship

7.61 As detailed earlier in this chapter, following its decision to detain a person in a mental health facility, the MHRT may make a financial management order committing the person's estate to the management of the NSW Trustee and Guardian. Subsequently, in the event the person is discharged from the facility, or in the event they cease to be under a guardianship order, the CEO of the NSW Trustee and Guardian may determine at that time or a later date the need for the financial management order to continue.[363]

7.62 The provision for this exists in sections 89 and 90 of the *NSW Trustee and Guardian Act 2009*. Section 89 provides that the NSW Trustee and Guardian, at the time of discharge or cessation of guardianship, may terminate a financial management order if it 'is satisfied that the person is capable of managing his or her own affairs.'[364] Section 89 further provides that the NSW Trustee and Guardian may refer to the Supreme Court, the MHRT or the Guardianship Tribunal the question as to whether a person is capable of managing his or her own affairs.[365]

7.63 Section 90 of the *NSW Trustee and Guardian Act 2009* provides that the NSW Trustee and Guardian may continue management of the person's estate after discharge or cessation of guardianship 'until [it] is satisfied that the person is capable of managing his or her affairs.'[366]

7.64 The NSW Trustee and Guardian submission argued that the fact that it makes the determination in relation to an estate it is already managing constitutes 'an inherent conflict of interest.' While acknowledging it can refer the matter to the appropriate court or tribunal, the NSW Trustee and Guardian submission nevertheless argued that making this referral 'places an unnecessary step in a process that is more appropriately reviewed by the relevant Tribunal.'[367]

7.65 The Blake Dawson Pro Bono Team argued that upon discharge of the person from a mental health facility the review should automatically be conducted by the Guardianship Tribunal. The Blake Dawson Pro Bono Team submission argued that the Guardianship Tribunal has the expertise to determine the ongoing need for the financial management order in these circumstances:

> The [Guardianship] Tribunal's expertise is in considering whether or not a person requires assistance managing their affairs. The MHRT's expertise is largely in

363 Submission 13, p 6

364 *NSW Trustee and Guardian Act 2009* (NSW), s 89 (1)

365 *NSW Trustee and Guardian Act 2009* (NSW), s 89 (3)

366 *NSW Trustee and Guardian Act 2009* (NSW), s 90 (3) (b)

367 Submission 13, p 6

> considering whether or not a person requires medical treatment against their will. Given the difference in focus of the Tribunal and the MHRT it is appropriate that the Tribunal determine whether or not a person should be subject to financial management on an ongoing basis.[368]

7.66 The Blake Dawson Pro Bono Team submission further stated that the episodic nature of mental illness, the effect of the medical treatment, and consistency with the principle of least restriction all argued for the automatic review by the Guardianship Tribunal of financial management orders upon the person's release from a mental health facility:

> Financial management orders made by the MHRT should be automatically reviewed on the release of the person from the mental health facility given the episodic nature of many mental illnesses. Further, on release from the mental health facility the person should be better able to express their view on whether or not they are able to manage their affairs. The person should not be required to initiate a review of the order, but rather a review should occur as a matter of course. This is consistent with the least restrictive alternative in the given circumstances.[369]

7.67 In the event that responsibility for determining the ongoing need for financial management upon release of the person from a mental health facility or cessation of guardianship should remain with the NSW Trustee and Guardian, the NSW Trustee and Guardian submission argued that in addition to regained capacity, the *NSW Trustee and Guardian Act 2009* should provide that the NSW Trustee and Guardian also consider whether revoking the financial management order is in the best interests of the person, even if they have not regained capacity.[370]

7.68 Ms Dodds stated that 'all the tribunals and courts should be able to apply that test.' Ms Dodds further stated that whilst the intention of making a financial management order was to introduce stability, it did not work in all cases, and the option to revoke the order should be available in those cases where it did not:

> The intention of putting a financial management order in place is, with the best will in the world, to put some stability into that person's life and take what is a chaotic life and give it some order. For many people, that works; but for some, it does not work, and it makes the circumstances even worse. They could go out into the street and perhaps would steal to feed their drug habit or engage in other behaviours that will make life worse for them and lead them into the criminal justice system, or they become so distressed by the very presence of the order that it becomes dysfunctional. They do not deal with us, they will not deal with us, and they will not relate to us. It does not happen very often, but when it happens you want to be able to say, no, this is not working.[371]

7.69 The NSW Trustee and Guardian submission suggested that the *NSW Trustee and Guardian Act 2009* be amended by adding the following to sections 89 (1) (b) and 90 (2) (b):

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368 Submission 25, p 8

369 Submission 25, p 8

370 Submission 13, p 7

371 Ms Imelda Dodds, Acting Chief Executive Officer, NSW Trustee and Guardian, Evidence, 28 September 2009, p 11

> That the NSW Trustee considers that it is in the best interests of the person that management be terminated (even though the NSW Trustee is not satisfied that the person is capable of managing his or her affairs)[372]

Committee comment

7.70 The Committee notes that whilst the MHRT determines the need for a financial management order for a person it has ordered to be detained in a mental health facility, it currently falls to the NSW Trustee and Guardian to determine the need for ongoing management of the person's estate in the event the person is discharged from the mental health facility.

7.71 The Committee acknowledges the NSW Trustee and Guardian's view that the responsibility to make this determination represents a conflict of interest, since at the time the person is discharged, the NSW Trustee and Guardian is the financial manager and will continue to be if it determines that the order should continue.

7.72 The Committee also acknowledges the argument from the Blake Dawson Pro Bono team that the Guardianship Tribunal is best placed to determine the need for ongoing financial management under these circumstances. In this regard, the Committee also notes the MHRT's own view that it is not as well resourced as the Guardianship Tribunal to determine the need for financial management, particularly where the estate of the person is complex or there is an application for the appointment of a private financial manager. This issue was discussed in the previous section and lead the Committee to recommend the MHRT be given the power to refer such matters to the Guardianship Tribunal.

7.73 The Committee believes that based on the evidence it has received there may be a case for amending the *NSW Trustee and Guardian Act 2009* to provide that upon a person being discharged from a mental health facility or upon that person ceasing to be under guardianship, and if there is in effect at the at time a financial management order, that the need for that order to continue be automatically reviewed by the Guardianship Tribunal.

7.74 However, the Committee did not receive enough evidence on the resource implications for the Guardianship Tribunal if such an amendment were to be made. In particular the Committee did not receive evidence as to the number of persons discharged from mental health facilities in NSW each year with their estates under management pursuant to a financial management order, the need for all such orders to be automatically reviewed, or whether a review should only take place if their was some indication that the person may have regained the capacity to manage his or her own affairs.

7.75 The Committee also notes that sections 89 and 90 of the *NSW Trustee and Guardian Act 2009* currently provide that the need for ongoing management be based solely on a determination of the person's capacity to manage his or her affairs. The Committee considers that this is inconsistent with the provisions in section 25G of the *Guardianship Act* which require the Guardianship Tribunal, in order to make a financial management order, be satisfied that the person is not capable of managing his or her affairs, and that in addition, there is a need to appoint someone to manage those affairs on his or her behalf, and that it is in the person's interest that the order be made. Furthermore, the Committee has recommended amendments to, 1) section 25P of the *Guardianship Act 1987* to require the Guardianship Tribunal consider

[372] Submission 13, p 13

capacity, need and best interests in the context of revoking a financial management order, and 2) the *NSW Trustee and Guardian Act 2009* to require the Supreme Court and MHRT to consider capacity, need and best interests in the context of making a financial management order.

7.76 The Committee believes that to promote consistency, in all circumstances the relevant court, tribunal or statutory body, in order to make or revoke a financial management order, must be consider the following three factors:

(a) the person's capacity to manage their own affairs,

(b) the need for another person to be appointed to manage their affairs, and

(c) whether the making of an order is in the person's best interests even if the person has not regained the capacity to manage their affairs.

7.77 Therefore, the Committee recommends that the NSW Government consider an amendment to the relevant legislation so that upon the release of a person from a mental health facility or their ceasing to be under guardianship, and if there is a financial management order in place at that time, that order be automatically reviewed by the Guardianship Tribunal. The Committee recommends that such investigation have particular regard for the resource implications for the Guardianship Tribunal of the additional reviews this would require it to undertake.

7.78 The Committee further recommends that notwithstanding the outcome of the above investigation, the *NSW Trustee and Guardian Act 2009* be amended to provide that whichever body is empowered to terminate a financial management order upon the person subject to the order being discharged from a mental health facility or ceasing to be under guardianship, be permitted to terminate the order if it is satisfied there is no longer a need for another person to manage the person's affairs, or if it is satisfied it is in the person's best interests that the order be terminated even if the person has not regained the capacity to manage their affairs.

Recommendation 21

That the NSW Government consider amending the relevant legislation to require that upon a person being discharged from a mental health facility or ceasing to be under guardianship, and if there is in place in relation to the person's estate a financial management order, that order be automatically reviewed by the Guardianship Tribunal.

That the NSW Government consider in particular the additional burden such an amendment may place on the resources of the Guardianship Tribunal.

Recommendation 22

That the NSW Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* providing that whichever body is empowered to terminate a financial management order upon the person subject to the order being discharged from a mental health facility or ceasing to be under guardianship be permitted to terminate the order if it is satisfied there is no longer a need for another person to manage the person's affairs, or if it is satisfied it is in the person's best interests that the order be terminated even if the person has not regained the capacity to manage their affairs.

Varying or revoking a financial management order

7.79 The Attorney General, in his letter referring the inquiry to the Committee, suggested the Committee could consider an amendment to the *NSW Trustee and Guardian Act 2009* 'to allow the Supreme Court or MHRT to vary or revoke an order (even where the person remains incapable of managing their affairs) on the application of a person who, in the opinion of the Supreme Court or the MHRT, has a genuine concern for the welfare of the protected person.'[373]

7.80 The proposal received support from a number of inquiry participants.[374] The MHRT submission supported the proposed amendment on the basis that it conformed with the UNCRPD and promoted autonomy:

> Such an amendment would conform with the Convention on the Rights of Persons with a Disability and would allow persons who may not have regained capacity some autonomy if it was considered in their best interest and would also allow for persons to rely on informal supports in making financial decisions.[375]

7.81 The MHRT also noted that section 88 of the *NSW Trustee and Guardian Act 2009* currently allows it to revoke an order on the application of the protected person only when they cease to be a patient, and submitted that any power to revoke orders on the application of an interested person be applicable even if the protected person remains a patient in a hospital.[376]

7.82 The Trustees Corporation Association of Australia submission supported such an amendment on the basis that it would allow an interested person to initiate a review of an order where 'a financial manager is considered to have acted negligently or where the protected person can demonstrate that they are no longer impaired to the point of being deemed to lack the legal capacity to manage their own affairs.'[377]

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373 Correspondence from the Hon John Hatzistergos, Attorney General, to Chair, 30 June 2009

374 See for example Professor Duncan Chappell, Faculty of Law, University of Sydney, Evidence, 5 November 2009, p 43; Professor Carney, Evidence, 28 September 2009, p 33; Submission 14, p 2; Submission 2pp 3-4

375 Submission 33, p 7

376 Submission 33, p 7

377 Submission 24, p 3

7.83 The NSW Trustee and Guardian submission also supported the proposed amendment, highlighting the fact the amendment would allow revocation of an order even if the person had not regained capacity. The experience of the NSW Trustee and Guardian has been, the submission stated, that 'in a small number of cases a person placed under a Financial Management Order may never be able to regain capacity to manage their affairs, however the actual presence of the Order is not assisting them in any practical way and may create more problems for the individual than it is solving.' While such cases were rare, the submission argued, 'when such circumstances arise it is imperative that the relevant Tribunals have the opportunity to revoke the Order on the grounds of best interests.'[378]

7.84 Similarly, Mr Mark Orr argued that although a person may not have the capacity to manage their affairs, their estate may be small, and management of it under a financial management order 'may be causing more harm to them, for example psychological distress, than good.'[379]

7.85 The Law Society of NSW suggested that the Supreme Court 'would already hold the inherent power to vary or revoke orders' in the circumstances described, and had no objection to the amendment 'subject to the legislation requiring the Court or the MHRT, as the case may be, to make a further order upon the revocation of any existing order.'

Committee comment

7.86 The Committee notes that section 25R of the *Guardianship Act 1987* provides for an application for variation or revocation of a financial management order to be made by:

(a) the protected person concerned,

(b) the NSW Trustee,

(c) the manager of the estate, or part of the estate, of the protected person,

(d) any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the protected person.[380]

7.87 The Committee believes that in order to maximise the ability of people involved in the life of a person whose estate is under management to initiate proceedings to protect the person's best interests, the same set of people should be able to apply, under the *NSW Trustee and Guardian Act 2009*, to the Supreme Court or MHRT for variation or revocation of a financial management order.

7.88 The Committee also agrees with inquiry participants who argue that such an application should be permitted even when the person whose estate is under management has not regained the capacity to manage their affairs, on the basis that such a provision maximises the ability of the Supreme Court and MHRT to respond to the changing interests of the person, to maximise their autonomy and ensure the least restrictive intervention is being implemented,

378 Submission 13, p 6

379 Submission 15, p 4

380 *Guardianship Act 1987* (NSW) s 25R

and to protect them from negligent management and from the inconvenience and stress of an order that has become unnecessary.

7.89 The Committee, for the same reasons, also agrees with the MHRT submission that the MHRT should be able to consider such an application even if the person whose estate is under management remains a patient in a hospital.

7.90 The Committee does not agree with the proposal that upon revocation of a financial management order the Supreme Court or MHRT should be required to make a further order, as such a requirement would be contrary to both the principle of presumption of capacity and the principle of least restriction.

7.91 Therefore, the Committee recommends that the *NSW Trustee and Guardian Act 2009* be amended to allow the Supreme Court or MHRT to vary or revoke an order (even where the person remains incapable of managing their affairs) on the application of the protected person, the NSW Trustee and Guardian, the manager of the estate or part of the estate of the protected person, or a person who, in the opinion of the Supreme Court or the MHRT, has a genuine concern for the welfare of the protected person, and that such provision has effect even if the person remains a patient in a hospital.

Recommendation 23

That the NSW Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* to allow the Supreme Court or Mental Health Review Tribunal to vary or revoke an order (even where the person remains incapable of managing their affairs) on the application of the protected person, the NSW Trustee and Guardian, the manager of the estate or part of the estate of the protected person, or a person who, in the opinion of the Supreme Court or the Mental Health Review Tribunal, has a genuine concern for the welfare of the protected person, and that such provision has effect even if the person remains a patient in a hospital.

Chapter 8 Powers of attorney and enduring guardianship

The majority of this report focuses on the instruments and processes of tribunals aimed at people who have already lost decision-making capacity. The preceding two chapters, for example, focussed on the role of the Guardianship Tribunal and Mental Health Review Tribunal in making substitute decision-making orders. The following two chapters focus on implementing financial management and guardianship orders for people who lack capacity. However, the subject of the current chapter, powers of attorney and enduring guardianship, are options for people with capacity to make their own provisions for the future, largely outside of the court and tribunal system.

With regard to powers of attorney, it should be noted that a general power of attorney ceases to have effect once the Principal loses capacity. Therefore, evidence relating to general powers of attorney – as opposed to enduring powers of attorney - is largely outside the terms of reference for this inquiry. However, it remains of some relevance to the inquiry and is considered in this chapter.

Powers of Attorney

8.1 This section examines the use of powers of attorney in the context of substitute decision-making. It begins by describing the different types of powers of attorney and the way loss of capacity is determined under an enduring power of attorney, and then examines safeguards that exist in relation to powers of attorney, and provisions for their registration, review and revocation.

8.2 Readers should note that the Land and Property Management Authority conducted a review of the *Powers of Attorney Act 2003 NSW* concurrently with this inquiry and tabled its report in December 2009.

Types of powers of attorney

8.3 Provisions for powers of attorney are made in the *Powers of Attorney Act 2003*. Under the Act a 'principal' may give the power of attorney to an 'attorney.' A power of attorney relates only to financial affairs.

8.4 During the inquiry participants referred to various types of powers of attorney, including prescribed powers of attorney, general powers of attorney and enduring powers of attorney, which were defined as follows:[381]

Prescribed power of attorney: A prescribed power of attorney is simply a power of attorney made in the prescribed form in the *Powers of Attorney Act 2003*. All powers of attorney must be in the prescribed form if they are to have the functions given to them by the *Powers of Attorney Act 2003*.

[381] Another type of power of attorney is an 'irrevocable power of attorney', which cannot be revoked by the Principal. It is generally used only in mortgage or commercial transactions.

General power of attorney: A general power of attorney is a power of attorney that ceases to have effect if the Principal loses capacity.

Enduring power of attorney: An enduring power of attorney is a power of attorney that continues to have effect after the Principal loses capacity.[382]

8.5 The Aged-Care Rights Service (TARS) submission and Ms Susan Field, New South Wales Trustee and Guardian Fellow in Elder Law at the University of Western Sydney, both noted a high degree of confusion in the community about these different instruments. The TARS submission recommended that some degree of confusion could be removed if there were different forms for a general power of attorney and enduring power of attorney rather than the same document being used for both, as is currently the case.[383]

Determining loss of capacity under an enduring power of attorney

8.6 An enduring power of attorney may be effective from the date it is created, or can come into effect only if and when the principal loses capacity.[384] The question then arises as to how the attorney determines whether the principal's decision-making capacity is sufficiently impaired to give effect to the enduring power of attorney.

8.7 Mr Peter Whitehead, National Manager, Fiduciary Solutions, Perpetual Limited, told the Committee that loss of capacity may become obvious through the observations of either the attorney or a family member, and subsequently a written medical report can be obtained to confirm the loss of capacity. Mr Whitehead noted that '[t]here are a number of arguments about whether you should make [a medical report] a compulsory piece of information before you commence to act. But that may be adding a level of extra regulation.'[385]

8.8 Similarly, Ms Anne Cregan, Pro Bono Partner at Blake Dawson Lawyers, stated that an initial determination is based simply of the observations of the attorney, who should then seek a medical opinion to back up their observations. Ms Cregan noted that there were no guidelines for attorneys as to how to determine a principal's loss of capacity but that such guidelines would be useful to protect both the Principal and the attorney.[386]

Safeguarding the principal under a power of attorney

8.9 The Committee heard concerns about the lack of a clear system for reporting abuse of powers of attorney. Ms Cregan told the Committee that there was 'no one place you go to to report

382 Mr Robert Goncalves, Legal Officer, Land and Property Management Authority, Evidence, 4 November 2009, p 38; Ms Anne Cregan, Pro Bono Partner, Blake Dawson Lawyers, Evidence, 29 September 2009, p 4

383 Submission 19, The Aged-Care Rights Service, p 8; Ms Susan Field, New South Wales Trustee and Guardian Fellow in Elder Law, University of Western Sydney, Evidence, 28 September 2009, p 39

384 Ms Cregan, Evidence, 29 September 2009, p 4

385 Mr Peter Whitehead, National Manager, Fiduciary Solutions, Perpetual Limited, Evidence, 4 November 2009, pp 19-20

386 Ms Cregan, Evidence, 29 September 2009, p 6

abuse of power of attorney'. The first step that should be taken is to terminate the power of attorney. Ms Cregan then described two courses of action available to the Principal, depending on the nature of the abuse. If the attorney had continued to act after the termination of the power of attorney, that is an offence that can be reported to the police. Ms Cregan noted, however, that 'police are very reluctant to intervene in what they see as a civil law matter.' If the abuse involves the attorney exceeding their authority while the power of attorney was still in effect, the principal can sue the attorney, although this would only result in compensation if the attorney had property.[387]

8.10 Ms Cregan proposed establishing a body to whom abuse of powers of attorney could be reported and that had the power to prosecute if the attorney continued to act after the termination of a power of attorney and possibly also in circumstances where an attorney had exceeded authority given under the power of attorney.[388]

8.11 Ms Field emphasised the importance of education for the potential Principal under a power of attorney, noting that such people are often in very vulnerable situations and may feel pressured into giving the power of attorney to someone else.[389]

8.12 Mr Robert Goncalves, Legal Officer with the Land and Property Management Authority (LPMA), also raised the importance of education for attorneys who simply may unwittingly exceed their authority under a power of attorney. Mr Goncalves told the Committee that a focus of the LPMA's review of the *Powers of Attorney Act 2003* was to explore measures to 'reduce fraud or attorneys acting outside their authority' and that education for attorneys had emerged as a key proposal:

> We felt that the main proposal that will alleviate a lot of fraud or attorneys acting outside their power is education. If attorneys knew what they can and cannot do, maybe a lot of that stuff would not be happening. It is not that there is a lot of fraud out there, but there may be attorneys out there who just do not know what they can and cannot do…[390]

8.13 In this regard, Mr Stephen Newell, Principal Solicitor and Manager, Legal Service, The Aged-care Rights Service (TARS), stated that TARS often received calls from attorneys unsure of their role – '[t]hey do not think they are hurting anybody, and possibly they are not; but technically they are.' Mr Newell argued that the *Powers of Attorney Act 2003* needed to be far more prescriptive about the role of an attorney and in particular provide detail about what acting in the best interests of a Principal actually involves.[391]

8.14 The TARS submission noted the provisions for guardians and financial managers in Queensland's *Guardianship and Administration Act 2000* and recommended that those or similar provisions should be included in the *Powers of Attorney Act 2003* and the *NSW Trustee and Guardian Act 2009*:

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387 Ms Cregan, Evidence, 29 September 2009, pp 5-6

388 Ms Cregan, Evidence, 29 September 2009, p 6

389 Ms Field, Evidence, 28 September 2009, pp 39-40

390 Mr Goncalves, Evidence, 4 November 2009, p 36

391 Mr Stephen Newell, Principal Solicitor and Manager, Legal Service, The Aged-care Rights Service, Evidence, 5 November 2009, p 19

> This will in our submission, improve accountability in appointed guardians and attorneys' and encourage compliance with the duties and obligations set out in the legislation and also reduce instances of conflict of interest between the interests of the attorney and those of the donor. These provisions will provide clarity for Attorneys and Guardians and remove some of the misguided notions of some Attorneys and Guardians as to what their duties and responsibilities are under the appointments.[392]

Registering powers of attorney

8.15 Mr Goncalves explained that while all powers of attorney can be registered, only powers of attorney dealing with land must be registered. Mr Goncalves reported that stakeholder feedback thus far to the LPMA's review of the *Powers of Attorney Act 2003* was not in favour of compulsory registration of all powers of attorney, mainly due to cost and privacy concerns:

> One of the proposals in the issues paper was whether we should make it compulsory for all powers of attorney to be registered. The submissions we received were not in favour of that mainly because of cost and privacy concerns with powers of attorney that do not deal with land. To someone going overseas for two weeks giving a power of attorney to deal with their banking requirements and then coming back, the $91 to register it would seem to be a bit too much.[393]

8.16 Mr Goncalves also noted some of the advantages stakeholders saw in registering powers of attorney, and in particular of having the scope of a particular power of attorney on the public record, which 'may dissuade an attorney from going outside his powers because he or she knows that their power can be inspected by the public at any time…'[394]

8.17 Ms Cregan supported registering powers of attorney on the basis that it would give increased protection for the Principal against fraud, since it would be 'very easy to check whether or not it is still in force.' Ms Cregan also noted a benefit to attorneys and third parties:

> It protects the attorneys because they then can go to a register to assist them to prove that they are in fact the attorneys. It assists third parties to have some assurance that the power of attorney is still valid and in operation.[395]

Reviewing and revoking of powers of attorney

8.18 This section examines evidence on the review and/or revocation of powers of attorney occurring in three contexts:

(1) revocation by a competent Principal of a general or enduring power of attorney,

(2) revocation of an enduring power of attorney by a Principal who may or may not lack capacity; and

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392 Submission 19, p 5

393 Mr Goncalves, Evidence, 4 November 2009, p 37

394 Mr Goncalves, Evidence, 4 November 2009, p 37

395 Ms Cregan, Evidence, 29 September 2009, p 3

(3) review and revocation of an enduring power of attorney for a Principal who lacks capacity.

8.19 Ms Field noted that although powers of attorney can be revoked either verbally or in writing, this was a very difficult step for an elderly or vulnerable person to take, particularly if they rely on the support of family and friends and may not want to offend the person they have given the power of attorney to.[396]

8.20 The TARS submission raised an issue from the attorney's point of view when the capacity of a Principal seeking to revoke a power of attorney is in question:

> An issue arises where the attorney receives notice of a revocation of the Enduring Power of Attorney but the capacity of the principal to give the revocation is uncertain or the principal lacks capacity. What is the position of the attorney on receipt of such a notice?[397]

8.21 The TARS submission stated that 'the Guardianship Tribunal does not have the power to review a revocation of an enduring power of attorney appointment' but must instead 'must rely on its discretion to treat such matters as an application for a financial management order.' The difficulty arises when 'an appointed attorney must decide if they should continue to pay bills for the person if there is a question over the capacity of the donor to revoke the appointment.'[398]

8.22 The TARS submission recommended that a revocation of an enduring power of attorney must be witnessed by a solicitor on whom '[t]he onus for assessing capacity would be similar to that required to be satisfied by the solicitor when witnessing the appointment.' The TARS submission further recommended 'that the Guardianship Tribunal be given the power to review a revocation of an Enduring Power of Attorney appointment.'[399]

8.23 Ms Diane Robinson, President of the NSW Guardianship Tribunal told the Committee that the Guardianship Tribunal will review an enduring power of attorney on application, conduct a hearing and if necessary revoke the power of attorney:

> The tribunal then will conduct a hearing in which we will hear the evidence and test the evidence and just see whether or not that document is working in the best interests of the person with the disability. If it is not, we can change it. We can revoke it, we can take out the attorney if they are doing the wrong thing and substitute another one, and we can have their records forensically audited. We have a range of powers under the *Powers of Attorney Act*. [400]

396 Ms Field, Evidence, 28 September 2009, p 39

397 Submission 19, p 8

398 Submission 19, p 9

399 Submission 19, p 9

400 Ms Diane Robinson, President, NSW Guardianship Tribunal, Evidence, 28 September 2009, p 54

Committee comment

8.24 The Committee notes the utility of enduring powers of attorney for people with capacity to make provisions for the management of their financial affairs at a time in the future when they may not have the capacity to manage those affairs themselves, and to do so outside of the court and tribunal system.

8.25 The Committee notes the concern among some inquiry participants about abuse of powers of attorney and the need for safeguards to protect the Principal and education and specific guidelines to protect the attorney. The Committee acknowledges that the issue of abuse of powers of attorney is a very important one, not least of all in light of the potential increase in the use of powers of attorney to meet the demands of Australia's ageing population.

8.26 The Committee sees merit in suggesting that a body be established or identified to which people can report abuse of a power of attorney and which would in addition have some powers to initiate legal action on behalf of the Principal.

8.27 The Committee is mindful that the Land and Property Management Authority has tabled its 'Review of the *Powers of Attorney Act 2003*' and that that review involved a more detailed and focussed examination of provisions for powers of attorney than has been possible in the current inquiry with its focus on substitute decision-making generally.

8.28 Therefore, the Committee does not make any recommendations in relation to powers of attorney, but instead refers the reader to the Land and Property Management Authority's 'Review of the *Powers of Attorney Act 2003*'.

Enduring guardianship

8.29 An adult with capacity can appoint another adult as their enduring guardian under the *Guardianship Act 1987*. The appointment only comes into effect once the person loses capacity and empowers the enduring guardian to make lifestyle decisions on behalf of the person, but not decisions about money or property.[401]

8.30 The Public Guardian submission explained the process of appointing an enduring guardian which requires a form to filled out and witnessed:

> An appointment form is filled out by the appointee and the person they wish to be their guardian. The appointment form will specify the areas of decision-making and can include any specific instructions or wishes that the person has. This form needs to be witnessed by a legal practitioner, and once signed it becomes a legal document.[402]

8.31 The Public Guardian submission stated that the Public Guardian received inquiries from people with concerns arising from the fact that enduring guardianships do not need to be registered:

401 Submission 7, Public Guardian, p 17

402 Submission 7, p 17

> There is currently no requirement for the document to be registered, and the person and their enduring guardian are encouraged to keep copies of the appointment with their important papers.
>
> The Public Guardian has taken many calls from people wanting to register their appointment. People are concerned that in an emergency, the relevant documents may not be available, or may not be recognized by health professionals or service providers. Enquiries have also been received from hospitals and other professionals, concerned about the validity of enduring guardianship appointments and wanting to check whether a person is under guardianship.[403]

8.32 The Public Guardian submission recommended that the issue of registering enduring guardianships be reviewed.[404]

8.33 The Public Guardian submission also stated that the Public Guardian received calls from people 'unsure who can witness enduring guardianship appointments and what the responsibility of the witness is.' Eligible witnesses, as defined in the *Guardianship Act 1987* include legal practitioners and clerks of the Local Court.[405]

8.34 The Public Guardian submission reported that local courts had expressed concern about the qualification of clerks to witness enduring guardianship appointments particularly when they contain complex instructions to enduring guardians such as directions for medical treatment:

> Local courts have expressed concern that clerks are not qualified to assess the capacity of people signing enduring guardianship instruments, particularly where these appointments contain complex directions to guardians. Particular issues have arisen for Jehovah's Witnesses, who wish to include specific directions regarding medical treatment in their enduring guardianship appointments, such as not accepting blood products. Local courts have expressed concern about the capacity of clerks to deal with the complexity of these issues.[406]

8.35 The Public Guardian submission recommended that this issue of local court clerks witnessing enduring guardianship appointments also be reviewed.

8.36 The procedure for witnessing enduring guardianships was described by the Law Society of NSW as 'cumbersome'. The Law Society of NSW submission contended that the time required to obtain and witness the signatures of all appointees can interfere with the intention of the appointment:

> A Guardianship Appointment not only requires that the signature of each appointee be witnessed by a qualified person (an eligible witness), it also requires the witness to provide a certificate. This is a cumbersome procedure, particularly if you have numerous appointees living in different areas. The time involved in getting a completed document can be lengthy and may interfere with ' the operation of the appointments and, potentially, the intentions of the appointor.[407]

403 Submission 7, p 18

404 Submission 7, p 18

405 Submission 7, p 18

406 Submission 7, p 18

407 Submission 26, Law Society of NSW, p 4

8.37 The Law Society submission pointed out the discrepancy between the procedure for appointing an enduring guardian and that for appointing a power of attorney:

> There is an obvious inconsistency in the application of the various provisions relating to the drafting of a Power of Attorney and the drafting of a Guardianship Appointment. In relation to Power of Attorney documents, there is no requirement for the appointee's signature to be witnessed or for a certificate to be signed by the person who witnessed the signature of the attorney.[408]

8.38 The Law Society submission recommended that the requirement for an enduring guardian's signature to be witnesses be removed as it serves only to increase costs and delays in making the appointment:

> It is suggested that the requirement for a Guardianship appointee's signature to be witnessed should be removed and, likewise, the certificate of the witness. The current requirements appear to serve no practical purpose. They operate to prevent the immediate operation of the Guardianship Appointment, and entail unnecessary costs and delay in relation to the completion of the document itself.[409]

Committee comment

8.39 The Committee notes the concerns raised by inquiry participants in relation to enduring guardianship appointments and the recommendations they make, namely that the registration of enduring guardianships be considered, the eligibility of local court clerks to witness enduring guardianship appointments be reviewed, and the requirement that appointee's signatures be witnessed be reviewed.

8.40 The Committee did not receive any evidence from other inquiry participants in relation to these recommendations. Therefore the Committee cannot make a specific recommendation in relation to these issues.

408 Submission 26, p 4

409 Submission 26, p 4

Chapter 9 Implementing substitute decision-making orders – financial management orders

Chapters 6 and 7 examined the process through which substitute decision-making orders are made in NSW, focussing on the Guardianship Tribunal and the Mental Health Review Tribunal and their determining the need for financial management and guardianship orders. The current and following chapter examine the way in which these substitute decision-making orders are implemented. This chapter examines the implementation of financial management orders, focussing on the activities of the NSW Trustee and Guardian and private financial managers in managing the estates of people for whom a financial management order has been made. The following chapter focuses on the implementation of guardianship orders and the activity of the Public Guardian.

The functions of the NSW Trustee and Guardian

9.1 This section examines some of the activities of the NSW Trustee and Guardian in the context of financial substitute decision-making, being the statutory body appointed by the Guardianship Tribunal or Mental Health Review Tribunal as the financial manager of last resort for people lacking the capacity to manage their own affairs. It examines the way the NSW Trustee and Guardian manages estates, engages with its clients and charges fees. It also examines the safeguards and monitoring mechanisms in place in respect of these activities. This section begins by canvassing the concerns of some inquiry participants with the title 'NSW Trustee and Guardian.'

The word 'guardian' in the title of the NSW Trustee and Guardian

9.2 Some inquiry participants raised concerns about the word 'guardian' in the title of the NSW Trustee and Guardian.

9.3 Mr Graeme Smith, the Public Guardian, stated that people assumed the NSW Trustee and Guardian was in fact the Public Guardian and that this confusion was evident even in some of the submissions to this inquiry:

> …people assume that the use of the term 'guardian' in the name of New South Wales Trustee and Guardian in fact refers to us, but it does not. …the use of the term 'guardian' in that context refers to financial guardianship not to guardianship, but from the outside you can see where it would be confusing for people. And, in fact, having looked at some of the submissions, it is apparent that some of the people making submissions were confused about it.[410]

9.4 Ms Frances Rush, Assistant Director, Advocacy and Policy, Public Guardian, also told the Committee that people thought the Public Guardian was the 'guardian' referred to in NSW Trustee and Guardian.[411]

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410 Mr Graeme Smith, Public Guardian, Evidence, 28 September 2009, p 17

411 Ms Frances Rush, Assistant Director, Advocacy and Policy, Public Guardian, Evidence, 28 September 2009, p 17

9.5 Mr Smith stated the choice of title for the NSW Trustee and Guardian was unfortunate and compounded the perception that the Public Guardian did not act independently:

> In reality, the decisions of the Public Guardian and those of the New South Wales Trustee are separate decisions but administratively we are joined. From the perception of people on the outside it may appear as though we are acting together whereas, in fact, we are not. The name given to the New South Wales Trustee and Guardian has potentially sought to compound that perception and it was, in my view, an unfortunate name.[412]

9.6 Ms Imelda Dodds, Acting Chief Executive of the NSW Trustee and Guardian, clarified that the NSW Trustee and Guardian and the Public Guardian were only administratively joined:

> So the Public Guardian is only administratively responsible to the Acting Chief Executive Officer of the New South Wales Trustee and Guardian. I have absolutely no authority whatsoever to interfere with or try to direct his statutory role as a decision-maker.[413]

9.7 The NSW Ombudsman submission and Ms Rachel Merton, Chief Executive Officer of the Brain Injury Association of NSW, also considered the title of the NSW Trustee and Guardian confusing and suggested it should be changed.[414]

9.8 Mr Smith agreed that changing the name of the NSW Trustee and Guardian would provide greater clarity for potential clients of the respective bodies.[415]

Committee comment

9.9 Evidence throughout the inquiry illustrates the important distinction between the NSW Trustee and Guardian and the Public Guardian and the clearly separate roles both have in regard to people lacking decision-making capacity.

9.10 In this respect, the Committee agrees with inquiry participants who argue that the use of the word 'guardian' in the title of the NSW Trustee and Guardian is unfortunate and confusing. The Committee considers it has the potential to confuse both members of the public and people working in the area of trusteeship and guardianship who may assume that the Public Guardian is the NSW Trustee and Guardian and that the latter carries out the functions of the former.

9.11 It also obscures an important effect of the *NSW Trustee and Guardian Act 2009*. Prior to the enactment of the *NSW Trustee and Guardian Act 2009* the Protective Commissioner was also the Public Guardian. That is, while the Office of the Protective Commissioner and the Office of the Public Guardian were separate, the holder of one position was also the holder the

412 Mr Smith, Evidence, 28 September 2009, p 17

413 Ms Imelda Dodds, Acting Chief Executive Officer, NSW Trustee and Guardian, Evidence, 28 September 2009, p 2

414 Submission 9, NSW Ombudsman, p 1; Ms Rachel Merton, Chief Executive Officer, Brain Injury Association of NSW, Evidence, 29 September 2009, p 23

415 Mr Smith, Evidence, 28 September 2009, p 17

other. Following the enactment of the *NSW Trustee and Guardian Act 2009* different people now hold these positions.

9.12 The Committee considers that the title 'NSW Trustee and Guardian' undermines the independence and functional separation of the Public Guardian by creating the perception that the functions of financial trusteeship on the one hand, and lifestyle and medical guardianship on the other, have been subsumed under the one entity - the NSW Trustee and Guardian.

9.13 In reality the Public Guardian, while administratively under the auspices of the NSW Trustee and Guardian, operates independently, arrives at its decision independently, and fulfils its role in relation to its clients independently. The Committee considers that this reality should be reflected and reinforced in the titles given to the Public Guardian and the NSW Trustee and Guardian.

9.14 Therefore, the Committee recommends that the NSW Government investigate the possibility of changing the name of the NSW Trustee and Guardian to more clearly reflect its distinction from the Public Guardian in name as well as function.

Recommendation 24

That the NSW Government change the name of the NSW Trustee and Guardian, and in particular remove 'Guardian' from the title, to more clearly distinguish it from the Office of the Public Guardian.

Focus on client's best interests

9.15 Ms Imelda Dodds, Acting Chief Executive Officer of the NSW Trustee and Guardian, told the Committee that the primary role of the NSW Trustee and Guardian was 'driven by the principles that are in section 39 of the [*NSW Trustee and Guardian Act 2009*]' and that '[t]he absolute focus of our endeavours has to be the person themselves and their best interests. Any decision we make must be driven by that.'[416]

9.16 The NSW Trustee and Guardian submission stated that the NSW Trustee and Guardian 'will work with the protected person, his or her family members and service providers when directly managing an estate'.[417] However, Ms Dodds explained, '[v]ery often the interests of the family may conflict with what is in the person's best interests', and in such circumstances the NSW Trustee and Guardian attempts to 'resolve these issues and explain to the family members why we are making a decision.'[418]

9.17 Mr Paul Marshall, Manager, Quality Service and Community Relations, NSW Trustee and Guardian, also stated that the NSW Trustee and Guardian attempted to resolve 'impasses that may arise where you cannot get agreement about what is in the best interests of the person'.

416 Ms Dodds, Evidence, 28 September 2009, p 8

417 Submission 13, NSW Trustee and Guardian, p 5

418 Ms Dodds, Evidence, 28 September 2009, p 8

However, Mr Marshall added, 'ultimately we are there to make decisions in the best interests of the person, and really to take on the role of mediating situations between family members would become a full-time job in itself.'[419]

Contact between the NSW Trustee and Guardian and its clients

9.18 This section discusses issue about contact between the NSW Trustee and Guardian and the person under management. Some inquiry participants were concerned with a lack of consultation and one-to-one contact with clients, while representatives from the NSW Trustee and Guardian explained that although consultation was the expected practice, extensive consultation and one-to-one contact was neither possible nor desirable in all circumstances.

Consultation with clients

9.19 The Aged Care Rights Service (TARS) submission stated that a common complaint received by TARS was that when the former Office of the Protective Commissioner (now the NSW Trustee and Guardian) was appointed there was 'little or no dialogue' with the protected person whose estate was now being managed. The TARS submission further noted that while the NSW Trustee and Guardian 'has a broad discretion under section 72 [of the *NSW Trustee and Guardian Act* 2009] whether to consult with the person under management and relatives of the person about a proposed course of action' there was 'no express legislative obligation to consult'. [420]

9.20 Section 72 of the *NSW Trustee and Guardian Act 2009* provides that:

> (1) The NSW Trustee must take the following steps before taking any action in respect of the estate of a managed person:
>
> (a) the NSW Trustee must determine whether the action is of such a nature that the person or a relative or relatives of the person should be consulted about the action,
>
> (b) if the NSW Trustee determines that consultation should take place, the NSW Trustee must cause to be taken all steps that are reasonably practicable in the circumstances to give notice to the person or the relative or relatives of the person of the action.[421]

9.21 Ms Dodds stated that it was 'an absolute given expectation that that consultation does occur' and that this accorded with the principles in section 39 of the *NSW Trustee and Guardian Act 2009* which 'specifically requires consultation with the person themselves'. Ms Dodds observed that with the large number of clients under direct management, consultation may not occur in every case, but that it was the expected practice:

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419 Mr Paul Marshall, Manager, Quality Service and Community Relations, NSW Trustee and Guardian, Evidence, 28 September 2009, p 9

420 Submission 19, The Aged Care Rights Service, p 6

421 *NSW Trustee and Guardian Act 2009* (NSW), s 72 (1)

> Can I put my hand on my heart and say that with 9,000 clients under direct management that there will not be occasions when [the client has not been consulted]. I think we would all be very surprised if I said absolutely that could never have happened but it is not the practise standard and it is not the expectation nor is it my expectation of what staff should be doing.[422]

9.22 The TARS submission provided an example of a client who had not been consulted about the decision to sell their home.[423] In relation to this scenario, Ms Dodds commented '[t]hat is most certainly not supposed to happen.' Ms Dodds explained that the process to be followed in relation to major decisions like the sale of property included written notice of the decision being given to the person, the option of seeking an internal review, and the option of appealing the decision to the Administrative Decisions Tribunal:

> Major decisions are made and reasons for decisions given in writing…They would be able to seek an internal review in the organisation, which is conducted by a senior officer, more senior than the person who made the original decision, and who has had no previous involvement in the decision. They make their decision, which can be to affirm the original decision, vary it or set it aside and make a new decision. If people remain unhappy with that they can appeal the whole decision to the Administrative Decisions Tribunal.[424]

9.23 Mr Marshall confirmed that the example provided by TARS had in fact occurred, but stated that it was the only instance he was aware of where that had occurred, and that the process described by Ms Dodds, involving written notice of the decision being given to the person, had in fact allowed the oversight to be detected:

> What happened was, in the process of making the decision the office notified the person and gave them the reason why the decision had been made to sell the property. That then alerted the person to the fact that this decision had been made and they had not been consulted about it, which enabled the review process to take place. In those rare instances where consultation does not occur, the process then to implement a decision requires a reason for decision letter that then goes to the person and is a safeguard on it.[425]

9.24 Mr Marshall stated that '[w]e had a lot of soul-searching about how that occurred. It really was a bit of a wake-up call, I suppose for the two areas involved. I think we have improved in that area.'[426]

9.25 Mr Marshall also noted that at the other end of the spectrum, the NSW Trustee and Guardian had to be careful not to allow the consultation process to continue too long:

> …what we have to be careful not to do, which we get criticised for sometimes, is allowing the consultation process to take so long that we end up not making a decision for too long a period of time. We have to draw a line at some point and say

422 Ms Dodds, Evidence, 4 November 2009, p 55

423 Submission 19, p 6

424 Ms Dodds, Evidence, 4 November 2009, p 56

425 Mr Marshall, Evidence, 4 November 2009, p 56

426 Mr Marshall, Evidence, 4 November 2009, p 56

> we have taken into account the views of the different parties and we now believe we are in a position to make a decision. We know that whatever decision we make someone is not going to be happy with it. There is, however, a review process that can be followed, otherwise you can end up in a situation where the decision goes on indefinitely because the consultation process never ends.[427]

One-to-one contact with clients

9.26 The Intellectual Disability Rights Service (IDRS) submission stated that the IDRS consistently received complaints about the financial management of the former Office of the Protective Commissioner (now the NSW Trustee and Guardian). These complaints included the use of 'client service teams' leading to no particular person being responsible or accountable for any particular client and a lack of individualised service to the needs and wishes of each client[428]

9.27 The NSW Ombudsman submission stated that it was aware that clients of the NSW Trustee and Guardian often needed a 'caseworker' but that 'the current interpretation of the financial manager's role prevents this type of involvement.' The submission further stated that a client's general financial affairs were not routinely monitored and that management orders related only to particular aspects of a person's financial affairs:

> There is no system, or expectation, that clients will be routinely monitored regarding their financial affairs unless an issue is brought to the attention of the financial manager. The limited availability of case management services in the community means that while a management order may offer protection from financial exploitation, other aspects of a client's everyday life remain difficult.[429]

9.28 Ms Dodds explained that the former Office of the Protective Commissioner had moved away from one-to-one service delivery to avoid the situation in which one person was responsible for the protected person's estate:

> Historically one of the reasons that the Office of the Protective Commissioner moved away from one- to-one client service delivery was a concern about the extent of control that one officer could have over an individual's entire estate. In any organisation you have a mix of staff; staff who are exceptionally good at what they do and, regrettably, there are staff who are less good at what they do.[430]

9.29 'Based on recommendations of a review commissioned by New South Wales Treasury', Ms Dodds continued, 'the office restructured the way in which it delivered services in 2006.' Ms Dodds also stated that after her appointment in August of 2007 she conducted a further review 'which has brought into place the client service teams that operate today."[431]

9.30 Ms Dodds noted that some clients will always require one-to-one support and some of the client service teams are structured to deliver that support. The 'intake team' for example, deal with a client when they first come under the control of the NSW Trustee and Guardian, and

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427 Mr Marshall, Evidence, 4 November 2009, p 57

428 Submission 3, Intellectual Disability Rights Service, p 7

429 Submission 9, p 3

430 Ms Dodds, Evidence, 28 September 2009, p 3

431 Ms Dodds, Evidence, 28 September 2009, p 3

work with the client 'on a one-to-one basis for a period of approximately three months whilst they look into the individual circumstances.'[432]

9.31 Another reason there has been a move away from one-to-one service delivery, explained Ms Dodds, is insufficient staff to provide such a service:

> In terms of the number of staff available to provide the service, one reason, but not the only reason, for a move away from one-to-one service delivery historically, as I understand it, was the fact that the organisation could not at that time, and nor probably reasonably into the future, keep pace with the demand for service by providing one-to-one service delivery for all clients. If what is sought is a return to one-to-one service delivery for all clients under management as a best outcome, then we could not do that with today's resources.[433]

9.32 Furthermore, Ms Dodds stated that although one-to-one service delivery was important for some clients it was not important for all:

> I am not of the view that it is essential for all clients though to have one-to-one service delivery. I am of the view that we need to provide that where it is essential and we need to be able to provide a quick and responsive service.[434]

9.33 In relation to clients in regional areas, Ms Dodds explained that while most contact at present is by phone, this will change in coming years as the NSW Trustee and Guardian utilises the regional branch network made available by the merger of the Office of the Protective Commissioner and the NSW Trustee:

> At the moment there is not a huge amount of personal contact. Now that is set to change in the coming year and following years when we look to devolve a lot of the services that are currently delivered by the phone through the office branch network that we have…This has all come about because of the merging of the former office of the Protective Commissioner and the former Public Trustee, the latter having that branch office network and the former not having any branch office except one in the city.[435]

Committee comment

9.34 The Committee notes that in relation to contact between the NSW Trustee and Guardian and persons under financial management, the move away from one-to-one contact to client service teams has been guided by at least two reviews, one external and one internal.

9.35 The Committee also acknowledges the potential difficulties that may arise for clients lacking capacity when they have to deal with a range of people and that in some cases it may be difficult to determine the specific needs of individual clients.

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432 Ms Dodds, Evidence, 28 September 2009, p 3

433 Ms Dodds, Evidence, 28 September 2009, p 13

434 Ms Dodds, Evidence, 28 September 2009,, p 13

435 Ms Dodds, Evidence, 4 November 2009, pp 55-56

9.36 In this regard, the Committee notes that the move towards client service teams and has in part been a response to concerns about one person having control over a person's estate, and in part a response to limited resources.

9.37 The Committee also notes that contact with regional clients under management is set to improve through utilisation of the branch network made available to the NSW Trustee and Guardian by the merger of the former offices of the Protective Commissioner and the Public Trustee.

Safeguards and monitoring of the NSW Trustee and Guardian

9.38 This section looks at mechanisms in place to provide safeguards for clients of the NSW Trustee and Guardian, in terms of monitoring and oversight of the NSW Trustee and Guardian and options for review of decisions made by the NSW Trustee and Guardian.

9.39 The NSW Trustee and Guardian submission explained that its decisions can be reviewed internally and by the Administrative Decisions Tribunal:

> The decisions of NSW [Trustee and Guardian] T&G can be reviewed, firstly through a formal internal process and then, if a client or stakeholder is dissatisfied, on application to the Administrative Decisions Tribunal.[436]

9.40 Ms Dodds also noted that there were provisions under section 21 of the *NSW Trustee and Guardian Act 2009* for the NSW Trustee and Guardian to sue itself.[437] Section 21 of the Act provides that:

> (1) The NSW Trustee, acting in one capacity, may maintain proceedings against itself acting in another capacity.
>
> (2) However, in any such case the NSW Trustee may apply to the Supreme Court for direction as to the manner in which the opposing interests are to be represented and must comply with the Court's directions.[438]

9.41 The joint submission from People With Disability Australia and the NSW Mental Health Coordinating Council (PWD and NSW MHCC) noted that under section 16 of the *NSW Trustee and Guardian Act 2009* the NSW Trustee and Guardian can initiate and defend legal action in relation to a person's estate, but that the client can only initiate legal action with the consent of the NSW Trustee and Guardian. The submission expressed concern that the NSW Trustee and Guardian is unlikely to support a client initiating legal action and was also in a position to prevent legal action being initiated against itself:

> The Protective Commissioner has historically been a very conservative body most unlikely to support its clients initiating legal action. More seriously, it is sometimes the conduct of the Protective Commissioner that is the subject matter of the complaint.

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436 Submission 13, p 5

437 Ms Dodds, Evidence, 28 September 2009, p 2

438 *NSW Trustee and Guardian Act 2009* (NSW), s 21

> The Protective Commissioner is therefore in a position to prevent a client from initiating legal action against that Office.[439]

9.42 The Public Interest Advocacy Centre (PIAC) submission recommended that an independent body be established to oversee the work of both public and private estate managers and that legislation be introduced to provide incentives to improve the performance of managers and to remove the monopoly of the NSW Trustee and Guardian. The PIAC submission's recommendations were as follows:

> (a) an independent authority be established to oversee and review the work of estate managers (public and private) to ensure there is no conflict of interest and to investigate and take action on abuse or fraud; and
>
> (b) relevant legislation be amended to introduce incentives to improve the management of estates, such as managers bearing the costs of losses due to their negligence and removing the monopoly of the Public Trustee and Protective Commissioner.[440]

9.43 Ms Dodds explained that there was some independent oversight of the NSW Trustee and Guardian in the form of its Independent Investment Advisory Committee that monitored the performance of State Street, managers of the NSW Trustee and Guardian's Common Fund, and the NSW Trustee and Guardian itself:

> [The Independent Investment Advisory Committee] membership includes people with experience in former trustee organisations, in investment and in financial planning. There is a representative from Treasury nominated by Treasury, also the Attorney General, as CEO and the senior finance staff are ex officio on that committee. As I said, it meets quarterly. It receives reports from State Street, who manage the common fund. It quite extensively quizzes State Street about their performance and then turns its attention to the performance of the organisation.[441]

9.44 Ms Brenda Lee Doyle, Provincial Director of the Office of the Public Guardian in Alberta, Canada, described the process that existed in Alberta whereby a person with concerns about their co-decision-maker, guardian or trustee can submit a written complaint, which may lead to an investigator being appointed who then makes a recommendation as to what action should follow:

> If it meets the criteria in the legislation, then it will be assigned to an investigator…
>
> …An investigator will make a recommendation to provide education and assistance, if it is a founded complaint, or they can make a recommendation for alternative dispute resolution, or if it is a very serious matter they can make a recommendation to have the guardian, co-decision maker or trustee removed…[442]

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439 Submission 4, People with Disability Australia Inc and NSW Mental Health Coordinating Council, p 19

440 Submission 22, Public Interest Advocacy Centre Ltd, p 6

441 Ms Dodds, Evidence, 28 September 2009, p 5

442 Ms Brenda Lee Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada, Evidence, 5 November 2009, p 7

Committee comment

9.45 The Committee notes that from the evidence presented to the Committee, two levels of review of decisions made by the NSW Trustee and Guardian have been identified: internal review, and review by the Administrative Decisions Tribunal.

9.46 In addition, the person whose estate is being managed may initiate legal action against the manager of their estate, and the NSW Trustee and Guardian can initiate legal action against itself.

9.47 In relation to external oversight, the Committee notes the function of the Independent Investment Advisory Committee in monitoring the performance of the NSW Trustee and Guardian's Common Fund, and the of the NSW Trustee and Guardian itself.

9.48 The Committee also notes the concerns of some inquiry participants that the NSW Trustee and Guardian may be in a position to prevent legal action being taken against it by a person whose estate is under management and the proposal that an independent body be established that could, amongst other functions, initiate legal action on behalf of such people. However, the Committee did not receive sufficient evidence on these matters to make a recommendation.

Fees charged by the NSW Trustee and Guardian

9.49 The NSW Trustee and Guardian charges most clients two fees: a 'Management Fee' and an 'Investment Fee' defined as follows:

> A Management Fee is a percentage of the total value of the estate NSW Trustee and Guardian is managing (excluding the client's principle place of residence).
>
> The Investment Fee is a percentage of the total amount invested in the NSW Trustee and Guardian's investment funds.[443]

9.50 The percentage fee and cap amount for each type of fee is as follows:

> **Management Fee**
>
> Establishment fee – 1% of chargeable assets (capped at $3,300)
>
> Annual Management fee – 1.1% (capped at $15,000)
>
> **Investment Fee**
>
> Annual fee - 0.5% of the value of the investment.[444]

9.51 Ms Dodds explained that the 0.5% Investment Fee included the fee to the NSW Trustee and Guardian and to the financial institutions managing the investment. For example, an amount may be held in the Common Fund in which case the 0.5% fee is divided between the NSW

443 NSW Trustee and Guardian, Fact Sheet Number 4, 'Facts on Fees,' p 1

444 NSW Trustee and Guardian, Fact Sheet Number 4, 'Facts on Fees,' p 1

Trustee and Guardian, State Street, as managers of the Common Fund, and P & B Parry, as master custodians.[445]

9.52 The joint submission from PWD and NSW MHCC described the manner in which the NSW Trustee and Guardian charges fees as 'arbitrary to the extent that they do not relate to specific transactions and other instances of service provided to the person.' The submission described a lack of transparency in fees as 'grossly inappropriate' and discriminatory in relation to persons with disabilities:

> The lack of transparency associated with these fees and charges is grossly inappropriate in view of the compulsory nature of the state's intrusion upon the person's affairs. To the extent that such arrangements would not be tolerated in the commercial sector they are discriminatory against persons with disability, and in violation of Article 5 of the CRPD [Convention on Rights of Persons with disabilities].[446]

9.53 Ms Dodds acknowledged that the fee structure of the NSW Trustee and Guardian was not 'activity based', and for this reason it was difficult to compare it to the fee structure of a commercial trustee company, which may have more 'activity based costing arrangements.'[447]

9.54 Mr Marshall noted that while the NSW Trustee and Guardian's fees were 'up front,' a private manager may not declare the fees they take from managed funds:

> Our fees are up-front. We have got the 1.1 per cent management fee and 0.5 per cent investment fee which attracts too. Now not all trustee organisations would declare the fees in that way. They would say, 'Okay we have got administration fees' but they are not going to declare necessarily the percentage that they are taking out of each of the funds as their fee.[448]

9.55 Mr Marshall further explained that financial institutions offering a fixed interest return may effectively be extracting a 'hidden' fee which is the difference between the return the institution earns on the investment and the fixed interest amount it pays out, and that this also made it difficult to compare the fees charged by such institutions to those charged by the NSW Trustee and Guardian:

> There is no requirement on a trustee organisation, for example, who has a fund that says 'We return an X-percentage interest rate' to actually declare how much they are taking out of that particular fund in terms of fees. You would have to go and look at the annual report. You will often see financial institutions advertising to all of us a 'no-fee account'. The reality is that they are taking out a fee that we are not aware of from that account. They are saying, 'We provide you with 6 per cent interest for a fixed period' but they might be earning 8 per cent interest on that which is, in effect, a 2 per cent fee that they are taking but that fee is hidden. That can make it very difficult to compare like with like.[449]

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445 Ms Dodds, Evidence, 4 November 2009, p 55

446 Submission 4, p 18

447 Ms Dodds, Evidence, 4 November 2009, p 54

448 Mr Marshall, Evidence, 4 November 2009, p 54

449 Mr Marshall, Evidence, 4 November 2009, p 54

9.56 The Committee examines the issue of fees charged by commercial trustee corporations later in this chapter.

Private managers and commercial trustee corporations

9.57 This section examines the activity of private managers, the NSW Trustee and Guardian's role in supporting and monitoring private managers, and responses available to the NSW Trustee and Guardian and the person under management in the event that a private manager does not perform their role satisfactorily.

9.58 The term 'private manager' encompasses both an individual – perhaps a family member or friend – and an organisation such as a commercial trustee corporation that has been appointed financial manager by the court or tribunal. The evidence that follows largely relates to both types of private manager, although there is a section devoted to commercial trustee corporations to reflect evidence specifically about the activity of such organisations.

9.59 It should be noted that a person may use a power of attorney to appoint someone to manage aspects of their financial affairs. People appointed under a power of attorney are not considered 'private managers' under the definition being used in this report. The topic of powers of attorney is addressed in Chapter 8

NSW Trustee and Guardian oversight of private mangers

9.60 As detailed in Chapter 6, the Guardianship Tribunal may appoint either the NSW Trustee and Guardian or a private manager under a financial management order. In cases where a private manager is appointed, the NSW Trustee and Guardian is nevertheless involved, authorising and oversighting the activities of the private manager. As the NSW Guardianship Tribunal's supplementary submission stated, '[a]ll financial management orders involve the NSW Trustee either as the financial manager or as the body which issues directions and authorities to a private manager.'[450]

9.61 The NSW Trustee and Guardian submission outlined the process through which the NSW Trustee and Guardian authorises private managers and requires that they lodge annual accounts, thereby providing safeguards for the person under management:

> The work of a Private Manager appointed by a Court or Tribunal is overseen by the NSW T&G. Private Managers must submit a plan of management on receiving the 'Authorities and Directions' document that enables them to act on behalf of the person under management. They must also lodge a statement of accounts on an annual basis. These accounts are examined to ensure that the Manager is acting in accordance with their authorities. These are safeguards intended to protect the estate of the person under management.[451]

9.62 Ms Dodds explained that private managers must submit to the NSW Trustee and Guardian a management plan that caters to the needs of that individual:

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450 Submission 5a, NSW Guardianship Tribunal, p 6

451 Submission 13, p 8

> When a private manager is appointed they must provide a plan to our office about how they propose to manage this person's estate. That may have some very particular requirements in it. For example, and this is a very common example, most people under private management at the moment are elderly and quite often they are in or about to go into aged care and their family member usually is appointed. It is often the case that the family home may need to be sold to provide the funds for that to occur. …We review that plan and we agree with it or talk to the private manager about where there needs to be refinement.[452]

9.63 One reason the NSW Trustee and Guardian advises on management plans, explained Ms Dodds, is to ensure they comply with the relevant legislation. Once a suitable plan has been established, the NSW Trustee and Guardian provides the 'directions and authorities' giving the manager the power to implement the plan:

> …the private manager is bound by legislation as well. They may be proposing something that they cannot do. It could be an investment that is outside the provisions of the Trustee Act, for example. So we would provide advice on that. But then on the basis of that plan we would prepare the directions and authorities, which give them the power to do what they need to do to manage their family member's affairs.[453]

9.64 The 'directions and authorities' allow for specific actions to be taken in the management of the person's estate. If further action is required, Ms Dodds explained that further authority must be sought from the NSW Trustee and Guardian:

> Using property as an example, it might be that there is a multiple property portfolio but the directions and authorities only provide for the sale of a particular piece of property in order to give effect to part of the plan. That is not to say that in the future another piece of property may need to be sold. They would simply come back and get a reissuing of directions.[454]

How often should private managers lodge accounts for review?

9.65 The NSW Trustee and Guardian submission stated that 'in practice' private managers are required to lodge accounts for review annually. However, the *NSW Trustee and Guardian Act 2009* and the NSW Trustee and Guardian Regulations 2008 'do not make specific provisions as to how often accounts should be submitted by private managers.' The submission notes that '[t]here is a view in some quarters that the NSW T&G should have the capacity to vary the requirement to lodge accounts' and raises the question as to whether the frequency of review should be based on performance:

> In circumstances where a Manager is performing reliably well should it be possible for the NSW T&G to extend the reporting period to every two or three years? In the event that a manager is not performing well or there is a risk of exploitation an earlier reporting schedule may be warranted.[455]

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452 Ms Dodds, Evidence, 28 September 2009, p 7

453 Ms Dodds, Evidence, 28 September 2009, p 7

454 Ms Dodds, Evidence, 28 September 2009, p 7

455 Submission 13, p 10

9.66 However, the NSW Trustee and Guardian submission continued, there is no legislative protection giving the NSW Trustee and Guardian the discretion to vary the frequency with which private managers must lodge accounts for review. The submission contended that the NSW Trustee and Guardian might come under criticism if it was 'to use such a discretion based on past reliability of the Manager but during the extension period the Manager performed less than satisfactorily…'[456]

9.67 Therefore, the NSW Trustee and Guardian submission recommends that 'if public feedback is in favour of extending the accounting period' the following should be inserted in the *NSW Trustee and Guardian Act 2009* after section 73, giving the NSW Trustee and Guardian the discretion to vary the review period and exempting it from liability:

> (a) The NSW Trustee may exercise its discretion as to when and how often the managed person's accounts are to be filed, examined and passed
>
> (b) The Chief Executive Officer or any authorised person acting under the delegation or direction of the NSW Trustee or Chief Executive Officer in pursuance of this section in good faith shall not be subject to any personal action, liability, claim or demand.[457]

Committee comment

9.68 The Committee notes that giving the NSW Trustee and Guardian the discretion to vary the frequency with which private managers are required to submit accounts for review would allow it to reduce the reporting requirements for private managers who have demonstrated satisfactory performance, and to increase monitoring and support for managers who are not performing satisfactorily. This would have the effect of allocating the resources required for reviews to be undertaken in the areas of greatest need.

9.69 The Committee did not receive sufficient evidence on this matter to make a specific recommendation to amend legislation, but does consider it an important matter that requires further investigation.

9.70 Therefore, the Committee recommends that the NSW Government consider amending the *NSW Trustee and Guardian Act 2009* to provide the NSW Trustee and Guardian with the discretion to decide how often private managers must lodge accounts for review and exempting it from any liability arising from its exercise of this discretion.

Recommendation 25

That the NSW Government consider amending the *NSW Trustee and Guardian Act 2009* to provide the NSW Trustee and Guardian with the discretion to decide how often private managers must lodge accounts for review and exempting it from any liability arising from the exercise of this discretion.

456 Submission 13, p 10

457 Submission 13, p 10

Responding to unsatisfactory performance by a private manager

9.71 The NSW Trustee and Guardian submission stated that in the small percentage of cases where a private financial manager is not performing satisfactorily, a request to replace the manager can be made:

> The majority of Private Managers discharge their role faithfully and well. Some struggle with the role and approximately 1% of managers fail to meet requirements and in some cases abuse the position of trust to such a degree that the NSW T&G is required to refer the matter back to the Court or Tribunal with a request that the manager be replaced.[458]

9.72 The NSW Trustee and Guardian submission observed that private managers can sometimes struggle with the complexity of estate management, which requires an understanding of various pieces of legislation:

> There is a common view that the management of a person's finances can be a matter of simple accounting. Increasingly this is not the case and sophisticated understanding of the nuances of financial management and the interplay between Commonwealth and State legislation particularly in relationship to the benefits and provision of Aged Care Bonds, together with the requirements of the Prudent Person Principle requirements of the Trustee Act 1925 can create a complexity which challenges many Private Financial Managers.[459]

9.73 In relation to monitoring the performance of private managers, Ms Dodds explained that the annual review of accounts was an opportunity to see if problems existed and that the initial check is to see whether the manager has complied with the 'directions and authorities' provided in relation to their management plan for the person under management. If the situation is 'redeemable', stated Ms Dodds, the NSW Trustee and Guardian will provide 'information and some level of guidance' to assist the private manager, '[h]owever, if we have severe concerns about the nature of the activities they are undertaking, we can apply to the relevant court or tribunal to have the order reviewed and to have the financial manager replaced with another financial manager…'[460]

9.74 Ms Dodds further stated that the newly appointed manager, be that the NSW Trustee and Guardian or another private manager, can, upon discovering that the previous manager has acted dishonestly, initiate legal action against that person, and that this is a course of action available to any citizen. Ms Dodds considered that the ability to take legal action to redeem losses civilly or criminally was a sufficient safeguard for a person under management.[461]

9.75 However, Mr Marshall observed that it can be very difficult to successfully run a case of 'misappropriation of funds', for example, 'when the person who you really need to get the evidence from has lost capacity':

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458 Submission 13, p 8

459 Submission 13, p 8

460 Ms Dodds, Evidence, 28 September 2009, p 7

461 Ms Dodds, Evidence, 28 September 2009, p 12

> There is the criminal route, where if the dishonesty or misappropriation is so apparent that the police may be interested in it. More often than not it is a case of having to take legal action on behalf of the person under management. You then have to weigh up the issue of whether the action is going to be successful and, if so, whether there will be any money to retrieve. …[I]t raises the bigger issue of how successful we are as a society in clawing back funds that have been misappropriated from any citizen where that person is no longer able to give evidence and say, 'Yes, that person stole money from me.'[462]

Oversight of commercial trustee corporations

9.76 As noted above, a commercial trustee corporation comes under the term 'private manager' and may be appointed by the court or tribunal as the manager of an estate in the same way an individual private manager or the NSW Trustee and Guardian is appointed. As with individual private managers, a commercial trustee organisation must submit a management plan to and receive a 'directions and authorities' from the NSW Trustee and Guardian in order to act as financial manager.[463]

9.77 Commercial trustee corporations also lodge accounts annually for review by the NSW Trustee and Guardian. Mr Paul O'Neill, Business Development Manager, Trust Company Limited, stated that a review to ensure the management plan is being followed occurs at least annually:

> We are reviewed on at least an annual basis where we have to provide a set of accounts, accounting for every dollar that is spent and showing whether the investments et cetera still fit within our initial plan and whether everything is seemingly going towards or along the way we had indicated at the outset.[464]

9.78 Mr Peter Whitehead, National Manager, Fiduciary Solutions, Perpetual Limited, observed that all trustees are subject to the same fiduciary obligations under legislation and common law and that a commercial trustee's products must also meet those obligations:

> Overall we have an obligation as a trustee, whether you are the New South Wales Trustee and Guardian or a trustee company, to meet our fiduciary obligations, and they are controlled by various parts of the legislation and the common law. Our product range and our obligations arising out of that product range are the same in terms of being assessed against a prudent and diligent fiduciary.[465]

9.79 Mr Whitehead argued that the combination of internal controls existing within a commercial trustee corporation and oversight by the NSW Trustee and Guardian meant that a commercial trustee corporation operated in a more transparent environment than individual private managers:

> Trustee companies will have internal controls in meeting their fiduciary obligations to have an annual review at least on investment under the Trustee Act. There are already

462 Mr Marshall, Evidence, 28 September 2009, p 12

463 Ms Dodds, 4 November 2009, p 52

464 Mr Paul O'Neill, Business Development Manager, Trust Company Limited, Evidence, 4 November 2009, p 19

465 Mr Peter Whitehead, National Manager, Fiduciary Solutions, Perpetual Limited, Evidence, 4 November 2009, p 15

> a number of controls for a trustee company, but for a private person they are not really answerable to anyone but the court should someone find the need to have them removed because they are not doing the right thing. That is a…less-transparent process, of course, because they are not doing this as part of their daily job like a trustee company.[466]

9.80 Mr O'Neill contended that the high level of scrutiny commercial trustee corporations operated under and their level of expertise, as compared to an individual private manager, indicated they could be given more leeway in the investment decisions they made:

> I think organisations like ours probably are scrutinised in so many different ways that I would like to think there could be some argument that trustee organisations could be given perhaps a little more leeway in the decisions that can be made, rather than individuals who might be appointed on a client's behalf, by sheer virtue of the expertise and the level of oversight we face.[467]

9.81 Mr Marshall suggested that difficulties could arise for commercial trustee corporations if they interpreted their role as maximising financial returns from the estate rather than acting in the best interests of the person under management:

> I think some of the difficulties the trustee companies have, and private managers generally, is to understand exactly what their role is. Sometimes a trustee organisation might think that their primary role is to maximise the returns of the estate, which is not their sole responsibility: it is to make decisions in the overall best interests of the person, and that can be different. If you do not have expertise in that area that can sometimes be problematic for a trustee who is used to acting in the best interests of the financial returns of the estate, not necessarily the best interests of the person.[468]

9.82 Mr O'Neill pointed out that it is in the best interests of the trustee corporation to do their best for a client as their reputation is on the line:

> The worst thing in the world you can have happen is a shortfall. You really want to do the best for your client, particularly because it is not just a consideration of income but also a consideration of reputation. We would not be considered for these matters unless we were deemed to be doing the job properly by virtue of the family members and the oversight body.[469]

Selecting an investment strategy

9.83 In relation to the particular investment strategy adopted for the estate of person under management, Mr O'Neill explained that the trustee corporation assessed the individual's circumstances and the financial needs which had to be met by the income from their estate. In relation to a compensation payout, for example, the money had to last for the rest of the person's life:

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466 Mr Whitehead, Evidence, 4 November 2009, p 19

467 Mr O'Neill, Evidence, 4 November 2009, p 19

468 Mr Marshall, Evidence, 4 November 2009, p 52

469 Mr O'Neill, Evidence, 4 November 2009, p 18

> The best way to consider that is that that may be the last payday that person is ever going to have. We have to try to do some financial modelling and forecasting to see what can be done to make this money last that client's anticipated life expectancy. That factor becomes one factor in how aggressive or conservative you would need to be in the investment portfolio that might be put together.[470]

9.84 Mr O'Neill stated that another factor taken into account was the person's previous lifestyle and attitude towards investment:

> We then try to look at their lifestyle habits or circumstances towards investment in the period prior to this event that caused their incapacity and we try to mirror the habits they have had in the past.[471]

9.85 Mr Marshall observed that both the NSW Trustee and Guardian and commercial trustee corporations tended to utilise the same financial models when developing an investment strategy for the estate of a person under management:

> The reality is that in a very similar way to the way our superannuation funds are invested, the trustee funds, as we do also, follow a very similar model based on a person's age, their life expectancy, the amount of capital they have got, et cetera. So the models are fairly similar.[472]

9.86 Mr Marshall further suggested that in the event that a trustee corporation's strategy was seen to be producing poor returns for the person under management, it was unlikely the corporation would face legal consequences if they had been complying with their obligations under the *Trustee Act* and the 'prudent person principle':

> My understanding of it is as long as the trustee complies with its obligations under the Trustee Act and the prudent person principle then I do not think there is any legal ramification for them. If, however, they are shown to have acted outside of those principles and that has resulted in a loss for a person then there would be legal ramifications. The difficulty always is, of course, it is not apparent perhaps until some years down the track whether or not a particular investment strategy was appropriate.[473]

Fees charged by commercial trustee corporations

9.87 Mr Ross Ellis, Executive Director, Trustee Corporations Association of Australia, explained that the maximum fees a corporation could charge were set in legislation, as percentages of capital and income, but that corporations negotiated their fee within the prescribed range depending on the circumstances of individual cases.[474]

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470 Mr O'Neill, Evidence, 4 November 2009, p 18

471 Mr O'Neill, Evidence, 4 November 2009, p 18

472 Mr Marshall, Evidence, 4 November 2009, p 52

473 Mr Marshall, Evidence, 4 November 2009, p 52

474 Mr Ross Ellis, Executive Director, Trustee Corporations Association of Australia, Evidence, 4 November 2009, 17

9.88 Mr O'Neill thought that the legislated maximum percentages were 5.5% of the initial capital sum and 6.6% of income earned.[475]

9.89 In response to the observation that the decisions a corporation made affecting the income earned from a client's estate simultaneously affected the size of the fee payable to the corporation, Mr O'Neill stated that the fee payable to the corporation was not a consideration when making investment decisions on behalf of a client.[476]

On the death of a private manager

9.90 The NSW Trustee and Guardian submission noted that currently there is no legislative provision allowing the NSW Trustee and Guardian to step in if a private manager dies, to fulfil the role of financial manager until the relevant court or tribunal appoints a new manager. This gap in management can lead to problems. Accordingly, the NSW Trustee and Guardian submission recommends that an amendment, 'making provision that on the death, incapacity or resignation of a private manager the NSW T&G be empowered to manage/protect the managed persons estate until such time as a new manager is appointed by the Court or Tribunal' be inserted in the *NSW Trustee and Guardian Act 2009* after section 70:

> From and after the death, incapacity or resignation of a manager and until another manager is appointed the estate of a managed person shall be managed by the NSW Trustee and Guardian.[477]

9.91 Professor Terrence Carney from the Sydney Law School agreed that the power was needed as an 'interim power'.[478]

9.92 Ms Therese Sands, Executive Director - Leadership Team, People with Disability Australia Inc, also agreed that the amendment was reasonable, subject to the person under management having the right to challenge the appointment and suggest their own private manager:

> …we would say that is reasonable as long as there is no delay to that and as long as there are safeguards in place for the person to perhaps make a challenge to that appointment and perhaps they also have the opportunity to nominate somebody themselves as an alternative private manager.[479]

Committee comment

9.93 The Committee notes the potential difficulties that could arise if a private manager dies and the estate of the person lacking capacity is without management until the relevant court or tribunal appoints a new manager.

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475 Mr O'Neill, Evidence, 4 November 2009, p 17

476 Mr O'Neill, Evidence, 4 November 2009, p 18

477 Submission 13, NSW Trustee and Guardian, p 10

478 Answers to questions on notice taken during evidence 28 September 2009, Professor Terrence Carney, Sydney Law School, Question 10, p 1

479 Ms Therese Sands, Executive Director - Leadership Team, People with Disability Australia Inc, Evidence, 29 September 2009, p 50

9.94 The Committee agrees that these difficulties can be avoided if the NSW Trustee and Guardian is empowered to manage the person's estate in these circumstances until such time as a new manager is appointed.

9.95 Therefore, the Committee recommends that the *NSW Trustee and Guardian Act 2009* be amended by inserting a clause providing for the NSW Trustee and Guardian to assume management of the estate of a person under a financial management order upon the death of a private manager previously appointed and until a new manager is appointed by the relevant court or tribunal.

Recommendation 26

That the NSW Government pursue an amendment to the *NSW Trustee and Guardian Act 2009* to provide for the NSW Trustee and Guardian to assume management of the estate of a person under a financial management order upon the death of a private manager previously appointed and until a new manager is appointed by the relevant court or tribunal.

Chapter 10 Implementing substitute decision-making orders – guardianship orders

The previous chapter examined the implementation of financial management orders, focussing on the role of the NSW Trustee and Guardian and private managers. This chapter examines the implementation of guardianship orders and the role of the Public Guardian. Two issues in particular are addressed: the use of restrictive practices and authorisation for NSW Police to use 'reasonable force' to implement a guardianship order. This chapter also examines a proposal for community guardianship based on the Public Guardian's authority to delegate its powers.

The functions of the Public Guardian

10.1 The Public Guardian is the statutory body appointed by the Guardianship Tribunal as the guardian of last resort for people lacking capacity. Issues around the use of restrictive practices and authorising NSW Police to use reasonable force to implement guardianship orders were raised during the inquiry and are examined in this section.

Restrictive practices

10.2 The Public Guardian defines restrictive practices as follows:

> Restrictive practices refer to the use of a broad range of techniques to manage or change a person's behaviour where, in the absence of consent, these procedures would constitute an assault or wrongful imprisonment. Restrictive practices can include the use of chemical restraint, physical restraint, loss of privileges, seclusion/confinement or denial of access.[480]

10.3 The joint submission from People With Disability Australia and the NSW Mental Health Coordinating Council (PWD and NSW MHCC) stated that 'a primary reason for the appointment of a guardian is to authorise the use of restrictive practices upon a person with disability'. The submission further stated that restrictive practices may cause pain and constitute punishment:

> Restrictive practices may cause physical pain and discomfort, deprivation of liberty, prevent freedom of movement, alter thought and thought processes, and deprive persons of their property and access to their children. They may constitute humiliation and punishment.[481]

10.4 The Public Guardian stated that approximately 7% of guardianship orders appointing the Public Guardian authorise the use of restrictive practices. Under such orders, the Public Guardian will only consent to the use of restrictive practices in order to protect the person

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480 Office of the Public Guardian, *Position Statement 8*, p 2, www.lawlink.nsw.gov.au, accessed 20 January 2010

481 Submission 4, People with Disability Australia Inc and NSW Mental Health Coordinating Council, p 27

under guardianship from harm. For example, the Public Guardian may consent to a person's confinement 'where it is demonstrably in their interests in that it will protect them from harm which may include being violent towards others which if uncontrolled will inevitably lead to their confinement within the criminal justice system.'[482]

10.5 Similarly, the NSW Council for Intellectual Disabilities (NSW CID) supplementary submission noted that restrictive practices were used 'in relation to some people with intellectual disability whose freedom of movement is restricted to help them keep out of trouble with the law and out of gaol.'[483]

10.6 The Public Guardian further stated that '[t]he use of restrictive practices is closely monitored by the Public Guardian where he has consented to such restrictions and regularly reviewed by the Guardianship Tribunal' and that they must form part of an overall plan that includes positive strategies:

> Restrictive practices must be located within a comprehensive plan designed to modify any challenging behaviours that require the implementation of restrictive practices. Restrictive practices must be balanced with positive behaviour management strategies.[484]

10.7 The NSW CID supplementary submission noted that '[t]here is a long history of people with disabilities being subjected to inappropriate use of physical and chemical restraint and inappropriate restrictions on their freedom of movement' but that in recent years there has been a move away from inappropriate restrictions and towards positive strategies:

> Over the last 20 years, quite a lot has occurred aimed at preventing inappropriate restrictions and instead developing positive approaches to addressing behaviour of some people with disabilities which places themselves and others at risk of harm. Best practice guidelines have been developed. The Department of Ageing, Disability and Home Care has developed policies and procedures for disability services.[485]

10.8 The NSW CID supplementary submission further stated that one of the strengths of restrictive practices being used in the context of guardianship was the focus on the best interests of the person under guardianship, rather than the best interests of the community:

> One of the strengths of the guardianship system in this area is that its legislative focus is on the interests of people with disabilities, not on protection of the community – this means that the Tribunal and any guardian has to be satisfied that there is a benefit to the person from being restricted and this commonly calls for any necessary restriction to be complemented by positive approaches to minimising and addressing inappropriate behaviour.[486]

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482 Answers to questions on notice taken during evidence 28 September 2009, Mr Graeme Smith, Public Guardian, Question 11, p 7

483 Submission 6a, NSW Council for Intellectual Disability, p 2

484 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 11, p 5

485 Submission 6a, p 2

486 Submission 6a, p 2

10.9 However, the joint submission from PWD and NSW MHCC expressed concern that guardianship legislation was increasingly being used to detain people with a disability on the basis that they posed a risk to others:

> In particular, we are concerned about the growing use of the guardianship legislation to authorise what is, in effect, civil or preventative detention of persons with disability who have been assessed as a risk to others. This is increasingly the case with respect to persons who are provided with accommodation and support services by the Department Ageing, Disability and Home Care under its Community Justice Program and related initiatives. [487]

10.10 The joint submission from PWD and NSW MHCC recommended legislative amendment to prohibit the restrictive practice of detention where its purpose was to protect others from harm:

> …we believe that guardianship legislation ought to be amended to explicitly provide that in no case may a provision in the Act, or an authority provided under the Act, be used to authorise a restrictive practice that amounts to civil or preventative detention of a person for the primary purpose of protecting others from harm.[488]

10.11 Their submission also recommended more generally 'that specific NSW legislation is enacted to regulate the use of restrictive practices.'[489] The NSW CID likewise saw a case for 'more specific legislative regulation' of restrictive practices that would 'build on the strengths of the guardianship approach rather than [replace] it.'[490]

10.12 Professor Terrence Carney from the Sydney Law School stated that it was 'quite unsatisfactory to let the current NSW position go on', recommending legislative amendment in relation to restrictive practices. He suggested new legislation could draw from the Victorian *Disability Act 2006*. Professor Carney cautioned that 'it is the kind of reform that needs careful research.'[491]

10.13 Mr Smith commented that 'the law could be strengthened to provide a specific regulation under the *Guardianship Act* to cover the use of restrictive practices.'[492]

Committee comment

10.14 The Committee acknowledges that the use of restrictive practices is justified in situations where it can protect the person under guardianship from harm they may otherwise bring upon themselves, for example by coming into conflict with the law. The use of restrictive practices in this regard is consistent with a focus on the best interests of the person under guardianship.

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487 Submission 4, p 28

488 Submission 4, p 28

489 Submission 4, p 28

490 Submission 6a, p 3

491 Answers to questions on notice taken during evidence 28 September 2009, Professor Terrence Carney, Sydney Law School, Question 3, p 1

492 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 3 (To all witnesses), p 7

10.15 The Committee also acknowledges that in many cases protecting a person from bringing harm upon themselves amounts to preventing them from harming someone else. In this respect, the use of a restrictive practice may be in the best interests of both the person under guardianship and others.

10.16 The Committee notes the argument from People With Disability Australia and the NSW Mental Health Coordinating Council that the restrictive practice of detention should not be utilised with the primary intention of protecting others.

10.17 The Committee notes the recommendation from some inquiry participants that there be specific legislation in NSW in relation to the use of restrictive practices within the context of guardianship and while the Committee did not examine this area closely enough to recommend legislative change it believes it is an area that requires further investigation.

Recommendation 27

That the NSW Government consider the need for legislation in relation to the use of restrictive practices within the context of guardianship.

Authorisation for NSW Police to use 'reasonable force'

10.18 A guardianship order from the Guardianship Tribunal may empower the Public Guardian to authorise NSW Police to take a person under guardianship from their current location to a place of residence consented to by the guardian, keep the person at that place of residence, and bring the person back to that place of residence should they leave it. However, the Public Guardian submission pointed out that the Public Guardian cannot specifically authorise NSW Police to use all reasonable force.[493]

10.19 The Public Guardian submission stated that on occasions NSW Police have not been satisfied that a guardianship order allows them to use reasonable force. In these circumstances, the Public Guardian has had to apply to the Guardianship Tribunal for a 'two week order authorising the use of "all reasonable force."'[494]

10.20 The Public Guardian submission recommended that section 21A of the *Guardianship Act 1987* be amended to enable the Guardianship Tribunal to 'specify in its orders the authority for Police to use all reasonable force.' The submission argued that this amendment would 'bring this provision into line with other provisions in the Act such as Sections 11 and 12 of Part 3 Division 2 which apply prior to the Tribunal making an order.'[495]

10.21 Sections 11 and 12 of the *Guardianship Act 1987* enable a member of the police force to use all reasonable force to remove a person from premises under certain circumstances, if an

493 Submission 7, Public Guardian, pp 18-19

494 Submission 7, p 19

495 Submission 7, p 19

application for guardianship relating to the person has been made, or the person appears to be a person in need of a guardian.[496]

10.22 Professor Duncan Chappell, Faculty of Law, University of Sydney questioned why the police would be involved in these circumstances rather than health professionals:

> I would want to know a lot more about how and when the police were involved in these situations. In fact, I am quite surprised to hear that they are even thinking about it in guardianship. I would have thought it was a health matter and that there would be well-trained health professionals, who could exercise restraint and, if necessary, medication to ensure that it was a peaceful transfer.[497]

10.23 However, there was cautious and conditional approval given for this proposal from other inquiry participants.

10.24 Professor Ian Hickie, Executive Director of the Brian and Mind Research Institute at the University of Sydney, pointed out that stable housing and a sense of home 'is one of the most important things we have to retain our mental health' and that this was in some ways even more critical for people with mental health problems. Professor Hickie stated that removing a person with mental health problems from their residence could be 'extremely detrimental' and would only be justified in circumstances where the person was 'extremely impaired' and there were 'clear benefits'.[498]

10.25 Ms Rosemary Kayess, Associate Director of the Community and Development Disabilities Studies and Research Centre, University of New South Wales, supported the amendment in limited situations where the person's capacity was so impaired that they required 'complete' substitute decision-making and that there was a risk of harm to others.[499]

10.26 Professor Ronald McCallum, Professor of Industrial Law at Sydney Law School, stated that in certain circumstances the amendment was appropriate but that 'the use of reasonable force to remove a person should only be used as a last resort' and that it was 'essential that such orders be immediately appealable and that there is strict judicial oversight.'[500]

10.27 Mr Jim Simpson, Senior Advocate, New South Wales Council for Intellectual Disability, also stated that such a power should be 'only used as an absolute last resort' and exercised with 'the greatest caution and care' but that it was a necessary power for police to have, particularly in

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496 *Guardianship Act 1987* (NSW), s 11 and 12

497 Professor Duncan Chappell, Faculty of Law, University of Sydney, Evidence, 5 November 2009, p 45

498 Professor Ian Hickie, Executive Director, Brian and Mind Research Institute, University of Sydney, Evidence, 4 November 2009, p 26

499 Ms Rosemary Kayess, Associate Director, Community and Development Disabilities Studies and Research Centre, University of New South Wales, Evidence, 28 September 2009, p 63

500 Answers to questions on notice taken during evidence 4 November 2009, Professor Ronald McCallum, Professor of Industrial Law, Sydney Law School, p 1

cases where the person under guardianship may be under the influence of a person who is abusing or neglecting them.[501]

Committee comment

10.28 The Committee notes that section 21A (1) of the *Guardianship Act 1987* provides that a guardianship order may specify that:

> (a) the person appointed as guardian, or
>
> (b) another specified person or a person of a specified class of persons, or
>
> (c) a person authorised by the guardian (the authorised person),
>
> is empowered to take such measures or actions as are specified in the order so as to ensure that the person under guardianship complies with any decision of the guardian in the exercise of the guardian's functions.[502]

10.29 The Committee understands that under section 21A (1) the Public Guardian can authorise NSW police to take a person under guardianship from their current location to a place of residence consented to by the guardian, keep the person at that place of residence, and bring the person back to that place of residence should they leave it, but cannot authorise the use of 'all reasonable force'.

10.30 The Committee heard evidence that NSW Police have argued that without the specific authorisation to use all reasonable force, they are not empowered to do so.

10.31 The Committee also acknowledges that NSW Police are empowered under sections 11 and 12 of the *Guardianship Act 1987* to use all reasonable force to remove a person from premises under certain circumstances, if an application for guardianship relating to the person has been made, or the person appears to be a person in need of a guardian. In this respect, the Committee notes there is an argument that if reasonable force is permitted prior to a guardianship order being made, it should be permitted after an order is made.

10.32 However, the Committee is mindful that the persons empowered by section 21A of the *Guardianship Act 1987* include persons other than the Public Guardian, whereas inquiry participants who gave evidence on this issue did so in response to an example that involved the Public Guardian authorising police to use reasonable force. It is not known what views inquiry participants may have on other persons referred to in section 21A being empowered to authorise police to use reasonable force, nor is the view of NSW Police known.

10.33 Therefore, the Committee recommends that the NSW Government consider the proposed amendment to section 21A of the *Guardianship Act 1987* enabling the Guardianship Tribunal to specify in a guardianship order that the persons referred to in that section may authorize members of the NSW police force to use all reasonable force where all other means have been exhausted and where the action is necessary to protect the wellbeing of the person or others.

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501 Mr Jim Simpson, Senior Advocate, New South Wales Council for Intellectual Disability, Evidence, 29 September 2009, p 43

502 *Guardianship Act 1987* (NSW), s 21A (1)

Recommendation 28

That the NSW Government consider the proposed amendment to section 21A of the *Guardianship Act 1987* enabling the Guardianship Tribunal to specify in a guardianship order that the persons referred to in that section may authorize members of the NSW police force to use all reasonable force where all other means have been exhausted and where the action is necessary to protect the wellbeing of the person or others.

Community guardianship

10.34 This section examines the Public Guardian's proposal for a community guardianship program, looking first at the existing legislative power of delegation held by the Public Guardian that would enable the program and the Public Guardian's arguments in favour of community guardianship. Elements of the proposal in terms of recruitment, training, support and monitoring of community guardians are examined, as is the response from inquiry participants to the proposal. Community guardian programs operating in Victoria and Western Australia are also outlined.

10.35 The Public Guardian has developed a proposal for a community guardianship program in NSW. In brief, the proposed program involves community members being delegated the authority to act as guardians for people in their community for whom the Guardianship Tribunal has made a guardianship order:

> The proposed model of community guardianship will enable community members from a variety of cultural and linguistic backgrounds to be engaged to deliver a statutory guardianship service in their community of origin.[503]

10.36 Mr Graeme Smith, the Public Guardian, advised the Committee that 'there has been extensive consultation with relevant groups in relation to the proposal and it has received unqualified support.'[504]

Powers of delegation

10.37 The passage of the *NSW Trustee and Guardian Act 2009* resulted in an amendment to section 77 of the *Guardianship Act 1987*, allowing the Public Guardian to delegate its functions to a prescribed class of persons. Section 77 (4) of the *Guardianship Act 1987* provides that:

> The Public Guardian may delegate to a person, of a class of persons approved by the Minister or prescribed by the regulations, any of the Public Guardian's functions, other than this power of delegation.[505]

503 Submission 7, p 14

504 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 7, p 3

505 *Guardianship Act 1987* (NSW), s 77 (4)

10.38 Mr Smith told the Committee that the amendment is designed to allow the Public Guardian to delegate to a community guardian:

> The amended power of delegation is designed to allow the Public Guardian to delegate his powers to a class of persons prescribed by the regulation as Community Guardians.[506]

10.39 The Public Guardian submission recommended that the Guardianship Regulation 2005 be amended to facilitate the community guardianship program.[507] Mr Smith explained that although the *Guardianship Act 1987* enabled the Public Guardian to delegate functions to a 'prescribed class of persons', the Guardianship Regulation 2005 also needs to prescribe community guardians, providing guidelines 'as to the sort of person that could be recruited as a community guardian'.[508]

10.40 Mr Smith further stated that '[e]xisting mechanisms covering the recruitment, screening, training and supervision of existing staff will be utilised for Community Guardians and can be made part of the regulation creating the class of persons to be known as Community Guardians.'[509]

The Public Guardian's arguments in support of community guardianship

10.41 The Public Guardian submission argued that '[c]ommunity guardianship offers benefits in terms of increased direct community participation in the guardianship process and more efficient decision-making across the Public Guardian's client population.'[510]

10.42 Mr Smith contended that a community guardian would be able to form a closer relationship with a client than the Public Guardian could, by virtue of closer and more frequent contact:

> For a person for whom we have an ongoing protective and monitoring responsibility, a community guardian is able to form a much closer and more intimate relationship with that person and get to know him or her. The community guardian is likely to be located in the same geographical area and literally would be able to visit the person more frequently, be more aware of his or her needs, and respond to those needs. The Public Guardian has three officers but we cannot cover the whole State all the time.[511]

10.43 The Public Guardian submission further argued that a community guardian located in the same community as the person under guardianship could obtain information both formally and experientially, develop greater credibility, focus exclusively on one client and ultimately make the optimum decision in respect of the person:

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506 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 5, pp 1-2

507 Submission 7, p 14

508 Mr Graeme Smith, Public Guardian, Evidence, 28 September 2009, p 24

509 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 7, p 3

510 Submission 7, p 14

511 Mr Smith, Evidence, 28 September 2009, p 25

> A community guardian, located in the community of the client and dedicated to providing a protective guardianship service, is ideally positioned to obtain information, not just from the written record, but also experientially. This information adds to the credibility of the community guardian in communicating decisions to interested parties and is likely to reduce complaints and concerns arising from communication breakdowns. The community guardian's interest is exclusively on the person in need of a guardian…
>
> The capacity of a community guardian to access a client, to experience the world of the client, and to focus on the life of the client within the context of the client's environment, and not just the information contained in the official record, should result in the correct and preferable decision being made; and this decision being effectively communicated in the minimum time because the community guardian knows the client.[512]

10.44 In relation to culturally appropriate services, the Public Guardian submission stated that '[t]he program will recognize and remunerate the cultural qualifications and experiences of [community guardians] in addition to their expertise in disability.'[513]

10.45 In addition, the submission suggested that the community guardianship program would help meet some of the principles in the *Guardianship Act 1987* and the objects of the *Disability Services Act 1993*:

> Community participation in statutory guardianship addresses, partially at least, principle 4(c) of the *Guardianship Act 1987 - such persons should be encouraged, as far as possible, to live a normal life in the community*, and substantially principle 4(h) - *the community should be encouraged to apply and promote these principles.*
>
> The proposed community guardianship program will also meet the objects of the *Disability Services Act 1993.* [514]

10.46 Mr Smith also emphasised the importance of the community guardianship program in meeting the needs of our ageing population and the expected increase in demand for guardianship services.[515]

Elements of the proposed community guardianship program

10.47 Mr Smith told the Committee that a campaign would be run advertising the opportunity to become a community guardian.[516] The incentive for applicants would be two-fold – the opportunity to contribute in an area in which they may have prior experience, and the fee offered:

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512 Submission 7, p 16

513 Submission 7, p 14

514 Submission 7, p 14

515 Mr Smith, Evidence, 28 September 2009, p 16

516 Mr Smith, Evidence, 28 September 2009, p 24

> There are two incentives…There is the obvious incentive that people who have worked in the aged care or disability field want to continue to make a contribution in that area. They might be retired social workers, psychologists, occupational therapists, nurses and doctors and they want to continue to play a role to support people with disabilities or older people. The other incentive in New South Wales is that we would provide a fee.[517]

10.48 Applicants would then be screened and recruited in the same manner as any other member of the Public Guardian's staff.[518] Mr Smith told the Committee that the community guardianship proposal had been developed with the NSW Ombudsman and builds on the screening process that office uses in relation to its Community Visitors:

> In constructing the proposed model in New South Wales we work very closely with the New South Wales Ombudsman because that office currently engages community visitors and has quite an extensive screening process to make sure that there are no problems with the people they are recruiting. We would build on that program in order to screen people.[519]

10.49 Mr Smith explained that the Public Guardian would seek to match the skills and prior experience of community guardian's with the needs of specific clients:

> [The Public Guardian would] try to attract people with specialist skills in certain areas. Let us say, for example, that we might have under our guardianship 20 or 30 people in a large institution such as Stockland. If we were to bring community guardians in to support that group of people we would be looking for people with specialist skills in the area of disability, whereas if we were looking supporting an elderly client in a nursing home in Broken Hill we might be looking for someone who had a professional background in aged and dementia care. It would work along similar lines to citizen advocacy in the sense that we would be seeking to match community guardians with specific clients.[520]

10.50 The Public Guardian submission stated that community guardians will be trained, 'will have access to the same range of supports including technology as members of the Public Guardian's staff' and will be 'supervised closely by an experienced Principal Guardian from the Public Guardian's permanent staff' in order to 'ensure that any inappropriate or poor performance can be identified quickly and dealt with.'[521]

10.51 Mr Smith advised that community guardians would 'be subject to strict conditions contained within a standard employment contract' and that 'in the event that a Community Guardian

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517 Mr Smith, Evidence, 28 September 2009, p 25

518 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 7, p 2

519 Mr Smith, Evidence, 28 September 2009, p 24

520 Mr Smith, Evidence, 28 September 2009, p 25

521 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 7, p 3

fails to meet the required standard of performance their delegation will be revoked and their employment contract terminated.'[522]

10.52 Under the Public Guardian's proposal, community guardians would be engaged only for people 'for whom the Public Guardian is reappointed after an initial appointment during which the Public Guardian has made all major decisions but where on-going monitoring is required.' The Public Guardian submission noted that 'a community guardian's priority would be meeting the protective decision-making needs of less intensive clients.'[523] Community guardians, stated Mr Smith, 'will not replace the need for increasing numbers of specialist professional guardianship staff employed by the Public Guardian.'[524]

10.53 Mr Smith emphasised that as a delegate of the Public Guardian, '[a]ny decisions made by a Community Guardian will be decisions of the Public Guardian and therefore reviewable by the Administrative Decisions Tribunal.'[525]

The preferred model of delegation rather than appointment by the Tribunal

10.54 A key element of the Public Guardian's community guardianship proposal is the preference that community guardians are delegated their functions and therefore directly supervised by the Public Guardian, as opposed to being appointed by the Guardianship Tribunal.

10.55 As a background to this element of the proposal, Mr Smith explained that in NSW there are three ways a person or body may come to be the guardian for another person:

(1) A competent person can themselves make provisions for their future by appointing someone as his or her enduring guardian

(2) The Guardianship Tribunal can appoint a suitable person as a private guardian

(3) The Guardianship Tribunal can appoint the Public Guardian.[526]

10.56 In relation to private guardians, Mr Smith argued that they are not screened or supervised by the Public Guardian and their decisions are not reviewable by the Administrative Decisions Tribunal:

> Private guardians are not screened to ensure that an inappropriate person is not being appointed. Private guardians are not supervised by the Public Guardian. The decisions of a private guardian are not reviewable decisions and cannot be reviewed by the Administrative Decisions Tribunal.[527]

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522 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 7, p 2

523 Submission 7, p 15

524 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 7, p 3

525 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 7, p 2

526 Mr Smith, Evidence, 28 September 2009, p 24

527 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 7, p 3

10.57 Mr Smith emphasised his preference for a model in which the Public Guardian is appointed as the guardian, and then delegates this function to a community guardian describing this model as 'a stronger model in terms of the checks and balances':

> Because the person who is delegated by the Public Guardian ostensibly acts on behalf of the Public Guardian, any decision they make is a decision of the Public Guardian and is therefore reviewable. A decision made by an enduring guardian in New South Wales or a private guardian is not reviewable.[528]

Stakeholder's response to the community guardianship concept

10.58 This section presents the response of some inquiry participants to the concept of community guardianship. Participants were not presented with the proposal in its entirety, but rather asked to give their views on the concept of community guardianship generally. While their responses do address some of the specifics of the proposed model, they cannot be taken as a response to the Public Guardian's proposed model as a whole.

10.59 The NSW Ombudsman, who was involved in the development of the Public Guardian's community guardianship proposal, supported the proposal on the grounds that it would improve the quality of guardianship, reduce the need for formal guardianship, and allow the Public Guardian to focus on more complex cases:

> A community guardianship program may provide the means to improve links between people in NSW who lack decision-making capacity and their local community, improve community understanding about people with disabilities, enhance compatibility between the person under guardianship and the substitute decision-maker, and, in the long term, reduce the need for formal guardianship.
>
> In addition, introducing a community guardianship program in NSW may enable the [Office of the Public Guardian] OPG to dedicate its guardianship responsibilities to matters that require the expertise of its officers, including those that are contentious, complex, or significant.[529]

10.60 Other inquiry participants highlighted the benefit of matching guardians with clients from similar cultural and linguistic backgrounds. Professor McCallum, for example, suggested that '[p]ersons of the same cultural and linguistic group as persons under substituted-decision-making orders are likely to better understand one another.'[530]

10.61 Ms Margaret Small, Solicitor with the The Aged-care Rights Service, thought it would be particularly appropriate for indigenous populations in remote areas:

> I think particularly in regional and remote areas it would play a very important role, particularly in some areas where there are quite high indigenous populations. I have

528 Mr Smith, Evidence, 28 September 2009, p 24

529 Submission 9, NSW Ombudsman, pp 2-3

530 Answers to questions on notice taken during evidence 4 November 2009, Professor McCallum, Question 10, p 1

> worked…with indigenous groups. They are quite tribal, they wish to keep it within their community and I think it would be a place for that.[531]

10.62 Ms Brenda Lee Doyle, Provincial Director of the Office of the Public Guardian in Alberta, Canada told the Committee that although Alberta did not have a community guardianship program their consultations indicated the importance of cultural and linguistic compatibility between guardians and clients:

> One of the things we heard during the consultation particularly with Aboriginal people is that the more they can have someone who comes from their cultural and linguistic environment, the better decisions are made. There is a greater comfort level that people share the same values and that people would be in tune to that. …We certainly strongly encourage whenever someone is coming for a guardianship that they know the values and beliefs of the adult who they are representing.[532]

10.63 The NSW Transcultural Mental Health Centre also emphasised the importance of 'culturally relevant services and practices' for culturally and linguistically diverse communities (CALD), particularly in terms of 'access and equity' for CALD communities and understanding the complexities of engaging with CALD individuals and their families.[533]

10.64 Mr Mark Orr gave his support to community guardianship 'if it means that people who are under guardianship are able to receive more consistent and regular contact and the highest possible quality of substitute decisions.' Mr Orr also noted that community guardianship is 'a creative response to the fact of ever increasing numbers of people coming under public guardianship and static or reducing resources.'[534]

Concern about safeguards

10.65 The Guardianship Tribunal's supplementary submission was very cautious about the community guardian proposal and about the Public Guardian's power to delegate its functions generally. The submission stated that the Tribunal supported the provision of additional guardianship services to people with cognitive disabilities 'however [the Tribunal] is concerned that any services should have appropriate and rigorous safeguards to prevent abuse and to maximise high quality substitute decision-making.'[535]

10.66 The Guardianship Tribunal's supplementary submission expressed concern about the lack of consultation that preceded the amendment to section 77 of the *Guardianship Act 1987* that allows the Public Guardian to delegate its functions to persons prescribed in the Guardianship Regulation, and called for 'a wide-ranging consultation with all relevant stakeholder groups about the scope and nature of this proposal.'[536] It noted that people under guardianship are

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531 Ms Margaret Small, Solicitor, The Aged-care Rights Service, Evidence, 5 November 2009, p 17

532 Ms Brenda Lee Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada, Evidence, 5 November 2009, p 11

533 Submission 32, NSW Transcultural Mental Health Centre, p 2

534 Submission 15, Mr Mark Orr, p 7

535 Submission 5a, NSW Guardianship Tribunal, p 5

536 Submission 5a, pp 4-5

vulnerable and a person empowered as their substitute decision-maker should be properly scrutinised:

> People with cognitive disabilities are amongst the most vulnerable people in society and are often the victims of personal, physical, sexual and financial abuse. Perpetrators of such abuse are often not strangers, but may be people with a family or other relationship with the person with a disability. It is therefore crucial to ensure that anyone who has power to make decisions about people with disabilities, is subject to proper scrutiny and professional standards. This should apply in relation to their recruitment, training, monitoring and supervision.[537]

10.67 In its submission, the Guardianship Tribunal cautioned that delegation of the Public Guardian's functions may be contrary to the United Nations Convention on the Rights of Persons with Disabilities if it were not properly safeguarded and called for immediate legislative attention to this issue:

> …the ability of the public substitute decision maker to delegate decision-making powers to others may be regarded as being outside the spirit and intention of the UN Convention when it is permitted without clear and comprehensive legislative safeguards. Such safeguards should prescribe how any scheme for delegated substitute decision-making can guarantee the welfare and best interests of people with disabilities. I believe this is a matter which requires immediate legislative attention.[538]

10.68 Mr Orr was similarly concerned about what 'checks and balances' would be in place to guide the selection of community guardians. Mr Orr emphasised the significance of the decisions that a person delegated the functions of the Public Guardian could potentially make, including the use of restraint to keep a person in a place against their wishes, medical and dental treatment against their wishes and 'ultimately to consent to decisions at the end of someone's life.'[539]

10.69 Mr Orr pointed out the potential difference between these decisions being made by the Public Guardian or someone who has been vetted for employment in the public sector or whose suitability has been assessed by a court or tribunal, and someone chosen by the Public Guardian:

> None of these decisions are ones outside of the competence of the Public Guardian or the staff of the Office of the Public Guardian…
>
> However, there is a difference between these decisions and consents being undertaken by those with professional qualifications and experience, who have withstood vetting processes involved in the employment in the public sector and provided appropriate regular professional development and professional supervision; those who are appointed after a consideration of their fitness and suitability by a court or tribunal process; and those who are chosen by the Public Guardian from a class of persons approved by the Minister or by regulation.[540]

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537 Submission 5a, p 5

538 Submission 5, NSW Guardianship Tribunal, pp 1-2

539 Submission 15, p 9

540 Submission 15, pp 9-10

10.70 The NSW Council for Intellectual Disability was also cautious in its support for community guardianship, contending that legislative safeguards were needed to protect the integrity of the program and that paying community guardians would help attract quality applicants:

> …careful consideration is needed of how such a system should be safeguarded in legislation and practice so as to ensure that it does not become a cheap, substandard and unaccountable system of guardianship. Legislation might specify that the appointment of a person as a community guardian be approved by, for example, the President of the Guardianship Tribunal…
>
> In order to recruit well qualified people and ensure accountability, it is essential that community guardians be paid, at least at a comparable level as official community visitors to disability services.[541]

The Western Australian community guardianship program

10.71 In the following discussion of the Western Australian and Victorian community guardianship programs it should be noted that the Public Advocate in those states is the statutory body incorporates the functions that the Public Guardian has in NSW.

10.72 Western Australia has had a community guardianship program since 2005 under which volunteers are trained by the Public Advocate, and then apply to the State Administrative Tribunal to be formally appointed as guardians.

10.73 Ms Pauline Bagdonavicius, the Western Australian Public Advocate, and Ms Gillian Lawson, Manager of Guardianship, Western Australian Office of the Public Advocate, outlined the program for the Committee.

10.74 Volunteers community guardians are selected 'on the basis that they have a genuine commitment and ability to advocate for, and to protect the rights of, persons with a decision-making disability'.[542] Ms Lawson stated that most volunteers came with many of the pre-requisite skills to act as a guardian, including 'communication skills, good interpersonal skills, [and an] understanding of the stakeholders in our areas of disability and health.'

10.75 Volunteers complete a mandatory two-day training program that covers the relevant legislation, the details of the role, case studies, and issues such as confidentiality.[543] Ms Lawson described the case study element of the training program:

> In particular, we look at the decisions they are likely to have to make should they become at some point a legally appointed guardian. We actually work with them and use case studies to go through how one would make a medical treatment decision and the processes that are involved in that. We may take them through the fact that they should be working closely with the person they represent, first and foremost; that they

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541 Submission 6a, p 3

542 Ms Pauline Bagdonavicius, Public Advocate, Western Australian Office of the Public Advocate, Evidence, 5 November 2009, p 58

543 Ms Gillian Lawson, Manager, Guardianship, Western Australian Office of the Public Advocate, Evidence, 5 November 2009, p 68

> should be liaising with anyone who has a close and personal relationship with them to find out their views; talk to doctors and specialists and so on.[544]

10.76 The phase of the process involves volunteers being matched with a client. To be included in the community guardianship program a client must 'have either a static or progressive diagnosis and there is no likelihood of them regaining capacity,' and live in supported accommodation. In addition, their case 'is not complex and there is an absence of conflict.' The program coordinator who matches the volunteer with the client takes into account the geographical proximity of the two.[545]

10.77 The Office of the Public Advocate supervises the initial contact between the volunteer and the client and maintains regular contact with the volunteer and the supported accommodation provider over the following months.[546]

10.78 At this point the Public Advocate is still the client's guardian, however the aim is that the volunteer subsequently takes over this role on their appointment as a community guardian by the State Administrative Tribunal. Applications for appointment as a community guardian are usually heard by three members of the Tribunal who may make an initial appointment for one year, followed by an appointment for a maximum of five years.[547]

10.79 The program coordinator maintains contact with the community guardian after their appointment and is available to be contacted by the community guardian and service providers:

> Following the appointment of a community guardian by the tribunal, the coordinator contacts the guardian at least every three months during the term of the initial order to discuss how the order is progressing. Community guardians are encouraged to contact the coordinator at any time for one-to-one case consultation. The coordinator ensures service providers are aware they can also contact our office with any concerns about how the guardianship order is working.[548]

10.80 The Community guardian is usually involved with making medical decisions on behalf of the client and in acting as an advocate, and is not involved in financial matters. Ms Bagdonavicius told the Committee that '[t]he extent to which they further become involved in the life of the person with a decision-making disability beyond the two roles of guardian and advocate is up to the individual volunteer.'[549]

10.81 Ms Bagdonavicius explained that Western Australia preferred the model whereby community guardians are appointed by the Tribunal in their own right. This was considered more consistent with the legislated principle of family and community responsibility for guardianship and the appointment of the Public Advocate as a guardian only as a last resort:

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544 Ms Lawson, Evidence, 5 November 2009, p 68

545 Ms Bagdonavicius, Evidence, 5 November 2009, p 58

546 Ms Bagdonavicius, Evidence, 5 November 2009, p 58

547 Ms Bagdonavicius, Evidence, 5 November 2009, p 59

548 Ms Bagdonavicius, Evidence, 5 November 2009, p 58

549 Ms Bagdonavicius, Evidence, 5 November 2009, p 58

> This approach is consistent with our Act in which section 97 (1) (g) states that there Public Advocate should promote family and community responsibility for guardianship, and section 44 (5) states that the tribunal shall not appoint a Public Advocate as guardian unless there is no-one else suitable and willing to act. The
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> appointment of a community guardian is a less restrictive alternative to the tribunal appointing a Public Advocate as guardian, which is considered the option of last resort.[550]

10.82 The program currently has 14 volunteers who have been matched with 14 clients out of the approximately 500 persons for whom the Public Advocate has been appointed guardian. Eight have been formally appointed as community guardians. Ms Bagdonavicius explained that the program in Western Australia was less about efficiency and cost savings and more about quality of life for the represented person:

> I think this program is not so much around an efficiency program but a quality of life program for the represented person. It is building here in Western Australia with slow momentum…At the end of the day this program is not about huge cost savings in that sense of the word.[551]

10.83 Ms Bagdonavicius concluded by stating that the community guardianship program in Western Australia had led to positive outcomes:

> In conclusion, the presence of a person in the represented person's life who is unpaid, independent, and able to focus solely on the person's best interests has led to improved advocacy and outcomes for the represented person and a decrease in social isolation. We feel that the best guardianship decisions are made for the represented person by someone who has an intimate understanding of the person and their needs.[552]

The Victorian community guardianship program

10.84 Ms Colleen Pearce, the Victorian Public Advocate, gave an outline of the Victorian community guardianship program, which has been in operation for 22 years and utilises approximately 50 community guardians.[553]

10.85 In contrast to Western Australia, Victorian community guardians are not appointed by a tribunal, but are engaged under a volunteer program by the Public Advocate who provides oversight and support.[554]

10.86 The aim of the program is to promote 'community involvement in the lives of people who are vulnerable.'[555] Ms Pearce explained that community guardians can spend more time with clients than the Public Advocate:

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550 Ms Bagdonavicius, Evidence, 5 November 2009, p 59

551 Ms Bagdonavicius, Evidence, 5 November 2009, p 67

552 Ms Bagdonavicius, Evidence, 5 November 2009, p 59

553 Ms Colleen Pearce, Public Advocate of Victoria, Evidence, 5 November 2009, p 51

554 Ms Pearce, 5 November 2009, p 51

> Our community guardians have the capacity to spend a bit more time with an individual than we might as a guardian… particularly…in some rural areas…[I]t gives people some insight into the lives of people who are vulnerable and who are socially isolated, and it is a way of ensuring community involvement and community inclusion.[556]

10.87 Ms Pearce pointed out that the Victorian community guardianship program was 'not a money-saving matter' but neither was it a costly program. It employs a half-time person who provides phone support to community guardians, runs training sessions and ensures the community guardian's manual is up to date.[557]

Committee comment

10.88 The Committee notes the Public Guardian's proposal for a community guardianship program in NSW and understands that the Director General of the Department of Justice and Attorney General or the Attorney General has not yet approved this proposal for implementation.

10.89 The Committee also notes the evidence from the Public Guardian that the recent legislative amendment to section 77 of the *Guardianship Act 1987* empowering the Public Guardian to delegate its functions to a class of persons prescribed by the regulations would allow a community guardianship program, as envisaged in the Public Guardian's proposal, to operate. The Committee understands that the Public Guardian is seeking an amendment to the Guardianship Regulation 2005 to prescribe the class of persons who would be community guardians and provide guidelines as to their recruitment, screening, training and supervision.

10.90 The Public Guardian's proposal for community guardianship, as outlined to the Committee, has a number of potential benefits. These include furthering the principle of community involvement in guardianship and allowing the Public Guardian to allocate fewer resources to the direct management of relatively simple cases and more resources to relatively complex cases. There is also the potential for significant benefit to the person under guardianship in the form of closer and more frequent contact with a guardian who is culturally and linguistically compatible resulting in more appropriate decisions being made on their behalf.

10.91 Part of the context in which the proposal is made is the expected increase in demand for guardianship services over the coming decades, due to our ageing population. The community guardianship program could potentially meet some of this demand. However, in this respect the Committee notes that the community guardianship programs in Western Australia and Victoria utilise 14 and 50 community guardians respectively, with each guardian matched to one client only. The Committee observes that in those states, under the particular community guardianship programs operating, the effect of those programs has not been to divert any significant proportion of the demand for guardianship from the statutory guardian. In addition, the Public Advocates from both Western Australia and Victoria advised the Committee that their community guardianship programs were not intended to be, and were not, cost saving programs.

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555 Ms Pearce, Evidence, 5 November 2009, p 51

556 Ms Pearce, Evidence, 5 November 2009, p 51

557 Ms Pearce, Evidence, 5 November 2009, p 51

10.92 The Committee notes that the Public Guardian's preferred model for community guardianship involves the Public Guardian delegating its functions to a community guardian rather than the Guardianship Tribunal directly appointing a community guardian. The Public Guardian has argued that its preferred model provides stronger safeguards derived principally from the fact that the Public Guardian will screen, train, supervise and if necessary immediately terminate the contract of community guardians.

10.93 The Public Guardian stated that private guardians appointed by the Guardianship Tribunal are not screened to determine their appropriateness for the role. In this respect the Committee understands that private guardians must be assessed as suitable by the Guardianship Tribunal in accordance with the criteria provided in section 17 (1) of the *Guardianship Act 1987*, but that this screening may not be as comprehensive as that envisaged in the Public Guardian's proposal.

10.94 The Committee also notes that the training and supervision regime envisaged in the proposal is more comprehensive than that which could be provided by the Guardianship Tribunal. However, the Committee also notes that under the Western Australian community guardianship program, which involves direct appointment of community guardians by the State Administrative Tribunal, the Office of the Public Advocate nevertheless remains significantly involved in the training and supervising of community guardians.

10.95 The Committee does not express a view as to which model of community guardianship, either direct appointment by the Guardianship Tribunal or delegation by the Public Guardian, is preferable.

10.96 The Committee considers the issue of safeguards for persons under guardianship to be fundamental. Some inquiry participants expressed significant concerns about the Public Guardian delegating its functions to community guardians, highlighting the importance of the decisions a community guardian would be making and the potential for exploitation and significant damage from poor decisions. In this respect, the Committee is of the view that the Public Guardian's experience and expertise in recruiting and training staff to execute the functions of guardianship, the emphasis in the proposal on strict screening and supervision of community guardians, and the fact that community guardians would be subject to the conditions of an employment contract which could be immediately revoked go a considerable way towards alleviating these concerns.

10.97 The Committee is mindful that the Public Guardian's community guardianship proposal is subject to an approval process independent of the current inquiry. In addition, the Committee heard evidence from inquiry participants on the concept of community guardianship generally, some specific aspects of the Public Guardian's proposal, but not on the proposal in its entirety.

10.98 Therefore the Committee does not make a recommendation as to whether or not the proposal should be implemented. However, the Committee does recommend that the NSW Government prioritise assessment of the Public Guardian's proposal and in particular examine the extent to which the proposed community guardianship program could meet the expected increase in demand for guardianship services in the coming decades, the cost effectiveness of the program, and the adequacy of safeguards for the person under guardianship in terms of the recruitment, screening, training and supervision of community guardians.

Recommendation 29

That the NSW Government prioritise assessment of the Public Guardian's proposed community guardianship program and in particular examine the extent to which the proposed community guardianship program could meet the expected increase in demand for guardianship services in the coming decades, the cost effectiveness of the program, and the adequacy of safeguards for the person under guardianship in terms of the recruitment, screening, training and supervision of community guardians.

Chapter 11 Proactive guardianship and individual and systemic advocacy

The previous chapter examined the delivery of guardianship services under a guardianship order. This chapter examines proposals from the Public Guardian that it be able to proactively investigate the need for guardianship and to deliver guardianship services without the need for a guardianship order being in place. These proposals fit into a broader discussion about individual and systemic advocacy on behalf of people lacking capacity. In this context, this chapter also examines the proposal that an Office of the Public Advocate be established in NSW and that ministerial responsibility for administering the *Guardianship Act 1987* be transferred from the Minister for Disability Services to the Attorney General.

Proactive guardianship

11.1 This section examines the Public Guardian's recommendation that it be enabled to proactively investigate the need for guardianship and to act without a guardianship order.

The Public Guardian's capacity to investigate the need for guardianship

11.2 The Public Guardian submission recommended that the *Guardianship Act 1987* be amended to allow it to proactively investigate the need for guardianship, particularly in situations where there is no-one to make an application to the Guardianship Tribunal on behalf of a vulnerable person:

> …situations arise where a person is being neglected or abused and, not only is there no one willing or available to make the application, there is no one to bring the situation to the attention of the Public Guardian so that an application can be made.[558]

11.3 The Public Guardian submission explained that under the legislation as it currently stands the Public Guardian does not have the authority to investigate the circumstances of someone it considers may require guardianship:

> Currently the Public Guardian cannot be pro-active in identifying vulnerable people who may be in need of a guardian. Even when the Public Guardian is aware of vulnerable people in potentially desperate situations, it can be difficult to assess whether an application [to the Guardianship Tribunal] should be made due to the Public Guardian lacking the authority or a clear role to investigate the situation, as opposed to simply making the application.[559]

11.4 Furthermore, the submission pointed out that the Public Guardian's equivalent in other states has this proactive role which allows it to make an application for guardianship or implement a less intrusive solution:

> In most other states, the equivalent of the Public Guardian has this role clearly stated in the guardianship legislation. As well as being used to decide about an application to

[558] Submission 7, Public Guardian, p 13

[559] Submission 7, p 14

> the Tribunal, it could be used to find a resolution to a problem that is less drastic than an application for a guardianship order.[560]

11.5 The Public Guardian submission recommended that section 77 of the *Guardianship Act 1987* be amended to provide for the Public Guardian to proactively investigate the need for guardianship by enabling it:

> To investigate any complaint or allegation that a person, who appears to the Public Guardian to have a decision-making disability, is being exploited, neglected or abused, or is in need of a guardian.[561]

11.6 The NSW Ombudsman submission supported the Public Guardian being given proactive powers of investigation suggesting that the Victorian model could be instructive, where the Public Advocate has the capacity to 'investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship.'

11.7 Ms Colleen Pearce, the Public Advocate of Victoria, explained that in Victoria the Public Advocate exercises its powers of investigation to determine the need for an application for guardianship:

> We play a key role in the examination of matters where there is evidence of exploitation, abuse or neglect of persons with a disability. Through our community visitors program we might hear about issues of neglect. For example, we have a supported residential service in the country where there has been an allegation of sexual abuse of an elderly woman. We believe there should have been an application for guardianship for her, but I am using my powers of investigation to look at the circumstances around that to make an application for guardianship.[562]

11.8 Professor Ronald McCallum, Professor of Industrial Law, Sydney Law School, suggested the Public Guardian would need proactive powers in order to visit institutions where there may be people so disabled they cannot easily make their wishes known to others:

> There are a small number of my sisters and brothers with such deep intellectual disabilities that it may be hard to determine their interests…I think a Public Guardian would need some proactive powers to go and visit institutions. Many of the persons with intellectual disabilities of which you and I have now been speaking are in institutional care. The cases are very sad and heartrending. Whether it be the Public Advocate or the Public Guardian there needs to be some form of proactivity.[563]

11.9 Ms Rachel Merton, Chief Executive Officer of the Brain Injury Association of NSW, expressed her support as well, highlighting the importance of early intervention in resolving conflict and protecting the person's rights:

> We would support that. If work is done early—early intervention and picking up crises early—issues can be resolved and conflicts can be mediated or worked upon. If

560 Submission 7, p 14

561 Submission 7, p 14

562 Ms Colleen Pearce, Public Advocate of Victoria, Evidence, 5 November 2009, p 47

563 Professor Ronald McCallum, Professor of Industrial Law, Sydney Law School, Evidence, 4 November 2009, p 7

> you get good advocacy and good intervention early on, no matter who does it—whether that is the role of the Public Guardian or the role of somebody else—it can save a lot of angst later. It also helps to maintain a person's rights.[564]

11.10 Ms Susan Field, New South Wales Trustee and Guardian Fellow in Elder Law at the University of Western Sydney, described the Public Guardian's proposal as 'an excellent idea' and could 'certainly see room for expansion of the role of the Public Guardian to have a more proactive position.'[565]

11.11 Ms Rosemary Kayess, Associate Director, Community and Development Disabilities Studies and Research Centre, University of New South Wales, also supported such powers for the Public Guardian, but emphasised the importance of a threshold of need to justify any investigation:

> …it would depend on what evidence there is to justify that investigation, so there would need to be a threshold at which they could have that authority to be able to investigate. … [I]f there is a threshold level at which they can demonstrate that they have evidence that there is a risk of harm to self or others and that intervention is warranted and you can demonstrate that it is proportional to a person's level of vulnerability or need, I feel that if those mechanisms could be in place, yes, the Public Guardian could have that power.[566]

11.12 However, the Guardianship Tribunal submission did not support the Public Guardian investigating the need for guardianship, arguing that the Tribunal already performed this function and it would amount to a duplication of services:

> The Tribunal does not support the proposal that the Public Guardian should assume the role of investigating whether there is a need for a guardian to be appointed. The Tribunal already performs this function efficiently and effectively and in a way which focuses on the rights and best interests of people with cognitive disabilities. The Tribunal's staff play a key role in diverting inappropriate applications from a hearing. It is therefore an unnecessary duplication of services to extend this role to the Office of the Public Guardian.[567]

11.13 The NSW Council for Intellectual Disability (NSW CID) submission likewise did not support the Public Guardian's proposal, also noting the Tribunal's investigation capacity and further arguing that there could be a conflict of interest for the Public Guardian in investigating the need for guardianship where the Public Guardian could be appointed as the guardian:

> In NSW, the Tribunal itself has staff to investigate applications [for guardianship]. The NSW practice should not be changed. The Public Guardian would face a major

564 Ms Rachel Merton, Chief Executive Officer, Brain Injury Association of NSW, Evidence, 29 September 2009, p 24

565 Ms Susan Field, New South Wales Trustee and Guardian Fellow in Elder Law, University of Western Sydney, Evidence, 28 September 2009, p 37

566 Ms Rosemary Kayess, Associate Director, Community and Development Disabilities Studies and Research Centre, University of New South Wales, Evidence, 28 September 2009, p 63

567 Submission 5a, NSW Guardianship Tribunal, p 3

conflict of interest if it had the investigation role. The report from the investigation could often influence whether or not the Tribunal appointed the Public Guardian.[568]

Committee comment

11.14 The Committee notes that under current legislative provisions the Public Guardian does not feel it has the authority to investigate the need for guardianship even in situations where it is aware a vulnerable person is in a desperate situation. The Public Guardian has proposed it be given the authority to proactively investigate the need for guardianship in circumstances where it becomes aware that need may exist. The Committee notes the support from some inquiry participants for this proposal.

11.15 The Committee also notes that the Guardianship Tribunal does not support the proposal, arguing that it already has the effective investigatory powers and resources to determine the need for guardianship. In this respect, the Committee notes that in the circumstances described by the Public Guardian, it can make an application to the Guardianship Tribunal that would then bring these investigatory resources to bear on the situation.

11.16 The Committee considers that under the existing and proposed schemes, an investigation is triggered by the Public Guardian becoming aware of the potential need for guardianship. The point of difference lies in which body then investigates this need, the Public Guardian or the Guardianship Tribunal. The Committee considers that there is the potential for the duplication of services with the Guardianship Tribunal if the Public Guardian utilises its resources to carry out this investigation. Furthermore, the Committee did not receive evidence as to the Public Guardian's current capacity to carry out this type of investigation in terms of its expertise and resources. Therefore, the Committee does not make a specific recommendation in relation to the Public Guardian's proposal.

11.17 The Committee considers a more important issue is how the Public Guardian becomes aware of the potential need for guardianship. The Committee notes that the Public Guardian's recommendation is that it be given the authority to investigate 'any complaint or allegation', implying that someone external to the Public Guardian would be raising the matter, and that without a complaint or allegation the investigatory power sought by the Public Guardian would not be triggered.

11.18 In this respect, the Committee notes the evidence from Professor McCallum who pointed out that there are people in institutions so disabled that they cannot easily make their wishes known to people around them. In such circumstances a complaint or allegation is unlikely to be made. In such circumstances a more important form of proactivity for the Public Guardian would be to visit such institutions and determine on a case-by-case basis the potential need for guardianship.

11.19 Therefore, the Committee recommends that the NSW Government consider the Public Guardian's proposal that it be given the authority to proactively investigate the need for guardianship where it has received a complaint or allegation, and that it consider the need for the Public Guardian to have the authority to visit institutions or such places where persons potentially in need of guardianship may reside to determine the need for guardianship even when no complaint or allegation has been received.

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568 Submission 6, NSW Council for Intellectual Disability, p 3

Recommendation 30

That the NSW Government consider the Public Guardian's proposal that it be given the authority to proactively investigate the need for guardianship where it has received a complaint or allegation.

That the NSW Government consider the need for the Public Guardian to have the authority to visit institutions or such places where persons potentially in need of guardianship may reside to determine the need for guardianship even when no complaint or allegation has been received.

The Public Guardian's capacity to act without a guardianship order

11.20 The Public Guardian submission recommended that section 77 of the *Guardianship Act 1987* be amended to enable the Public Guardian to assist people lacking decision-making capacity without a guardianship order, arguing that this accords with the principle of least restriction and promotes assisted decision-making:

> This would enable the Public Guardian to be able to provide a less restrictive option than guardianship to meet the needs of some people with decision-making disabilities. This would give effect to the right to access supported or assisted decision-making as a first step rather than having to resort to full substitute decision-making.[569]

11.21 The submission contended that there are circumstances where it is appropriate that the Public Guardian simply provide assistance, with the option of a guardianship order remaining if this less intrusive step is insufficient:

> Clearly, if a person or group needs assistance to pursue better life circumstances, rather than someone to adjudicate a dispute about their life circumstances, it would be preferable if this could occur without an application to the Guardianship Tribunal and a guardianship order. Guardianship may later be needed if less drastic approaches are inadequate, but the less drastic approaches should be available to be tried first.[570]

11.22 Furthermore, the Public Guardian submission states that the principle that substitute decision-making be implemented only as a last resort was more difficult to follow in NSW than in other states:

> A key feature of Australian guardianship laws, in general, is that a guardianship order should not be made if there is a less drastic way of meeting the needs of the individual. A person's decision-making rights should not be formally taken away except as a last resort.
>
> In practice, it has often been difficult to apply this approach in NSW because the Public Guardian is not able to assist an individual or group of people with decision-

569 Submission 7, p 13

570 Submission 7, p 13

> making disabilities without first being appointed as their guardian. In contrast, the Public Guardian's counterparts in other states are able to do this.[571]

11.23 The Public Guardian's proposal received support from a number of inquiry participants.[572] For example, The Brain Injury Association of NSW submission suggested it would enable the provision of assisted decision-making arrangements.[573]

11.24 The NSW Ombudsman submission supported the proposed amendment noting that at times the Public Guardian was appointed guardian to advocate and mobilise services on behalf of a person but that the required guardianship order was an unnecessarily intrusive measure to accomplish this:

> …the OPG [Office of the Public Guardian] is, at times, appointed to pursue better options for individuals, through, for example, advocacy and mobilisation of appropriate services to meet the person's needs. While this is an important role, under the current legislation the OPG can only assist an individual in this capacity if it has been appointed as their guardian.
>
> Guardianship of people with disabilities is important to protect certain individuals from abuse, neglect and exploitation, and to ensure that decisions are made in the best interests of the person. However, guardianship is also highly intrusive and restrictive, with considerable impost on an individual's privacy and autonomy.[574]

11.25 Mr Jim Simpson, Senior Advocate, NSW CID, likewise noted that the Guardianship Tribunal at times appointed the Public Guardian in order to provide advocacy for a person, and argued that it would be less intrusive to make that service available without the need for a hearing and a guardianship order which takes away the person's rights:

> What we see now is that there are situations where the Guardianship Tribunal quite rightly appoints the Public Guardian because that is the only way to get advocacy for a person that the person desperately needs. The Public Guardian is also given decision-making authority, but it is really the advocacy that is the core issue. It would be less intrusive and less formalistic if the Public Guardian could simply assist that individual without needing to go through tribunal processes and without the person's rights being taken away through guardianship.[575]

11.26 The NSW CID also argued that it should not be necessary in NSW to take away the rights of a person who does not require substitute decision-making simply to enable the Public Guardian to advocate on their behalf:

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571 Submission 7, p 8

572 See for example Mr Jim Simpson, Senior Advocate, New South Wales Council for Intellectual Disability, Evidence, 29 September 2009, p 38; Ms Merton, Evidence, 29 September 2009, p 24; Ms Field, Evidence, 28 September 2009, p 37; Submission 34, Physical Disability Council of NSW, pp 3 & 7

573 Submission 21, Brain Injury Association of NSW, p 3

574 Submission 9, NSW Ombudsman, pp 1-2

575 Mr Simpson, Evidence, 29 September 2009, p 39

> The Public Guardian has no mandate to assist an individual unless appointed as guardian. This leads to cases where the Public Guardian is appointed (or reappointed) as guardian not because the person needs someone to have formal decision-making authority but because the person needs the advocacy that the Office of the Public Guardian provides as a complement to its decision-making role. In other Australian jurisdictions, the Public Guardian or equivalent has a legislated capacity to advocate for an individual without the need for a guardianship appointment.
>
> It should not be necessary to take away a person' rights in order for advocacy to be provided.[576]

Committee comment

11.27 The Committee notes that the Public Guardian can offer a range of services from advocacy, the mobilisation of services and the pursuit of better accommodation, through to substitute decision-making, but that any or all of these services can be delivered only under the auspices of a guardianship order made on application to the Guardianship Tribunal.

11.28 Consequently, people with impaired decision-making capacity for whom an appropriate intervention is from the less intrusive end of the Public Guardian's range of services must be subject to an order that is made on the basis that they lack decision-making capacity, or in the terms of the *Guardianship Act 1987*, are 'totally or partially incapable of managing his or her person.'[577]

11.29 Another consequence is that such persons must endure the potentially difficult experience of a Tribunal hearing and that the Tribunal must devote its resources to conducting that hearing.

11.30 The Committee considers that the current arrangement at best inserts an unnecessary and burdensome step in accessing support, and at worst is contrary to the principles of presumption of capacity, least restriction and assisted decision-making that are incorporated in the United Nations Conventions on the Rights of Persons with Disabilities and which the Committee is seeking to apply throughout this inquiry.

11.31 Therefore, the Committee recommends that the NSW Government pursue an amendment of section 77 of the *Guardianship Act 1987* to enable the Public Guardian to assist people lacking decision-making capacity without a guardianship order.

Recommendation 31

That the NSW Government pursue an amendment of section 77 of the *Guardianship Act 1987* to enable the Public Guardian to assist people lacking decision-making capacity without a guardianship order.

576 Submission 6, p 2

577 *Guardianship Act 1987* (NSW), s 3 (1), definition of a 'person in need of a guardian'

An Office of the Public Advocate in NSW

11.32 The preceding sections of this chapter examined proposals that the Public Guardian be enabled to act proactively to investigate the need for guardianship and provide guardianship services without the need for a guardianship order. The context of these proposals in terms of the current inquiry was a broader discussion of the need for individual and systemic advocacy and the fact that these services, often delivered by the Public Advocate in other states, are not available in NSW from a state entity. This section examines the proposal for an Office of the Public Advocate to be established in NSW.

11.33 The Committee did not receive evidence on a specific proposal for an Office of the Public Advocate as it did in relation to the Public Guardian's proposed community guardianship program discussed earlier in this chapter. Evidence referred to a general proposal that such an office be established in NSW. The role a Public Advocate in NSW would perform, in the view of inquiry participants, would include both systemic and individual advocacy, representation at formal proceedings such as Tribunal hearings, scrutiny and investigation of service providers and government bodies, and the ability to act quickly and with authority and without the need for a guardianship order.

11.34 Details on these elements of the Public Advocate's role are provided in the following section, however in general there was widespread support for a Public Advocate from a range of stakeholders across all sectors including government, commercial, advocacy groups, academics and private individuals.[578]

The role of a Public Advocate in NSW

11.35 Some inquiry participants described the involvement a Public Advocate could have in formal proceedings such as tribunal hearings. Professor Chappell noted that during Mental Health Review Tribunal hearings there was sometimes a need for an advocate to provide assistance on complex legal issues:

> …during the time I was at the Mental Health Review Tribunal, that there was a need for someone like an advocate because on quite a few occasions there were important issues that came up where matters of law and procedure and practice so far as patients

578 Answers to questions on notice taken during evidence 28 September 2009, Mr Graeme Smith, Public Guardian, Question 5 (To all witnesses), p 9; Professor Duncan Chappell, Faculty of Law, University of Sydney, Evidence, 5 November 2009, p 38; Mr Stephen Newell, Principal Solicitor and Manager, Legal Service, The Aged-care Rights Service, Evidence, 5 November 2009, p 17; Hon Gregory James QC, President, Mental Health Review Tribunal, Evidence, 4 November 2009, p 48; Professor Ian Hickie, Executive Director, Brian and Mind Research Institute, University of Sydney, Evidence, 4 November 2009, p 34; Mr Peter Whitehead, National Manager, Fiduciary Solutions, Perpetual Limited, Evidence, 4 November 2009, p 13; Mr Paul O'Neill, Business Development Manager, Trust Company Limited, Evidence, 4 November 2009, p 13; Professor McCallum, Evidence, 4 November 2009, p 5; Mr Benjamin Fogarty, Principal Solicitor, Intellectual Disability Rights Service, Evidence, 29 September 2009, p 32; Ms Kayess, Evidence, 28 September 2009, p 64; Ms Diane Robinson, President, NSW Guardianship Tribunal, Evidence, 28 September 2009, p 56; Professor Terrence Carney, Sydney Law School, Evidence, 28 September 2009, p 34; Submission 15, Mr Mark Orr, p 15; Submission 19, The Aged-Care Rights Service, p 9; Submission 3, Intellectual Disability Rights Service, p 8; Submission 5a, NSW Guardianship Tribunal, p 2;

> were concerned needed to be given more attention, more detailed legal consideration, and more detailed analysis and argument…I think that is one very important role that a Public Advocate could, and should, perform.[579]

11.36 Professor Chappell noted the role organisations such as the Mental Health Advocacy Service and the Public Interest Advocacy Centre already perform in this area, but suggested that the former was 'not funded or geared towards bringing test cases or dealing with matters that are quite complex over a longer period of time' and that the latter was 'has a very targeted and focused program as to where it concentrates its activities. It is not individual orientated; it is more about broader issues.'[580]

11.37 The Hon Gregory James QC, President, Mental Health Review Tribunal, also stated that the MHRT 'would be greatly assisted if we got proper assistance from advocates with full powers and full opportunity.' Mr James told the Committee that 'a public advocate's office is something that the Public Interest Advocacy Centre, the Law Reform Commission and other bodies have advocated for many years. We would see it as immensely useful.'[581]

11.38 Mr Peter Whitehead, National Manager, Fiduciary Solutions, Perpetual Limited, suggested that a Public Advocate could represent people at tribunal hearings 'so that there is this independent view to make sure that the best interests are being achieved.' Mr Whitehead saw a specific role for a Public Advocate during tribunal hearings where there was conflict involving the person's family as to who should be appointed as financial manager:

> In terms of working out who should be the financial manager for the person, there is often disputes within a family that can cause the wrong decision to be made…
>
> From our point of view, if there was a large conflict it will be clearly seen as an advantage, in a way, to have an advocate pick up on those issues and advocate for an independent financial manager on behalf of the person rather than the tribunal having to respond to only viewpoints seen through the eyes of that person but through probably vested interests of members of the family.[582]

11.39 Mr Paul O'Neill, Business Development Manager, Trust Company Limited, agreed, adding that in disputes involving a person's family a Public Advocate could affirm the correct course of action was being taken or suggest another course of action:

> I think our role is often scrutinised by family members who, in some circumstances, do not necessarily have the other individual's best interests at heart…[S]ometimes we find that the individual that we are protecting will sometimes question the decisions that I would like to say we make together but sometimes we do need to impose a view for their own benefit. In circumstances like that it would be good to have an impartial individual like a public advocate to either reaffirm that we are doing the right thing on their behalf or to question our decision and maybe make us come at it in a different way.[583]

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579 Professor Chappell, Evidence, 5 November 2009, p 38

580 Professor Chappell, Evidence, 5 November 2009, p 38

581 Mr James Evidence, 4 November 2009, p 48

582 Mr Whitehead, Evidence, 4 November 2009, p 13

583 Mr O'Neill, Evidence, 4 November 2009, p 13

11.40 Some inquiry participants focussed on the role a Public Advocate could have in scrutinising service providers and government bodies. For example, Mr Benjamin Fogarty, Principal Solicitor, Intellectual Disability Rights Service, suggested that '[t]he public advocate could scrutinise and take action against government agencies to promote and protect the rights of persons under guardianship and financial management orders'.[584]

11.41 Mr Stephen Newell, Principal Solicitor and Manager, Legal Service, The Aged-care Rights Service, argued that a Public Advocate would have greater authority than existing advocacy services to 'open doors' and investigate allegations:

> I think there is a need for [a Public Advocate], because our experience is quite often you can advocate but you have no authority…to open doors, and to make things happen. Certainly one of the real issues I think is the inability to investigate the circumstances around the allegations of incapacity or the allegations of making a bad decision. … We get a lot of evidence and a lot of allegations from interested parties, some well-meaning and some self-interested, and it is extremely frustrating from our point of view to try to get to the bottom of it. …[W]e do not have the authority even to ring the police and ask them to look at what is happening here.[585]

11.42 Professor Ian Hickie, Executive Director of the Brian and Mind Research Institute, University of Sydney, argued that a Public Advocate would provide more consistent and ongoing advocacy by providing 'a more established mechanism to raise these issues rather than relying on periodic inquiries'. Professor Hickie stated that there has been a reliance on 'ad hoc inquiries' in specific areas, rather than 'a continuously progressive approach.'[586]

11.43 Professor Hickie also highlighted the effectiveness of individual advocacy in bringing about change in large organisations:

> …the systems I have worked in, like large public health systems, suddenly become more responsive once somebody else, a public official, is pursuing the individual case.[587]

11.44 Other inquiry participants highlighted the systemic advocacy role a Public Advocate could perform.[588]

11.45 Professor Terrence Carney, Sydney Law School, stated that the most important change that could be implemented in NSW would be 'to change the public guardian into an office of public advocate'. Professor Carney reported that his analysis of the situation in NSW and in Victoria suggested that one of the reasons NSW has a high rate of guardianship was the absence of a Public Advocate:

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584 Mr Fogarty, Evidence, 29 September 2009, p 32

585 Mr Newell, Evidence, 5 November 2009, p 17

586 Professor Hickie, Evidence, 4 November 2009, p 34

587 Professor Hickie, Evidence, 4 November 2009, p 34

588 Ms Robinson, Evidence, 28 September 2009, p 56; Professor Carney, Evidence, 28 September 2009, p 30

> We looked closely at the situations in New South Wales and Victoria. I heard the evidence that then and still New South Wales makes a much higher proportion of orders for administration of property than occurs per head of population in Victoria.
>
> Why? Our book concluded that New South Wales lacked two agencies. One was the public advocate and the other was the disability review panel.[589]

Separation of the Public Guardian and the Public Advocate

11.46 Some inquiry participants addressed the issue of whether a Public Advocate would be merged with the existing Public Guardian or would exist as a separate entity.

11.47 Professor McCallum argued that a Public Advocate could 'counterbalance' the role of the Public Guardian and that safeguards would exist if the powers of guardianship, the judiciary and the Public Advocate were separated:

> We are only going to safeguard my sisters and brothers with disabilities if we divide up powers between guardianship, between judicial oversight and the Public Advocate…[590]

11.48 Ms Janene Cootes, Executive Officer, Intellectual Disability Rights Service, noted that in other states the role of the Public Guardian and the Public Advocate were combined, but it was preferable for them to be separate:

> In other States those roles are combined. I guess if you want a public advocate who could also comment on the problems of people under financial management with that system and people under public guardianship, it could not be the same.[591]

11.49 However, Mr Graeme Smith, the Public Guardian, envisaged the Public Advocate and Public Guardian being merged into one office, as was the case in other jurisdictions:

> The Public Advocate would replace the Public Guardian. In all other jurisdictions there is either a Public Guardian or Public Advocate except in Queensland, where until recently, there was both an Adult Guardian and a Public Advocate. The Queensland Government has recently decided to merge these offices into one. The Public Advocate would interact with the other relevant bodies in the same way that the Public Guardian does in respect of people under guardianship but would carry additional powers of investigation and advocacy which would assist and enhance the existing role of the Ombudsman.[592]

589 Evidence, 28 September 2009, p 34

590 Professor McCallum, Evidence, 4 November 2009, p 9

591 Ms Janene Cootes, Executive Officer, Intellectual Disability Rights Service, Evidence, 29 September 2009, p 34

592 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 5 (To all witnesses), p 9

11.50 Ms Pearce told the Committee that in Victoria the roles were merged and that although there is a possible 'contradiction' in the arrangement, it was considered that separate offices would create 'greater levels of bureaucracy' and involve too many people.[593]

Committee comment

11.51 The Committee notes the evidence presented during the inquiry that NSW is alone among Australian states in not having a Public Advocate whose role includes systemic and individual advocacy, scrutinising and investigatory functions and importantly, the ability to provide these and other guardianship services to people with disability without the need for a guardianship order.

11.52 The Committee notes that a specific proposal for an Office of the Public Advocate has not been developed. The Committee considers it important and timely that the NSW Government engage the relevant department and agency to consult with relevant stakeholders and develop such a proposal.

11.53 From the evidence presented to it, the Committee considers the issues addressed in the proposal should include but not be limited to:

- the involvement of a Public Advocate in court and tribunal proceedings involving persons with disabilities, in terms of providing representation, advice and mediation
- the authority of a Public Advocate to investigate and scrutinise service providers and government bodies and instigate legal action on behalf of persons with disabilities
- how the role of a Public Advocate would cover both systemic and individual advocacy
- the impact an Office of the Public Advocate would have on the number of people under guardianship in NSW
- whether the Office of the Public Advocate and the Office of the Public Guardian should be merged or exist separately.

593 Ms Pearce, Evidence, 5 November 2009, p 47

Recommendation 32

That the NSW Government consult with the relevant stakeholders and develop a proposal for the establishment of an Office of the Public Advocate and that the issues addressed in the proposal include but not be limited to:

- the involvement of a Public Advocate in court and tribunal proceedings involving persons with disabilities, in terms of providing representation, advice and mediation
- the authority of a Public Advocate to investigate and scrutinise service providers and government bodies and instigate legal action on behalf of persons with disabilities
- how the role a Public Advocate would cover both systemic and individual advocacy
- the impact an Office of the Public Advocate would have on the number of people under guardianship in NSW
- whether the Office of the Public Advocate and the Office of the Public Guardian should be merged or exist separately.

Ministerial responsibility for the *Guardianship Act 1987*

11.54 The Public Guardian submission proposed that responsibility for administering the *Guardianship Act 1987* should be transferred from the Minister for Disability Services to the Attorney General with the effect that the Public Guardian would then report to the Attorney General rather than the Minister for Disability Services.[594]

11.55 The Public Guardian submission's proposal is based on two points; that such a transfer would:

(1) reflect the recent paradigm shift in relation to people with disabilities in terms of a focus on human rights rather than welfare, by transferring the legislation 'into a justice policy milieu', and

(2) remove the actual or perceived conflict of interest arising from the fact the Public Guardian currently reports to the Minister responsible for delivering services to the very people whose interests the Public Guardian is charged with protecting and on behalf of whom the Public Guardian advocates.[595]

A shift in focus from 'welfare' to 'rights'

11.56 In relation to the first point, Mr Smith told the Committee that guardianship legislation in NSW 'is focused on the welfare and interests of people, not [on] their rights to exercise their legal capacity', which are the rights emphasised in the United Nations Convention on the

[594] Submission 7, p 6

[595] Submission 7, pp 6-7

Rights of Persons with Disabilities (UNCRPD). Mr Smith argued that in accordance with the UNCRPD, NSW legislation relating to capacity and incapacity should be removed from a welfare environment and placed in a legal environment, as is the case in other Australian jurisdictions, and should apply generally, not just to people with disabilities:

> …it is an anathema for legislation that ought to be encompassing the civil law provisions in response to issues of capacity and incapacity to be located in the disability welfare policy environment.
>
> The central thesis of our argument is that the passage of the [UNCRPD] represents a paradigm shift in the way in which we ought to be thinking about issues of capacity and incapacity; we ought to be lifting it out of the welfare policy thinking and locating it more in the way in which the law is structured to respond to issues of capacity and incapacity in a general sense; that is to say, that it ought not be just focused on people with disabilities. It ought to be focused on issues of incapacity whenever and wherever they arise. In terms of developing the law and the policy to support the law, it is our view that that would more appropriately be located in the Justice or Attorney General's area, as it is in every other Australian jurisdiction other than New South Wales…[596]

11.57 Ms Therese Sands, Executive Director of the Leadership Team, People with Disability Australia Inc, supported transferring guardianship legislation to the Attorney General, pointing out that laws relating to capacity had to be analysed 'from the point of view of a new human rights framework set out in the [UNCRPD]'. The issues Ms Sands, continued, 'are really not about disability so much as human rights.'[597]

A conflict of interest

11.58 In relation to the second aspect of the argument, the conflict of interest, The Public Guardian submission observed that 'the Public Guardian is required to act with complete independence in protecting the interests of the people for whom he is guardian', but that so long as the Public Guardian reported to the Minister for Disability Services, both 'remain open to a charge of conflict of interest in their dealings with people with decision-making disabilities.' It recommended 'that the Public Guardian report to a Minister who is not involved in providing or funding the services with which the Public Guardian deals on a day-to-day basis for people with disabilities.'[598]

11.59 Mr Smith elaborated on this argument, noting that in NSW, unlike Victoria, the Public Guardian can be dismissed without notice and may be unlikely to criticise service providers under the authority of the minister he is required to report to, a situation some have referred to as the 'pacification' of the Public Guardian:

> The Public Advocate in Victoria is protected in relation to such disclosures by the nature of her appointment. That is, she cannot be dismissed unless by the Victorian Parliament. This is the same protection afforded to the Chief Executive Officer of the NSW Trustee and Guardian. However, the Public Guardian in NSW does not have

596 Mr Graeme Smith, Public Guardian, Evidence, 28 September 2009, p 18

597 Ms Therese Sands, Executive Director - Leadership Team, People with Disability Australia Inc, Evidence, 29 September 2009, p 48

598 Submission 7, pp 6-7

> the same protection. The Public Guardian in NSW is an SES officer who, like other SES officers, can be dismissed for no reason and without notice. In fact in NSW, the Public Guardian has a reporting requirement to the Minister for Disability. It would be very difficult for the Public Guardian to publicly criticise the Department of Ageing, Disability and Home Care for their service provision whilst being required to report to the Minister for Disability and Minister for Ageing. Unlike the Public Advocate in Victoria the Public Guardian is not required to report to the NSW Parliament. This situation has been referred to by some disability advocacy bodies in NSW as 'pacification' of the Public Guardian.[599]

11.60 The Physical Disability Council of NSW and the Public Interest Advocacy Centre submissions both supported the proposal that the Public Guardian not report to the Minister for Disability Services, from the point of view of a person under guardianship lodging a complaint against a service provider. They argued that changing the current reporting arrangement would provide 'greater transparency' for the complainant and facilitate the Public Guardian's role in assisting the client through the complaint process.[600]

11.61 The joint submission from People With Disability Australia and the NSW Mental Health Co-ordinating Council also supported the proposal, arguing that structural separation of both the Public Guardian and the Guardianship Tribunal from disability services would facilitate the Public Guardian's role in challenging service providers:

> To be an effective safeguard of the human rights of persons with disability it is essential for the Guardianship Tribunal and the Public Guardian to have a very high degree of structural separation and independence from disability services. In particular, the Public Guardian must have the capacity to vigorously challenge disability service providers where required to secure or protect the human rights of persons with disability. This includes the Minister for Disability Services and the Department of Ageing, Disability and Home Care, who are the largest providers of disability services in NSW.[601]

11.62 The submission further suggested that under the current reporting arrangement the Public Guardian was sometimes subject to pressure to acquiesce to an action of the Minister for Disability Services that may compromise the rights of a person under guardianship:

> The Public Guardian is sometimes subject to significant inappropriate pressure to accede to, or acquiesce in, conduct of the Minister or Department that compromises the human and legal rights of persons under guardianship. Key examples are the pressure placed on the Public Guardian to consent to placements of persons with disability in appropriate accommodation services, such as institutions and boarding houses.[602]

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599 Answers to questions on notice taken during evidence 28 September 2009, Mr Graeme Smith, Public Guardian, Question 10, p 5

600 Submission 34, Physical Disability Council of NSW, p 5; Submission 22, Public Interest Advocacy Centre Ltd, p 3

601 Submission 4, People with Disability Australia Inc and NSW Mental Health Coordinating Council p 24

602 Submission 4, p 24

Impact on the operation of the Guardianship Tribunal

11.63 The NSW CID supplementary submission opposed moving responsibility for the *Guardianship Act 1987* from the Minister for Disability Services to the Attorney General based on its concerns about the impact such a transfer would have on the operation of the Guardianship Tribunal. The submission held that the existence and maintenance of several of the Tribunal's essential features were due to 'the understanding of, and support for, the role of the Tribunal by successive Ministers for Disability Services in both Labor and Coalition Governments.'[603]

11.64 These 'essential features' include:

- cases being heard by three members bringing a range of expertise and experience.
- an investigative approach both in the preparation of cases by Tribunal staff and in the conduct of hearings. Legal representation is appropriately not the norm and unnecessary legalism can be minimised.
- the Tribunal providing written reasons for its decisions.
- the Guardianship Tribunal not being part of a broader tribunal so that it can maintain and continue to develop a culture suited to its unique work and avoid its resources being diverted to other priorities.
- an accessible, expert and multi member appeal structure.[604]

11.65 The NSW CID supplementary submission stated its concern that moving the Guardianship Tribunal into the Attorney General's portfolio would threaten some of these features and potentially lead to a more legalistic and adversarial approach being taken in the Tribunal:

> We would be very concerned about the Tribunal being moved into the Attorney-General's portfolio. Tribunals in that portfolio tend to have a much more legalistic and adversarial approach than the Guardianship Tribunal…[I]f the Guardianship Tribunal was moved across to Attorney Generals, we could readily envisage the Tribunal losing some of its essential features…[W]e see [the Tribunal] as a largely effective and highly regarded body and we see this as significantly flowing from its being placed within the Disability Services portfolio.[605]

11.66 Mr Simpson suggested that if the Guardianship Tribunal became just one of the courts or tribunals under the responsibility of the Attorney General's Department it may be more vulnerable to budget cuts:

> …the Attorney General's Department…has responsibility for a wide range of courts and tribunals that have different roles overall, and where adversarial, formal and legalistic procedures are much more the norm. Inevitably, if the Guardianship Tribunal was moved across there, there would be a danger, over time, of budget pressures being imposed each time Treasury does its budget cuts and so on that would reduce its investigative capacity, increase people's reliance on lawyers, and make more

603 Submission 6a, NSW Council for Intellectual Disability, p 2

604 Submission 6a, pp 1-2

605 Submission 6a, p 2

> likely the moving towards a single member lawyer dealing with cases rather than multi members.[606]

11.67 Mr Simpson also suggested that the 'culture and style' of the Guardianship Tribunal could be threatened by being 'absorbed' into a larger collection of courts and tribunals.[607]

11.68 However, Mr Phillip French, Member and Adviser, People with Disability Australia Inc, noted that the Department of Justice and Attorney General 'administer a wide range of tribunals, including multimember tribunals' and that as a member of cabinet the Minister for Disability Services could still advocate on behalf of the Guardianship Tribunal:

> …the Minister for Disability Services is a member of a Cabinet that makes decisions as a whole and it seems to me he or she could advocate a position for multimember tribunals as effectively representing the constituency that they are responsible for as a member for the Cabinet, whether or not the Guardianship Tribunal is within a welfare portfolio or a justice portfolio.[608]

11.69 Furthermore, Mr French argued that involving the Attorney General in the administration of the Guardianship Tribunal would increase the degree of government responsibility for people with disabilities:

> One of the most important principles for improving the situation that people with disability face is broadening the scope of government responsibility in the area… And in this case would it not be good if both the Attorney General and the Minister for Disability Services were arguing for appropriate resources for the Guardianship Tribunal and other bodies?[609]

11.70 Mr Smith pointed out that operation of the Guardianship Tribunal was protected by the fact that its constitution is covered by the *Guardianship Act 1987,* and that any move to amend the legislation would be subject to parliamentary scrutiny:

> Shifting administrative responsibility for the Act to the Attorney General does not lead to a conclusion that it would result in changes to the Tribunal. There is no evidence to support such an inference. Any changes to the constitution, composition or procedures of the Tribunal would require changes to the legislation. If the Attorney intended to amend the legislation such changes would be subject to parliamentary scrutiny.[610]

11.71 Mr Smith further argued that moving responsibility for the Guardianship Tribunal to the Attorney General's Department would in fact provide it with a greater level of support:

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606 Mr Jim Simpson, Senior Advocate, New South Wales Council for Intellectual Disability, Evidence, 29 September 2009, p 40

607 Mr Simpson, Evidence, 29 September 2009, p 40

608 Mr Phillip French, Member and Adviser, People with Disability Australia Inc, Evidence, 29 September 2009, p 48

609 Mr French, Evidence, 29 September 2009, p 49

610 Answers to questions on notice taken during evidence 28 September 2009, Question 9, p 4

> If anything a more reliable inference would be that the Tribunal would benefit from being part of a wider network of courts and specialist Tribunals. The Guardianship Tribunal would have access to a much greater support infra-structure, including technology, designed to support the operations of courts and specialist tribunals.[611]

Committee comment

11.72 The Committee understands the two pillars of the proposal to transfer responsibility for administration of the *Guardianship Act 1987* from the Minister for Disability Services to the Attorney General are:

(1) it would constitute a move from a 'welfare-based' environment to a 'rights-based' environment, reflecting the paradigm shift encapsulated in the UNCRPD, and;

(2) it would remove the actual or perceived conflict of interest that currently exists by virtue of the Public Guardian reporting to the Minister for Disability Services, freeing the Public Guardian to advocate more vigorously on behalf of persons with disabilities and, where necessary, to be critical of disability service providers.

11.73 The Committee notes that both these outcomes would be consistent with the Committee's recommendations in this report aimed at emphasising the rights and autonomy of people lacking decision-making capacity and reinforcing the principles of the UNCRPD, but considers that the evidence relating to a move to a 'rights-based' environment is less compelling than the evidence relating to removing the conflict of interest.

11.74 The Committee notes the concerns of some inquiry participants that transferring responsibility for the *Guardianship Act 1987* to the Attorney General could undermine important features of the Guardianship Tribunal, which operates under the Act. However, the Committee agrees with those inquiry participants who argue that the constitution and proceedings of the Tribunal are protected by legislation and that any move to change them would be subject to appropriate parliamentary scrutiny, regardless of which minister had responsibility for administering the Act.

11.75 The Committee did not receive sufficient evidence to make a recommendation on transferring responsibility for administering the *Guardianship Act 1987* but does consider such a transfer could contribute to furthering a 'rights-based' environment for people with disabilities, including those lacking decision-making capacity, and assist the Public Guardian in advocating on behalf of people under guardianship unrestrained by any actual or perceived conflict of interest.

11.76 Therefore, the Committee recommends that the NSW Government consider the merits of transferring responsibility for administering the *Guardianship Act 1987* from the Minister for Disability Services to the Attorney General.

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611 Answers to questions on notice taken during evidence 28 September 2009, Question 9, p 4

Recommendation 33

That the NSW Government consider the merits of transferring responsibility for administering the *Guardianship Act 1987* from the Minister for Disability Services to the Attorney General.

Chapter 12 Implementing substitute decision-making arrangements – medical consent and end-of-life decision-making

The previous two chapters examined the guardianship functions that typically cover 'lifestyle' decisions, such as place of residence and consent for some medical and dental treatment. This chapter focuses on the issue of medical consent for treatments that lie outside the authority of a guardianship order. This is a very broad area and the current inquiry focuses only on consent for medical treatment for involuntary patients in mental health facilities, consent for termination of pregnancy, and consent for medication of mentally ill persons. This chapter also considers substitute decision-making at the end of life and the role of advance medical directives.

As these issues were not explicitly canvassed in the inquiry's terms of reference, the Committee acknowledges that the evidence provided on these matters was limited.

Medical treatment for mentally ill persons

12.1 This section looks at the provisions in section 84 of the *Mental Health Act 2007* for a medical officer to authorise medical treatment for a person detained in a mental health facility and the provisions in the *Mental Health Act 2007* and the *Guardianship Act 1987* for consent to termination of pregnancy. It also considers the issue of enforcing compliance to medication regimes for mentally ill persons.

Authorisation of treatment for persons detained in a mental health facility

12.2 The Mental Health Review Tribunal (MHRT) submission raised concerns about the scope of section 84 of the *Mental Health Act 2007* which gives authority to a medical officer to authorise medical treatment for a person detained in a mental health facility.[612] Section 84 of the *Mental Health Act 2007* provides that:

> An authorised medical officer of a mental health facility may, subject to this Act and the *Mental Health (Forensic Provisions) Act 1990*, give, or authorise the giving of, any treatment (including any medication) the officer thinks fit to an involuntary patient or assessable person detained in the facility in accordance with this Act or that Act.[613]

12.3 The Hon Greg James QC, President of the MHRT, defined an 'assessable person' and an 'involuntary patient':

> **Assessable persons** - these are patients who have been examined by 2 medical officers, one of whom must be a psychiatrist and have been found to be mentally ill and for whom a mental health inquiry is required to be held.

612 Submission 33, Mental Health Review Tribunal, p 5

613 *Mental Health Act 2007* (NSW), s 84

> **Involuntary patients** - these are patients who have been found by the magistrate to be mentally ill under the MHA 2007 and who must be detained in the facility, subject to periodic review by the Tribunal.[614]

12.4 Mr James explained that a mentally ill person may be found on the street in need of mental health care, medical care and surgical care, and is brought to the hospital by the Police who remain with them in the emergency department. The hospital takes over care of the patient when they are admitted. Mr James told the Committee that a period of 'limbo' then follows after the person has been assessed by the two medical officers, found to be mentally ill and detained in a mental health facility at the hospital, and before the magistrate has conducted a mental health inquiry to determine whether or not they should be an involuntary patient.[615]

12.5 During this time, Mr James stated, 'there are difficulties to work out who can give them surgical and medical treatment and, from the point of view of estates, what is to happen to their estate.' Mr James recommended that the MHRT should be able to authorise treatment during that time to give surety, beyond Common Law entitlements, to medical officers and their insurers:

> Really there should be clear power for the Tribunal to authorise a surgical or medical procedure, or special procedure, during that time when necessary. There are Common Law powers for doctors to treat people in emergencies, but doctors are not familiar with them, they are not happy to rely on a Common Law entitlement. They like to see something in an Act, which they feel will mean that they are protected and their insurers are protected and they have an appropriate immunity from being sued.[616]

12.6 Furthermore, the MHRT submission stated that section 84 of the *Mental Health Act 2007*, relating to both assessable persons and involuntary patients, was unclear in two ways: firstly on what medical treatment an officer can authorise, and secondly whether that treatment can be authorised in a place other than in a mental health facility:

> One of the concerns is that it is not clear if section 84 allows an authorised medical officer [AMO] to authorise treatment other than mental health treatment if that treatment occurs in a place other than a mental health facility. For example, if a patient has been scheduled to a hospital but has a medical condition that requires treatment, such as chemotherapy, can that treatment be authorised by the AMO of the mental health facility? If not, what is the basis upon which treatment can occur, if the patient is unable to give an informed consent?[617]

12.7 The MHRT submission further stated '[t]he Tribunal is frequently contacted by mental health professionals seeking clarification of the ambit of s 84. They are understandably anxious to ensure that they are acting within the law.'[618]

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614 Answers to questions on notice taken during evidence 4 November 2009, Hon Greg James QC, President, Mental Health Review Tribunal, Question 7, p 9

615 Mr James, Evidence, 4 November 2009, p 47

616 Mr James, Evidence, 4 November 2009, p 47

617 Submission 33, p 5

618 Submission 33, p 5

12.8 Mr James recommended that section 84 of the *Mental Health Act 2007* be amended to clarify that an authorised medical officer can authorise any medical treatment to occur in any place, including a place other than a mental health facility.

12.9 The MHRT submission raised a further concern with section 84 of the *Mental Health Act 2007*, that it does not make provisions for 'all categories of persons following their detention in a mental heath facility', for example some categories of persons must be dealt with under the *Guardianship Act 1987*:

> …patients who have been detained in a mental health facility and who have yet to be made an involuntary patient by a magistrate and who require emergency surgery, surgery or special medical treatment must have their consents determined by reference the *Guardianship Act*.[619]

12.10 The MHRT submission recommended that provisions for all categories of persons should be contained in the *Mental Health Act 2007*:

> It is submitted that all treatments in respect of persons detained in a mental health facility should be contained in the *Mental Health Act*. The present anomaly is confusing for medical practitioners and patients and as a matter of principle it is preferable that their care and treatment be determined under one legislative regime.[620]

Consent to terminate pregnancy

12.11 The MHRT submission pointed out the inconsistency between the *Mental Health Act 2007* and the *Guardianship Act 1987* in relation to substitute consent for termination of pregnancy, resulting in differential treatment of a pregnant woman lacking decision-making capacity, depending on which Act she came under. The inconsistency exists in the fact that the substitute decision-making process is different under each Act, both in regard to who makes the decision and the 'test' that must be passed for the treatment to be authorised.[621]

12.12 Mr James explained that, depending on which Act the person came under the decision could be made by either the Guardianship Tribunal, the person's primary carer and the Director General, or the MHRT:

> Under the *Guardianship Act* the matter is subject to a hearing by the Guardianship Tribunal, whereas under the *Mental Health Act* the decision may be made in the first instance by the Director General under s 100 if the primary carer agrees to the procedure, and only if there is no such agreement or there is no primary carer it is a decision made by the MHRT.[622]

12.13 A further inconsistency arises from the fact that 'the *Guardianship Act* defines a termination as a special medical treatment, whereas the [*Mental Health Act*] considers the same procedure to

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619 Submission 33, p 5

620 Submission 33, p 5

621 Submission 33, pp 6-7

622 Answers to questions on notice taken during evidence 4 November 2009, Mr James, Question 8, p 11

be surgery.'[623] Mr James explained that under the *Guardianship Act 1987* the criteria to met for 'special medical treatment' is stricter than the criteria under the *Mental Health Act 2007* for 'surgery':

> …the criteria to be met for special medical treatment is more strict. It must be proven that the procedure is 'necessary to save the life of the patient or prevent serious damage'.
>
> Whereas the criteria for surgery is less exacting as it only must be 'desirable having regard to the interests of the patient'.[624]

12.14 Furthermore, Mr James states, there is a difference in the level of review the decision under each Act is subject to:

> In the case of the Guardianship Tribunal there is automatic review by an independent body, namely the Tribunal, whereas under the *Mental Health Act* the decision must be made by an employee of the Health Department producing a clear discrepancy in the level and nature of what is essentially the same decision.[625]

12.15 The MHRT submission recommends that the regimes under the two Acts should be harmonised and that criteria for treatment in the *Mental Health Act 2007* be bought into line with the stricter criteria in the *Guardianship Act 1987*:

> It is submitted that there should be consistency between the two regimes and because of the serious and irreversible nature of such a procedure it should be redefined in the MHA as a special medical treatment which may only be approved by the Tribunal if a patient is unable to give informed consent.[626]

Committee comment

12.16 The Committee notes that in the evidence presented by the MHRT and its President the Hon Greg James QC there are four recommendations:

(1) That the MHRT be enabled to authorise medical treatment in the 'limbo' period between a person having the status of an 'assessable person' and their having the status of an 'involuntary patient.'

(2) That section 84 of the *Mental Health Act 2007* be amended to clarify that an authorised medical officer may authorise medical treatment other than mental health treatment and may authorise that treatment to occur in a place other than a mental health facility.

623 Submission 33, p 6

624 Answers to questions on notice taken during evidence 4 November 2009, Mr James, Question 8, p 11

625 Answers to questions on notice taken during evidence 4 November 2009, Mr James, Question 8, p 11

626 Submission 33, pp 6-7

(3) That provisions for the treatment of all categories of persons admitted to a mental health facility be contained in one Act, namely the *Mental Health Act 2007*.

(4) The manner in which substitute consent for termination of pregnancy is dealt with under the *Guardianship Act 1987* and the *Mental Health Act 2007* be harmonised including that the criteria for treatment in the *Mental Health Act 2007* be bought into line with the stricter criteria in the *Guardianship Act 1987*.

12.17 The Committee further notes that the MHRT has recommended that the amendments to section 84 of the *Mental Health Act 2007* 'requires urgent clarification and consultation with relevant stakeholders such as the Health Department, medical officers and the Tribunal to determine the best approach' and has undertaken to provide 'a short submission as to what legislative changes are required' in relation to the issue of termination of pregnancy.

12.18 The committee agrees that this is an important area of potential law reform and that further, broad consultation and submissions are required before a determination of the most appropriate amendments, if any, can be made. The stakeholders that would be consulted should include NSW Health, medical officers, the MHRT, non-government organisations, community groups and families of people detained under the *Mental Health Act 2007*.

12.19 Therefore, the Committee recommends that the NSW Government consider the need for amendments to the *Mental Health Act 2007* and the *Guardianship Act 1987* in relation to the authority of medical officers to authorise medical treatment for a person detained in a mental health facility and the manner in which substitute consent for the termination of pregnancy is determined, and in particular consider the recommendations of the MHRT made during this inquiry.

Recommendation 34

That the NSW Government consider the need for amendments to the *Mental Health Act 2007* and the *Guardianship Act 1987* in relation to the authority of medical officers to authorise medical treatment for a person detained in a mental health facility and the manner in which substitute consent for the termination of pregnancy is determined.

That the NSW Government consult broadly on the need for such amendments, including with NSW Health, medical officers, the Mental Health Review Tribunal, non-government organisations, community groups and families of people detained under the *Mental Health Act 2007*.

Forced medication for mentally ill persons

12.20 Professor Ian Hickie, Executive Director, Brian and Mind Research Institute, University of Sydney addressed the issue of providing a medication regime for a person against their will.

Professor Hickie was concerned that 'our current systems frequently allow people to reject treatment very early in the course of recovery.'[627]

12.21 Professor Hickie explained that medication can often produce a short term reduction in symptoms and an apparent return of decision-making capacity when decision-making capacity in fact remains impaired:

> …you get this disconnection between symptomatic improvement and obvious improvement in a person's behaviour, without necessarily a real improvement in their more complex cognitive capacities.[628]

12.22 Professor Hickie argued that using improvement in overt symptoms as an indication of capacity can lead to overlooking a lack of capacity arising from a more enduring illness:

> What tends to happen at the moment is that overt symptoms are used as the judge of capacity. The moment a person's symptoms settle down it is assumed their capacity has returned. At the moment, a lot of neuro-psychological testing shows that that is often not the case. Often those illnesses are associated with capacity problems to start with, before people become acutely symptomatic and then during the recovery phase people do not recover their capacity nearly as quickly as the current treatments cause their symptoms to settle down.[629]

12.23 Professor Hickie held that if a person's capacity is impaired to the point their decision-making rights are removed, evidence of regained capacity should extend beyond short-term symptomatic improvement:

> So, having made the decision that a person's capacity was so impaired that the right to decision-making is removed, we would generally think you would need to look at a longer period of that treatment being continued until you have evidence of return of their capacity, not just reduction in their symptoms.[630]

12.24 Professor Hickie acknowledged that in medicine there was a general acceptance of a person's right to refuse medical treatment, but that this is suspended when decision-making capacity is impaired.[631] Professor Hickie observed that 'our overarching concern has been, generally speaking, not to override people's rights…particularly the right to refuse treatment' but that failing to provide treatment to a person's whose capacity is impaired could be an infringement of their right to treatment:

> For people whose mental capacity is clearly impaired, for a civilised society to not provide treatment or not provide pathways to care may infringe that person's rights as well. We expect there to be a care system available for an impaired person.[632]

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627 Professor Ian Hickie, Executive Director, Brain and Mind Research Institute, University of Sydney, Evidence, Evidence, 4 November 2009, p 29

628 Professor Hickie, Evidence, 4 November 2009, p 29

629 Professor Hickie, Evidence, 4 November 2009, p 29

630 Professor Hickie, Evidence, 4 November 2009, p 29

631 Professor Hickie, Evidence, 4 November 2009, p 29

632 Professor Hickie, Evidence, 4 November 2009, p 30

12.25 Professor Duncan Chappell, Faculty of Law, University of Sydney, also addressed this issue, stating that a person may have capacity in some areas and yet still fit the criteria for involuntary treatment. Professor Chappell observed that while medication might restore some level of capacity, there were circumstances where this was outweighed by other considerations:

> There are, with the benefits of medication, very often patients who regain capacity once they are given appropriate anti-psychotic drugs, or whatever. On one view you could say that once that happens they should no longer be involuntarily treated or subject to conditions, but because risk of harm to themselves or others also entered into the equation, as did the possibility of relapse, the issue of capacity did not prevail.[633]

12.26 Professor Hickie gave the example of a person who may particularly wish to reject in the short term medication that produces unwanted side-effects,[634] but that once fully recovered they recognise the benefit of the treatment:

> So we see many situations in which persons have fully recovered six or 12 months later, and at that point they would say very clearly, 'If this happens to me again, I want to be treated. I want to be treated for three months, or six months, and I want to be really well. I do not want to stop the treatment after two weeks and be discharged…'[635]

12.27 Professor Hickie argued that '[w]e tend to have insufficient monitoring and measurement of people right through recovery in between periods of illness'[636] and recommended a move towards an assessment regime including ongoing neuropsychological testing to determine regained capacity.[637]

12.28 Professor Hickie further argued that such an assessment regime would be cost-effective and more in the patient's best interests, particularly to the extent that it helped reduce repeat treatment for relapsing patients in a high cost environment such as a hospital:

> The current systems are actually very expensive. Once you get hospitalised, once you are involved in high levels of care you have entered a sort of intensive care-like environment, and the poor use of those resources and the continuing poor use of those resources…are the most cost-inefficient systems and they are the most human rights-abusing, if you like, and least in the patient's interest to repeatedly have to use acute-care systems involving these other legal mechanisms.[638]

12.29 Mental health services were delivered most cost-effectively in the community, continued Professor Hickie, and 'one of the critical aspects of surviving in the community for many

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633 Professor Duncan Chappell, Faculty of Law, University of Sydney, Evidence, 5 November 2009, p 40

634 Professor Hickie, Evidence, 4 November 2009, p 30

635 Professor Hickie, Evidence, 4 November 2009, p 31

636 Professor Hickie, Evidence, 4 November 2009, p 31

637 Professor Hickie, Evidence, 4 November 2009, p 32

638 Professor Hickie, Evidence, 4 November 2009, p 32

people is continuing access to treatment' which 'may include the necessity to provide treatment over longer periods against a person's express wishes.'[639]

Committee comment

12.30 The Committee acknowledges the difficulty in weighing the rights and bests interests of a mentally ill person with impaired capacity who wishes to reject treatment that is contributing to their regaining capacity.

12.31 The Committee also acknowledges that this issue is further complicated by the fact that medication can often produce a short term alleviation of acute symptoms that gives the impression of regained capacity – including the capacity to reject the medication – whereas capacity has not in fact been regained.

12.32 The Committee agrees with inquiry participants that regaining capacity is not the only consideration to be weighed when considering the right of a person to reject treatment. In addition there is the consideration of the person's risk to themselves, risk to others, the possibility of relapse, the possibility that given a longer course of treatment and more complete recovery the person themselves may endorse the involuntary treatment regime, and the fact that repeated treatment of relapsing patients who reject medication early in the recovery phase is a very cost-ineffective way of delivering mental health treatment.

End-of-life decision-making

12.33 This section examines the evidence received during the inquiry on substitute decision-making at the end of someone's life, focussing on the authority for a substitute decision-maker to refuse life-sustaining medical treatment for the person lacking capacity and on the status and function of 'Advance Care Directives'.

Refusal of life sustaining medical treatment

12.34 Associate Professor Cameron Stewart, Director of the Centre for Health, Governance, Law and Ethics, University of New South Wales Law School, observed that '[w]hereas in the past we were more likely to die at home or work, in modern times we die in hospitals or nursing homes.' He stated that modern life sustaining medical interventions had made death a process that needs to be managed:

> One the issues that has arisen in relation to the increasing number of medical interventions is the problem of choosing when they should be made available to patients and when they should be withdrawn. Essentially, the success of modern medicine has created the problem of how we manage dying.[640]

639 Professor Hickie, Evidence, 4 November 2009, p 32

640 Submission 36, Associate Professor Cameron Stewart, Director, Centre for Health, Governance, Law and Ethics, University of New South Wales Law School, pp 1-2

12.35 Associate Professor Stewart noted that legislation relating to end-of-life decision-making 'will, at some point or another, affect every single person living in NSW', describing the current state of NSW legislation as 'quite frankly in a very poor state.'[641]

12.36 In relation to how end-of-life decision-making is managed in NSW, Associate Professor Stewart provided an overview of the hierarchy that currently operates – outside of the correctional and mental health environments. The decision hierarchy begins with the patient themselves, and ends with the Supreme Court:

> The first question you ask yourself is: Has the patient made their own decision? Are they capable of making their own decision now? If they can talk to you or communicate with you and they can make their own decision, then that is what the decision is… If they are no longer competent, then we ask: Is there an advanced care directive? Have they made a decision in the past when they were competent? If that is the case, then we respect that decision. The next level of inquiry is, if there is no competent decision, there is no advanced care directive; is there someone else who is allowed to make the decision? That is when we go to the person responsible. That would include a guardian, an enduring guardian, a relative or close friend. We could ask them. Then we could go working together with the health professionals to determine what will promote and maintain the health and wellbeing of the patient, which is what the [*Guardianship Act*] now says, or what are the best interests of the patient, which is what the Act should say. Then we could make a decision to withdraw treatment or to continue, depending on the process decided. Finally, if no-one can agree, then you go to the Guardianship Tribunal or to the Supreme Court. They will then make a decision.[642]

12.37 Associate Professor Stewart referred, as did a number of other witnesses, to the significance of section 32 of the *Guardianship Act 1987* to end-of-life decision-making in NSW. Section 32 states the objects of Part 5 of the Act, 'Medical and dental treatment' in relation to substitute decision-makers:

> The objects of this Part are:
>
> (a) to ensure that people are not deprived of necessary medical or dental treatment merely because they lack the capacity to consent to the carrying out of such treatment, and
>
> (b) to ensure that any medical or dental treatment that is carried out on such people is carried out **for the purpose of promoting and maintaining their health and well-being.**.[643]

12.38 The submission from Dying With Dignity explained the significance of the words 'promoting and maintaining their health and well-being' and the potential for problems when there was a dispute about the withdrawal of life sustaining treatment for a person lacking capacity:

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641 Submission 36, p 2

642 Associate Professor Cameron Stewart, Director, Centre for Health, Governance, Law and Ethics, New South Wales Law School, Evidence, 5 November 2009, p 31

643 *Guardianship Act 1987* (NSW), s 32 (emphasis added)

> The problem occurs if anyone disputes a substitute decision to withhold life sustaining medical treatment. Such a dispute will generally be resolved with reference to the *Guardianship Act 1987*. The problem arises because Section 32(b) of the Act appears to insist that any substitute decision about medical treatment must promote and maintain the health and wellbeing of the person. On the face of it this wording does not permit a decision to withhold life-sustaining treatment.[644]

12.39 The submission from Dying With Dignity argued that '[s]ubstitute decision-makers must have the same end-of-life choices available to them that we have for ourselves' noting that '[f]or persons who still have decision-making capacity it is clearly established in common law that we have the right to refuse unwanted medical treatment, even if the refusal of such treatment will cause our death.'[645] The submission recommended that section 32 of the *Guardianship Act 1987* be amended by including as an object of Part 5 of the Act:

> …to ensure that people are not subjected to any unnecessary medical or dental treatment merely because they lack the capacity to refuse the carrying out of such treatment.[646]

12.40 Section 32 (b) of the *Guardianship Act 1987* applies to 'person's responsible' which includes the appointed guardian, enduring guardian, spouse, carer, close friend or relative, and to the Guardianship Tribunal itself.[647] Associate Professor Stewart noted the Administrative Appeals Tribunal decision in *FI v Public Guardian* [2008] NSWADT 263 which '[made] it clear that guardians do have the power to refuse treatment, as long as the decision is made in the patient's best interests.' However, Associate Professor Stewart continued, 'it remains to be seen whether other persons responsible also have this power.'[648]

12.41 The Public Guardian submission also noted the decision in *FI v Public Guardian* meant that a guardian with authority to make health care decisions 'can make decisions to withdraw life sustaining medical treatment where to continue such treatment would not be in the patient's best interests.' It described the effect of section 32 (b) of the *Guardianship Act 1987* on other 'person's responsible' as an 'unintended consequence', arguing that 'it was never intended that families, those closest to the dying patient, would not play the same role in this type of decision-making as they do in relation to other medical decisions.'[649]

12.42 The Public Guardian submission recommended that section 32 (b) of the *Guardianship Act 1987* be amended:

> …to remove the phrase 'for the purpose of promoting and maintaining their health and well-being' and instead insert the phrase 'for the purpose of ensuring the best interests of the person'.[650]

644 Submission 16, Dying with Dignity NSW, pp 2-3

645 Submission 16, p 2

646 Submission 16, p 3

647 Submission 36, p 6

648 Submission 36, p 6

649 Submission 7, p 20

650 Submission 7, p 20

12.43 The Public Guardian submission further recommended that section 33 'Definitions' of the *Guardianship Act 1987* be amended:

> …to include within the definition of medical treatment, 'medical treatment includes the withdrawal of medical treatment considered to be futile and not in the patient's best interest'.[651]

12.44 Similarly, Professor Stewart recommended that section 32 (b) be immediately amended to incorporate the best interests test:

> An immediate reform which is necessary and appropriate would be to amend the wording of the Act to replace the phrase 'promote and maintain health and wellbeing' with 'promote the best interests of the person.' Alternatively the phrase 'promote the best interests of the person' could be used as an alternative test to 'promote and maintain health and wellbeing.'[652]

12.45 In relation to how the patient's 'best interests' were determined, Mr Graeme Smith, the Public Guardian, stated that in the context of life sustaining treatment, a patient's best interests were comprised of three elements: their 'critical interests', which he defined as their stated wishes, desires, values and beliefs, whether or not the treatment was 'futile', and whether or not the treatment was 'burdensome.'[653]

12.46 Treatment was considered 'futile', stated Mr Smith, when 'no therapeutic benefit could be obtained from continuing [the] treatment', while 'burdensome' treatment was that 'where the burdens on the person generated by the treatment outstrip the benefits.'[654]

12.47 Mr Smith explained that treatments such as artificial nutrition and hydration could be considered burdensome:

> Artificial nutrition and hydration, sticking a peg tube into someone and feeding them artificially is not without its problems. It can lead to frequent occurrences of aspiration pneumonia, which then requires further treatment and can generate this cycle. So it can be burdensome, but with no clear benefit to the patient looking into the future.[655]

12.48 Associate Professor Stewart observed that a regime under which life sustaining treatment cannot be withdrawn means that people lacking capacity who would otherwise have had the treatment withdrawn are 'treated to death' and also noted the harmful side-effects of some life sustaining treatments:

> Now these people who would otherwise have been allowed to make decisions for themselves or would otherwise have had the treatment withdrawn because it was no longer helping them have had to be treated to the point where the treatment kills them.

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651 Submission 7, p 20

652 Submission 36, p 8

653 Mr Graeme Smith, Public Guardian, Evidence, 28 September 2009, p 27

654 Mr Smith, 28 September 2009, p 27

655 Mr Smith, Evidence, 28 September 2009, p 28

> …People do not think about these life-sustaining treatments as being harmful, but they can be. You can be ulcerated; your eyes can get ulcers on them and you can have bleeding in the oesophagus from the breathing tubes. The feeding tubes can become infected and you can get aspirational pneumonia from artificial nutrition and hydration. Oftentimes it will be the treatment that kills you.[656]

12.49 Associate Professor Stewart held that recognising these side effects meant a decision had to be made about how to allow a person to die:

> Once we realise that, we have to make a decision about the best way to allow a person to die, because they are dying. Do we do it by aggressively treating them until the treatment kills them, or can we provide them with palliative care?[657]

12.50 Associate Professor Stewart argued that the problem with interpreting the phrase 'promoting and maintaining their health and well-being' in section 32 (b) as prohibiting the withdrawal of life sustaining treatment was that 'it ignores the fact that when a patient is dying, treatment withdrawal and palliative care can substantially enhance a patient's welfare, and, in that sense, promote their health and wellbeing' and 'that disabled patients who are not competent to refuse treatment will be left with aggressive treatment as the only option and will effectively be battered to death.'[658]

12.51 While recommending that the 'best interests' clause be inserted immediately into section 32 (b) of the *Guardianship Act 1987*, Associate Professor Stewart recommended that the issue of end-of-life decision-making generally be referred for inquiry to the Law Reform Commission:

> Firstly, we need to make changes in relation to the best interest test immediately. …My second request is that we then refer these issues generally to the New South Wales Law Reform Commission.
>
> That is based on two reasons: firstly, they could give us an overview of the international perspectives. They could give us an overview on what has happened in the United Kingdom with regard to the Mental Capacity Act and how it is working over there. They could also tell as how to properly integrate advanced care directives into part 5 of the *Guardianship Act*. It would be a good idea to get the view of the New South Wales Law Reform Commission on that.
>
> The second reason for doing it is that they have just finished and completed their inquiry into substitute decision-making for children in medical treatment. They could quite easily build upon the work they have already done there. [659]

Advance care directives

12.52 An advance care directive (ACD), also referred to as a 'living will,' is a document describing a person's preference for or refusal of medical treatment at a time in the future when they are

656 Associate Professor Stewart, Evidence, 5 November 2009, p 30

657 Associate Professor Stewart, Evidence, 5 November 2009, p 30

658 Submission 36, p 6

659 Associate Professor Stewart, Evidence, 5 November 2009, p 25

no longer able to express those preferences. The NSW Health publication, 'Using Advance Care Directives' defines an ACD as follows:

> An 'advance care directive' contains instructions that consent to, or refuse, specified medical treatments in the future. They become effective in situations where the person is no longer able to make decisions. For this reason advance care directives are also, though less frequently, referred to as 'living wills'.[660]

12.53 Mr Smith informed the Committee that in addition to 'Using Advance Care Directives' other relevant NSW Health publications include 'Decisions relating to No Cardio-Pulmonary Resuscitation (CPR) Orders 2008' and 'Guidelines for end-of-life care and decisionmaking 2005.'[661]

12.54 All Australian jurisdictions, apart from NSW and Tasmania, have legislative mechanisms for creating ACDs.[662] Ms Pauline Bagdonavicius, the Western Australian Public Advocate, told the Committee that Western Australia will soon proclaim the *Acts Amendment (Consent to Medical Treatment) Act*, which will make provisions for advance care directives and bind guardians to the instructions they contain.[663] Ms Colleen Pearce, the Victorian Public Advocate, told the Committee that a Victorian resident can establish the equivalent of and ACD by signing a 'refusal of treatment certificate' as part of a medical power of attorney under the *Medical Treatment Act 1988*. However, the certificate only relates to existing conditions.[664]

12.55 In NSW the validity of ACDs has been upheld in common law by the Supreme Court ruling in *Hunter and New England Health Service v A* [2009] NSWSC 761.[665] Mr Smith told the Committee that in his ruling on that case, 'Judge McDougall upheld the patient's right of self-determination even where withdrawal of treatment would have life threatening consequences.'[666] Judge McDougall also stated in his ruling that 'to some extent and for some purposes, the *Guardianship Act* may give recognition to advance care directives.'[667]

12.56 In relation to an ACD's impact on guardians, Mr Smith stated that '[t]here is a direct relationship between guardianship and advance care directives, and a guardian would be bound by the directions outlined in a valid advance care directive.'[668] NSW Health's 'Using

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660 NSW Health, 'Using Advance Care Directives,' 2004, p 11

661 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 4 (To all witnesses), p 8

662 Submission 36, p 4

663 Ms Pauline Bagdonavicius, Public Advocate, Western Australian Office of the Public Advocate, Evidence, 5 November 2009, pp 62-64

664 Ms Colleen Pearce, Public Advocate of Victoria, Evidence, 5 November 2009, p 55

665 Submission 36, p 4; Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 4 (To all witnesses), p 8

666 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 4 (To all witnesses), p 8

667 *Hunter and New England Health Service v A* [2009] NSWSC 761 at [39], in Submission 36, p 4

668 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 4 (To all witnesses), p 8

Advance Care Directives' provides similar advice, adding that in the absence of an ACD a guardian applies the best interests test:

> If an ACD has been drafted independent of the enduring guardianship appointment, and this ACD is authoritative, then an enduring guardian is bound by these directions. If such a directive is not sufficiently authoritative to act on (for example it does not apply to the clinical circumstances at hand), then the enduring guardian consents or refuses consent to treatment according to the perceived best interests of the patient.[669]

12.57 In relation to an ACD's impact on medical practitioners, Professor Terrence Carney from the Sydney Law School and Mr Smith both stated that doctors will 'generally' comply with ACDs.[670]

12.58 Professor Stewart addressed the fact that medical technology may advance in the period of time between a person creating an ACD and their losing capacity. He proposed that people regularly review their ACD in order to update it, but also contended that if a new medical treatment was not addressed by the specific terms of the ACD it would not be covered by the ACD and could therefore be provided:

> We ask people when they are drafting these documents to provide very specific instructions about the treatments that they want and that is why generally the New South Wales Health guidelines suggest that it be done in consultation with health professionals, et cetera. So if there was new treatment suddenly developed and the person was unable to make a decision, it would not be covered by the advanced care directives so that it could be given. [671]

12.59 Associate Professor Stewart referred to the experience from British jurisdictions where vaguely worded ACDs, along the lines of 'I refuse all life sustaining treatment', tend not to be followed, with judges erring on the side of caution and ordering that treatment be provided.[672] However, Associate Professor Stewart also noted the value even a vaguely worded ACD has as a statement of values that can provide guidance to a substitute decision-maker.[673]

12.60 Associate Professor Stewart stated that the broader practice of 'advance care planning' was more important than ACDs, particularly since people tended to avoid writing ACDs. Advance care planning involves beginning conversations with patients at an early stage about what they would like done in the future:

> There will be regular conversations about their treatment and what the future possibilities are and what the patient wants to have done, and that is documented. They are the best types of advance care directive. In fact, we do not tend to call that a directive; that is what we call advance care planning, which is a wider concept. Advance care directives tend to be quite limited because people do not like doing

669 NSW Health, 'Using Advance Care Directives,' 2004, p 11

670 Answers to questions on notice taken during evidence 28 September 2009, Professor Terrence Carney, Sydney Law School, Question 4, p1; Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 4 (To all witnesses), p 8

671 Associate Professor Stewart, Evidence, 5 November 2009, p 26

672 Associate Professor Stewart, Evidence, 5 November 2009, p 26

673 Associate Professor Stewart, Evidence, 5 November 2009, p 27

> them. That is my sneaking suspicion, that people do not like writing them in the same way that they do not like writing wills. They do not like having to think about that.[674]

12.61 Mr Stephen Newell, Principal Solicitor and Manager, Legal Service, The Aged-care Rights Service, made a similar point, highlighting the importance of education in starting people thinking about instruments such as ACDs:

> …part of the aim of our service is very much an education focus to get the idea out there so at least people will think about it…It is really just getting people to give thought to these things, especially the advanced care directives and the like - not what should be in it but at least to think about it, at least go and make some inquiries. But education is the crux of it.[675]

Advance psychiatric care directives

12.62 Professor Chappell noted the need for ACDs in relation to psychiatric care, or 'advance psychiatric care directives.' Professor Chappell stated the absence of recognised advance psychiatric care directives was discriminatory against people with mental illness:

> …the current emphasis on guardianship law is on promoting advanced care directives, but it is one of the anomalies that in the area of psychiatric treatment at least, if a person is suffering from mental illness there is not an ability—as I understand, anyway—in this State nor across the country generally to allow for advanced care directives to be utilised. I think that is a discriminatory feature.[676]

12.63 Professor Chappell explained that an advance psychiatric care directive would operate in the same way as an ACD in relation to treatment for mental illness such as electroconvulsive therapy (ECT) and preferences in relation to hospitals and treating psychiatrists:

> [An advance psychiatric care directive] would contemplate certainly the possibility of a person suffering at some future point from a mental illness or for that matter from a dementia or something of that nature. It would then also, I think, envisage the types of possible treatment that might be applied and whether or not that person wished to receive such treatment. ECT, I suppose, is a very good example of that. People might not want to have ECT, even if it was something that was thought to be beneficial. I think there also might be a consideration of whether or not they were prepared to be admitted to hospital and, perhaps, which hospital and which treating psychiatrist they wanted to have. I think there would be things that they would want to go through, at the very least, with their general practitioner.[677]

Should NSW have legislation providing for advance care directives?

12.64 There was difference of opinion among inquiry participants as to whether NSW should have legislation providing for ACDs or whether the current situation in which they are recognised at common law was adequate.

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674 Associate Professor Stewart, Evidence, 5 November 2009, p 27

675 Mr Stephen Newell, Principal Solicitor and Manager, Legal Service, The Aged-care Rights Service, Evidence, 5 November 2009, p 22

676 Professor Chappell, Evidence, 5 November 2009, p 36

677 Professor Chappell, Evidence, 5 November 2009, p 40-41

12.65 Ms Imelda Dodds, Acting Chief Executive Officer of the NSW Trustee and Guardian, advocated for specific legislation providing for ACDs.[678]

12.66 Professor Carney noted that currently ACDs have a 'back-door' status and need to be formally recognised to remove the reliance on the common law:

> In my view they should be formally recognised (so the public at large knows what is possible—i.e., overt or 'front door' is preferable to reliance on lawyer's assurances about what the common law interpretation may be of existing provisions designed for other ends ...)[679]

12.67 Professor Chappell agreed, stating that legislation was preferable to relying on 'judicial wisdom':

> It will clarify matters and perhaps reflect the will of the people more than relying on judicial wisdom—as much as it is to be acknowledged that judicial wisdom has moved us a very long way in the common law. But I think it is preferable in an area like this that we have legislation.[680]

12.68 Professor Chappell also highlighted the need for a review mechanism for ACDs in situations where the instructions contained in an ACD are unreasonable:

> There is going to be a definite need for review of any advance care directive mechanism because there will be situations where a particular directive is seen to be so unreasonable or likely to cause harm that was not foreseeable and someone will have to review it, whether it be a mental health tribunal or a guardianship tribunal or an amalgamated form of that or a court. There has to be some mechanism for that purpose.[681]

12.69 However, some inquiry participants argued that the current situation in which ACDs are recognised in common law was appropriate.

12.70 Mr Smith stated that the current situation was adequate and there was no need for legislation:

> The Public Guardian's view is that the range of information available both in case law and policy adequately provides for the use of advance care directives in NSW and there is no need for specific legislation.[682]

12.71 Associate Professor Stewart was also comfortable with the current lack of legislative provisions for ACDs in NSW, pointing out the disadvantage of requiring in legislation that all ACDs take the same form:

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678 Ms Imelda Dodds, Acting Chief Executive Officer, NSW Trustee and Guardian, Evidence, 28 September 2009, p 14

679 Answers to questions on notice taken during evidence 28 September 2009, Professor Carney, Question 4, p1

680 Professor Chappell, Evidence, 5 November 2009, p 42

681 Professor Chappell, Evidence, 5 November 2009, p 42

682 Answers to questions on notice taken during evidence 28 September 2009, Mr Smith, Question 4 (To all witnesses), p 8

> We do not have anything in our *Guardianship Act* about advance care directives. I think that may actually be a good idea, firstly because if we have a legislative form of advance care directive that everyone has to use they tend not to be very effective because people want to express their decisions in different ways.[683]

12.72 Associate Professor Stewart pointed out that United Kingdom legislation on ACDs essentially codified the common law and made only basic prescriptions for the content of ACDs:

> In the United Kingdom, the Mental Capacity Act recognises advance care directives, provides for minimum content but then says nothing else about what form it has to take because they want as many people as possible to have access to making these types of decisions. They have basically codified the common law requirements. To me, that sounds like a more sensible option because it allows people to develop different forms, coming from different patient groups and from different religious groups, and you are not disenfranchising them all by saying this is the form of directive they have to have.[684]

Committee comment

12.73 The Committee acknowledges that end-of-life decision-making is an intensely personal and sensitive area and that there are a number of valid viewpoints, none of which can be considered right or wrong. The Committee also notes that the current inquiry did not involve a wide consultation with all relevant stakeholder groups on this particular area of substitute decision-making.

12.74 From the evidence it received, the Committee notes that section 32 (b) of the *Guardianship Act 1987* has lead to confusion as to whether or not 'persons responsible' under the Act have the authority to refuse life sustaining medical treatment on behalf of a person lacking capacity.

12.75 The Committee notes also the Administrative Decisions Tribunal's decision in *FI v Public Guardian* [2008] NSWADT 263 gives 'guardians' the authority to refuse or withdraw life sustaining medical treatment if it is in the person under guardianship's best interests, but, on the evidence presented to the Committee, it is not clear how this decision affects other 'persons responsible.'

12.76 Some inquiry participants have recommended that section 32 (b) of the *Guardianship Act 1987* be amended to insert a clause having the effect of allowing a substitute decision-maker under the Act to withdraw life sustaining medical treatment if doing so were in the best interests of the person under guardianship.

12.77 The Committee agrees that there is a need to clarify the role of substitute decision-makers in end-of-life decision-making and in particular around their authority to consent to the withdrawal of life-sustaining medical treatment. However, the Committee did not receive enough evidence to make a specific recommendation in this important area.

12.78 The Committee notes that currently there is no legislative provision for advance care directives in NSW but their validity has been upheld in common law by the Supreme Court ruling in *Hunter and New England Health Service v A* [2009] NSWSC 761.

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683 Associate Professor Stewart, Evidence, 5 November 2009, p 29

684 Associate Professor Stewart, Evidence, 5 November 2009, p 29

12.79 From the evidence presented to the Committee it is not entirely clear how guardians are bound by the instructions contained in ACDs. The evidence from some inquiry participants is that guardians are bound by the instructions in ACDs, however the judgement in *Hunter and New England Health Service v A* [2009] NSWSC 761 states that 'to some extent and for some purposes, the *Guardianship Act* may give recognition to advance care directives' which appears to leave the matter in some doubt.

12.80 The Committee notes the difference of opinion among inquiry participants in relation to whether NSW requires specific legislation providing for ACDs or whether the current reliance on their common law status is sufficient.

12.81 Recommendations around the role of substitute decision-makers in withdrawing life sustaining medical treatment and legislation making provision for ACDs could only be based on evidence from a broader range of stakeholders than participated in this inquiry, focussing more specifically on end-of-life decision-making and ACDs rather than substitute decision-making generally.

12.82 In this regard, the Committee is mindful of the recommendation from some inquiry participants that provisions for end-of-life decision-making and ACDs in NSW be referred for inquiry to the NSW Law Reform Commission. The Committee notes that both the Queensland and Victorian governments have referred a review of guardianship laws generally to their respective Law Reform Commissions.

12.83 Therefore, the majority of the Committee recommends that the NSW Government consider the need for an inquiry focussing specifically on the provisions for end-of-life decision-making and ACDs in NSW. The NSW Law Reform Commission could undertake this inquiry.

Recommendation 35

That the NSW Government consider the need for an inquiry focussing specifically on the provisions for end-of-life decision-making and advance care directives in NSW and consider referring such an inquiry to the NSW Law Reform Commission.

Appendix 1 Submissions

No	Author
1	Ms Myree Harris (Coalition for Appropriate Supported Accommodation for People with Disabilities)
2	Ms Bronwyn McCutcheon (Legal Aid NSW)
3	Mr Ben Fogarty (Intellectual Disability Rights Service)
4	Ms Therese Sands (People with Disability Australia Inc) and Ms Jenna Bateman (Mental Health Coordinating Council)
5	Ms Diane Robinson (NSW Guardianship Tribunal)
5a	Ms Diane Robinson (NSW Guardianship Tribunal)
6	Ms Carol Berry (NSW Council for Intellectual Disability)
6a	Ms Carol Berry (NSW Council for Intellectual Disability)
7	Mr Graeme Smith (Office of the Public Guardian)
8	Mr Mark Pattison (National Council on Intellectual Disability)
9	Mr Bruce Barbour (NSW Ombudsmans Office)
10	Ms Rosemary Kayess (Disability Studies and Research Centre)
11	Mr Christopher Heckenberg (Mission Australia (Riverina Financial Counselling Service))
12	Mr Rodney Lewis
13	Ms Imelda Dodds (NSW Trustee and Guardian)
14	Ms Kath Brewster (Council on the Ageing NSW)
15	Mr Mark Orr
16	Dr Giles Yates and Dr Robert Marr (Dying With Dignity NSW)
17	Hon John Watkins (Alzheimer's Australia NSW)
18	Professor Ron McCallum (University of Sydney)
19	Ms Janna Taylor and Mr Stephen Newell (The Aged-care Rights Service)
20	Mr Andrew Johnson
20a	Confidential
21	Ms Rachel Merton (Brain Injury Association of NSW Inc)
22	Ms Brenda Bailey (Public Interest Advocacy Centre Ltd)
23	Ms June Walker
23a	Ms June Walker
23b	Ms June Walker
24	Mr Ross Ellis (Trustee Corporations Association of Australia)
25	Ms Anne Cregan (Blake Dawson Pro Bono Team)
26	Mr Joe Catanzariti (Law Society of NSW)

No	Author
27	Mrs Maureen Cahill
28	Ms Maryjo Thomas
29	Ms Elena Katrakis (Carers NSW)
30	Confidential
30a	Confidential
31	Mr Michael Vescio (Oppressed People of Australia (Inc))
32	Associate Professor Abd Malak AM (NSW Health, Sydney West Area Health Service)
33	Hon Greg James QC (Mental Health Review Tribunal)
34	Ms Jordana Goodman (Physical Disability Council of NSW)
35	Ms Fiona Given, Ms Jonna Shulman and Rosemary Kayess (NSW Disability Discrimination Legal Centre Inc)
36	Associate Professor Cameron Stewart (Sydney Law School and Faculty of Medicine, University of Sydney)
37	Ms Clarissa Mulas (Sydney West Area Health Service, NSW Health)
38	Mr Grahame Thomas and Mrs Denise Thomas
39	Ms Sarah Dahlenburg (Australian Medical Association)
40	Ms Bernadette Curryer (Self Advocacy Sydney Inc)
41	Confidential
42	Mr Wayne Sampson
43	Name suppressed
44	Ms Sonia Bernardi (Department of Human Services, Ageing, Disability and Home Care)

Appendix 2 Witnesses

Date	Name	Position and Organisation
Monday 28 September 2009 Jubilee Room, Parliament House	Ms Imelda Dodds	Acting Chief Executive Officer, NSW Trustee and Guardian
	Mr Paul Marshall	Manager, Quality Service & Community Relations, NSW Trustee and Gurdian
	Mr Graeme Smith	Public Guardian, NSW Public Guardian
	Ms Frances Rush	Assistant Director, Advocacy and Policy, NSW Public Guardian
	Professor Terry Carney	Sydney Law School, University of Sydney
	Ms Susan Field	NSW Trustee and Guardian Fellow in Elder Law, University of Western Sydney
	Mr Andrew Buchanan	Chairperson, Disability Council of NSW
	Mr Dougie Herd	Executive Officer, Disability Council of NSW
	Ms Diane Robinson	President, NSW Guardianship Tribunal
	Ms Rosemary Kayess	Associate Director, Community and Development, Disabilities Studies and Research Centre, University of New South Wales
Tuesday 29 September 2009 Waratah Room, Parliament House	Ms Anne Cregan	Pro bono Partner, Blake Dawson Lawyers
	Mr Samuel Indyk	Lawyer, Blake Dawson Lawyers
	Ms Anne-Marie Elias	Policy and Communications Manager, Council on the Ageing NSW
	Ms Rachel Merton	Chief Executive Officer, Brain Injury Association of NSW
	Ms Janene Cootes	Executive Officer, Intellectual Disability Rights Service

Date	Name	Position and Organisation
	Mr Benjamin Fogarty	Principal Solicitor, Intellectual Disability Rights Service
	Mr Jim Simpson	Senior Advocate, NSW Council for Intellectual Disability
	Ms Therese Sands	Executive Director, Leadership Team, People with Disability Australia Inc.
	Mr Phillip French	Member and Advisor, People with Disability Australia Inc.
	Mr Alan Kirkland	Chief Executive Officer, Legal Aid NSW
	Ms Monique Hitter	Director, Civil Law, Legal Aid NSW
	Ms Nihal Danis	Senior Solicitor, Mental Health Advocacy Service, Legal Aid NSW
4 November 2009 Room 814/815, Parliament House	Professor Ron McCallum	Professor of Industrial Law, Sydney Law School, University of Sydney
	Ms Belinda Reeve	Researcher, Sydney Law School, University of Sydney
	Mr Ross Ellis	Executive Director, Trustee Corporations Association of Australia
	Mr Ian Pendleton	General Manager, Fiduciary Solutions, Perpetual Limited
	Mr Paul O'Neill	Business Development Manager, Financial Services, Trust Company Limited
	Mr Peter Whitehead	National Manager, Fiduciary Solutions, Perpetual Limited
	Mr Peter Bryant	Group Legal Counsel, Trust Company Limited
	Professor Ian Hickie	Executive Director, Brain and Mind Research Institute, University of Sydney
	Mr Robert Goncalves	Legal Officer, Land and Property Management Authority

Date	Name	Position and Organisation
	Hon Greg James QC	President, Mental Health Review Tribunal
	Ms Maria Bisogni	Deputy President, Mental Health Review Tribunal
	Ms Imelda Dodds	Acting Chief Executive Officer, NSW Trustee and Guardian
	Mr Paul Marshall	Manager, Quality Service and Community Relations, NSW Trustee and Guardian
5 November 2009 Waratah Room, Parliament House	Ms Brenda Lee Doyle	Provincial Director, Office of the Public Guardian, Alberta, Canada
	Mr Stephen Newell	Principal Solicitor and Manager, The Aged-Care Rights Service
	Ms Margaret Small	Solicitor, The Aged-Care Rights Service
	Associate Professor Cameron Stewart	Associate Professor and Director, Centre for Health, Governance, Law and Ethics, NSW Law School University of Sydney
	Professor Duncan Chappell	Professor of Law, University of Sydney
	Ms Colleen Pearce	Public Advocate, Victorian Office of the Public Advocate
	Ms Pauline Bagdonavicius	Public Advocate, Western Australian Office of the Public Advocate
	Ms Gillian Lawson	Manager, Guardianship, Western Australian Office of the Public Advocate

Appendix 3 Tabled documents

1. Tuesday 29 September 2009

Public Hearing, Waratah room, Parliament House

- Ms Anne-Marie Elias, Policy and Communications Manager, Council on the Ageing, tendered a document entitled, 'When a client's capacity is in doubt' - A practical guide for solicitors, The Law Society of NSW.

2. Wednesday 4 November 2009

Public Hearing, Waratah Room, Parliament House

- Professor Ron McCallum, Professor of Industrial Law, Sydney Law School, University of Sydney, tendered a document titled 'Convention on the Rights of Persons with Disabilities and its optional Protocol', Sydney Law School.
- The Hon Greg James QC, President, Mental Health Tribunal, tendered Electro Convulsive Therapy (Section 6) and Apply for consent to Surgery or Special Medical Treatment (Section 7) produced by Mental Health Review Tribunal, Consent to Medical Treatment – Patient Information, NSW Health, Policy Directive and a document from the Mental Health Review Tribunal answers to questions on notice provided pre-hearing.

3. Thursday 5 November 2009

Public Hearing, Waratah Room, Parliament House

- Ms Brenda Lee Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada, a copy of the Adult Guardianship and Trusteeship Act PowerPoint presentation which she presented.
- Ms Margaret Small, Solicitor, The Aged-Care Rights Service, tendered Enduring Guardianship Guide / appointment form and Enduring Power of Attorney Guide /form produced by the Guardianship Tribunal, Advance Care Planning: The Basics, Sydney South West Area Health Service, NSW Health and Aged Services Learning and Research Centre, Southern Cross University, Advance Care Planning Documents.

Appendix 4 Answers to questions on notice

The Committee received answers to questions on notice from:

- Professor Terry Carney, University of Sydney
- Council on the Ageing
- Guardianship Tribunal
- Intellectual Disability Rights Service
- Hon Greg James QC, Mental Health Review Tribunal
- Land and Property Management Authority
- Legal Aid NSW
- Professor Ron McCallum, Sydney Law School
- NSW Council for Intellectual Disability
- NSW Trustee and Guardian
- Office of the Public Guardian
- People with Disability Australia Inc.
- The Aged-Care Rights Service
- Victorian Office of the Public Advocate
- Western Australian Office of the Public Advocate

Appendix 5 Minutes

Minutes No. 37
Tuesday 30 June 2009
Room 814/815, Parliament House at 1:45 pm

1. Members present
Mr Ian West *Chair*
Mr Trevor Khan *Deputy Chair*
Mr Greg Donnelly
Dr John Kaye
Mr Mick Veitch

2. Apologies
Ms Marie Ficarra

3. ####

4. ####

5. ####

6. ####

7. Consideration of Ministerial reference
The Chair tabled a letter, dated 30 June 2009, from the Hon John Hatzistergos MLC, Attorney General, requesting the Committee conduct an inquiry into the legislative provisions for the management of estates of people incapable of managing their affairs; and the guardianship of people who have disabilities.

8. Inquiry into substitute decision-making for people lacking capacity
Resolved, on the motion of Mr Khan: That, in accordance with the reference received from the Attorney General, the committee adopt the following terms of reference:

1.That the Standing Committee on Social Issues inquire into and report on the provisions for substitute decision-making for people lacking capacity in New South Wales, and in particular:

(a) whether any NSW legislation requires amendment to make better provision for:
(i) the management of estates of people incapable of managing their affairs; and
(ii) the guardianship of people who have disabilities.

2.That the committee report by February 2010.

Reporting terms of reference to the House
Resolved, on the motion of Mr Veitch: That, in accordance with paragraph 5(2) of the resolution establishing the Standing Committees, the Chair inform the House of the terms of reference for an inquiry into substitute decision-making for people lacking capacity received from the NSW Attorney General.

Publication of correspondence
Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act* 1975 and standing order 223(1), the Committee authorise publication of correspondence received from the NSW Attorney General on Tuesday 30 June 2009 omitting the name of the departmental officer.

Call for submissions
Resolved, on the motion of Mr Veitch:

- That the inquiry and call for submissions be advertised in the earliest practicable date in the Sydney Morning Herald and the Daily Telegraph.

- The closing date for submissions to the inquiry be 21 August, and that the Committee continue to accept submissions after this date

Press release
Resolved, on the motion of Dr Kaye: That a press release announcing the commencement of the inquiry and the call for submissions be distributed to media outlets throughout NSW to coincide with the call for submissions.

Committee inquiry activity
Resolved, on the motion of Mr Khan: That the Committee reserve the follow dates for committee activities:

- Morning of 26 August 2009
- 28 August 2009
- 28 and 29 September 2009
- 4 and 5 November 2009

Invitation to stakeholders to make a submission
Resolved, on the motion of Dr Kaye: That:

- Committee members provide the names of stakeholders to the secretariat by 5pm, Monday 6 July 2009
- The secretariat circulate a list of identified stakeholders, as well as any additional stakeholders identified by the Secretariat in consultation with the Chair, to Committee members
- The Chair write to the identified stakeholders informing them of the inquiry and inviting them to make a submission.

9. Adjournment
The Committee adjourned at 5:30pm, *sine die*.

Rachel Simpson
Committee Clerk

Minutes No. 38
Wednesday 26 August 2009
Room 814/815, Parliament House at 9:15 pm

1. Members present
Mr Ian West *Chair*
Mr Trevor Khan *Deputy Chair*
Mr Greg Donnelly
Dr John Kaye
Mr Mick Veitch
Ms Marie Ficarra

2. Confirmation of previous minutes
Resolved, on the motion of Mr Veitch: That Draft Minutes No 37 be confirmed.

3. Correspondence
The Committee noted the following items of correspondence received:
####

Substitute decision-making inquiry

- 30 June 2009 – Letter from the Attorney General to the Chair referring the inquiry into substitute decision-making for people lacking capacity to the Standing Committee on Social Issues
- 3 August 2009 – Letter from Mr Warwick Watkins, Registrar General, Department of Lands regarding the review of the *Powers of Attorney Act 2003* and enclosing an issue paper.

####

4. Publication of submissions – inquiry into substitute decision-making
Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise publication of submission Nos. 1 to 11.

5. Extension of closing date for submissions – inquiry into substitute decision-making
Resolved, on the motion of Mr Veitch: That the closing date for submissions to the inquiry into substitute decision making be extended until Friday 18 September 2009, and that the Committee continue to accept submissions and supplementary submissions after the closing date.

6. ####

7. Public hearings – inquiry into substitute decision-making

Public hearings are scheduled on the following dates:

- Monday 28 September 2009
- Tuesday 29 September 2009
- Wednesday 4 November 2009
- Thursday 5 November 2009

Resolved, on the motion by Mr Khan: That, Committee members nominate potential witnesses for 28 and 29 September to the Committee secretariat by Friday 11 September 2009, and that after consultation with the Chair, the secretariat circulate the list of potential witnesses to members.

8. Committee briefing – inquiry into substitute decision-making
Resolved on the motion of Mr Donnelly: That, in accordance with Standing Order 218(2), the Committee invite Ms Dodds, Acting CEO of the NSW Trustee and Guardian, Mr Smith, NSW Public Guardian, Office of the Public Guardian and Mr Herd, Director of the Office of the Disability Council of NSW to join the meeting of the Committee.

Ms Dodds, Mr Smith and Mr Herd were admitted.

The Chair welcomed the invited guests to the meeting of the Committee.

Ms Dodds, Mr Smith and Mr Herd gave brief presentations to the Committee

The Chair, on behalf of the Committee, thanked Ms Dodds, Mr Smith and Mr Herd for attending and providing the briefing to the Committee.

Ms Dodds, Mr Smith and Mr Herd withdrew.

9. Adjournment
The Committee adjourned at 1:00pm *sine die*.

Rachel Simpson
Committee Clerk

Minutes No. 39
Monday 21 September 2009
Room 1102, Parliament House at 9:00 am

1. Members present
Mr Ian West *Chair*
Mr Greg Donnelly
Dr John Kaye
Mr Mick Veitch
Ms Marie Ficarra

2. Apologies
Mr Trevor Khan

3. Confirmation of previous minutes
Resolved, on the motion of Ms Ficarra: That Draft Minutes No 38 be confirmed.

4. Correspondence
The Committee noted the following items of correspondence.

Inquiry into substitute decision-making – correspondence received:

- 2 September 2009 – Email from Ms Imelda Dodds, Acting CEO NSW Trustee and Guardian, providing information to the Committee as requested of her during her briefing to the Committee on Wednesday 26 August.

Resolved, on the motion of Dr Kaye: That the secretariat clarify the requested confidentiality of documents provided by Ms Dodds.

5. Publication of submissions – inquiry into substitute decision making
Resolved, on the motion of Dr Kaye: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise publication of submission Nos. 12 to 22 and a supplementary submission 6a, and that submission 20a be confidential, at the request of the author.

6. Inquiry into substitute decision-making – public hearings 28 and 29 September
Resolved, on the motion of Dr Kaye: That the following people be invited to attend the public hearings on 28 and 29 September 2009 at Parliament House:

- Ms Imelda Dodds, Acting CEO, NSW Trustee and Guardian
- Mr Graeme Smith, NSW Public Guardian
- Ms Frances Rush, Assistant Director, Advocacy and Policy, NSW Public Guardian
- Professor Terry Carney, Sydney Law School
- Ms Sue Field, NSW Trustee and Guardian Fellow in Elder Law, University of Western Sydney
- Mr Andrew Buchanan, Chairperson, Disability Council of NSW
- Ms Diane Robinson, President, Guardianship Tribunal
- Ms Rosemary Kayess, Associate Director, Community and Development, Disabilities Studies and Research Centre, UNSW
- Ms Anne Cregan, Pro bono Partner, Blake Dawson Lawyers
- Ms Anne-Marie Elias, Policy and Communications Manager, Council on the Ageing
- Ms Rachel Merton, Chief Executive Officer, Brain Injury Association of NSW
- Mr Ben Fogarty, Principal Solicitor, Intellectual Disability Rights Service
- Ms Janene Cootes, Executive Officer, Intellectual Disability Rights Service
- Mr Jim Simpson, Senior Advocate, NSW Council for Intellectual Disability
- Ms Therese Sands, Executive Director, People with Disability
- Mr Alan Kirkland, Chief Executive Officer, Legal Aid NSW
- Ms Monique Hitter, Director, Civil Law, Legal Aid NSW
- Mr Nihal Danis, Senior Solicitor, Mental Health Advocacy Service, Legal Aid NSW

7. Disability Awareness Training
The secretariat advised that disability awareness training for secretariat staff has been scheduled for Friday 25 September 2009 from 2:00 pm until 3:30 pm. Members and their staff are invited to attend.

8. ####

9. Adjournment
The Committee adjourned at 11:15 am, until 28 September 2009 at 9:00 am in Room 814/815.

Rachel Simpson
Committee Clerk

Minutes No. 40
Monday 28 September 2009
Jubilee Room, Parliament House at 9:15 am

1. Members present
Mr Ian West *Chair*
Mr Trevor Khan *Deputy Chair* (until 3.45pm)
Mr Greg Donnelly
Dr John Kaye
Mr Mick Veitch
Ms Marie Ficarra

2. Confirmation of previous minutes
Resolved, on the motion of Mr Veitch: That Draft Minutes No 39 be confirmed.

3. Publication of submissions – inquiry into substitute decision making
Resolved, on the motion of Ms Ficarra: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise publication of submission Nos. 24 to 29 and supplementary submission 5a.

4. Additional questions on notice by members
Resolved, on the motion of Ms Ficarra: That for the duration of the inquiry into substitute decision making, Committee members forward additional questions on notice for witnesses at a hearing to the secretariat within 3 business days from the date of the hearing.

5. Return of answers to questions taken on notice
Resolved, on the motion of Ms Ficarra: That for the duration of the inquiry into substitute decision making, the Committee request witnesses to return answers to any questions taken on notice during the hearings, and any additional questions on notice from Committee members, within 21 days of the date on which the questions are forwarded to the witness by the committee clerk.

6. Inquiry into substitute decision-making – public hearing
Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following representatives from the NSW Trustee and Guardian were sworn and examined:

- Ms Imelda Dodds, Acting Chief Executive Officer
- Mr Paul Marshall, Manager, Quality Service & Community Relations

The evidence concluded and the witnesses withdrew.

The following representatives from the NSW Public Guardian were sworn and examined:

- Mr Graeme Smith, Public Guardian
- Ms Frances Rush, Assistant Director, Advocacy and Policy

The evidence concluded and the witnesses withdrew.

The following representative from Sydney Law School, University of Sydney, was sworn and examined:

- Professor Terry Carney

The evidence concluded and the witness withdrew.

The following representative from University of Western Sydney and representative of Alzheimer's Australia NSW was sworn and examined:

- Ms Sue Field, NSW Trustee and Guardian Fellow in Elder Law (UWS) and representative of Alzheimer's Australia NSW

The evidence concluded and the witness withdrew.

The following representatives from the Disability Council of NSW were sworn and examined:

- Mr Andrew Buchanan, Chairperson
- Mr Dougie Herd, Executive Officer

The evidence concluded and the witnesses withdrew.

The following representative of the NSW Guardianship Tribunal was sworn and examined:

- Ms Diane Robinson, President

The evidence concluded and the witness withdrew.

The following representative of the Disabilities Studies and Research Centre, UNSW was sworn and examined:

- Ms Rosemary Kayess, Associate Director, Community and Development

The evidence concluded and the witness withdrew.

The public hearing concluded.

The public and media withdrew.

7. Adjournment

The Committee adjourned at 5:15 pm, until 29 September 2009 at 9:00 am in the Waratah Room.

Rachel Simpson
Committee Clerk

Minutes No. 41
Tuesday 29 September 2009
Jubilee Room, Parliament House at 9:15 am

1. Members present

Mr Ian West *Chair*
Mr Trevor Khan *Deputy Chair (until 12:00 pm)*
Mr Greg Donnelly
Dr John Kaye
Mr Mick Veitch *(until 1:30 pm)*
Ms Marie Ficarra

2. Apology

Mr Veitch *(from 1:30pm)*

3. Inquiry into substitute decision-making – public hearing

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following representatives from Blake Dawson Lawyers were sworn and examined:

- Ms Anne Cregan, Pro bono Partner, Blake Dawson Lawyers
- Mr Sam Indyk, Lawyer, Blake Dawson Lawyers

The evidence concluded and the witnesses withdrew.

The following representative from the Council on the Ageing NSW was sworn and examined:

- Ms Anne-Marie Elias, Policy and Communications Manager, Council on the Ageing NSW

Ms Anne-Marie Elias tendered a document titled 'A Practical Guide for Solicitors: When a client's capacity is in doubt', The Law Society of NSW

The evidence concluded and the witness withdrew

The following representative from the Brain Injury Association of NSW was sworn and examined:

- Ms Rachel Merton, Chief Executive Officer, Brain Injury Association of NSW

The evidence concluded and the witness withdrew.

The following representatives from the Intellectual Disability Rights Service, were sworn and examined:

- Ms Janene Cootes, Executive Officer, Intellectual Disability Rights Service
- Mr Ben Fogarty, Principal Solicitor, Intellectual Disability Rights Service

Mr Khan left the hearing at 12:00pm

The evidence concluded and the witnesses withdrew.

The following representative from the NSW Council for Intellectual Disability was sworn and examined:

- Mr Jim Simpson, Senior Advocate, NSW Council for Intellectual Disability

The evidence concluded and the witness withdrew.

The following representatives of the People with Disability Australia were sworn and examined:

- Ms Therese Sands, Executive Director, People with Disability Australia
- Mr Phillip French, Member and human rights legal expert, People with Disability Australia

The evidence concluded and the witnesses withdrew.

The following representatives of Legal Aid NSW were sworn and examined:

- Mr Alan Kirkland, Chief Executive Officer, Legal Aid NSW
- Ms Monique Hitter, Director, Civil Law, Legal Aid NSW
- Ms Nihal Danis, Senior Solicitor, Mental Health Advocacy Service, Legal Aid NSW

The evidence concluded and the witnesses withdrew.

The public hearing concluded.

The public and media withdrew.

4. Acceptance and publication of documents tendered during the public hearing

Resolved, on the motion of Mr Donnelly: That the Committee accept and publish, according, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1) the following documents tendered during the public hearing:

A Practical Guide for Solicitors: When a client's capacity is in doubt, The Law Society of NSW, tendered by Ms Anne-Marie Elias, Council on the Ageing

5. Publication of submissions – inquiry into substitute decision making

Resolved on the motion of Ms Ficarra: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions Act 1975* and Standing Order 223(1), the Committee authorise the partial publication of Submission Nos 23, supplementary submissions 23a and 23b with names and appendices suppressed and 31 with appendices suppressed.

Resolved on the motion of Ms Ficarra: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions Act 1975* and Standing Order 223(1), the Committee keep Submission No. 30 and Supplementary Submission No 30a confidential, at the request of the author.

6. Adjournment
The Committee adjourned at 4:30 pm, until 4 November 2009 (public hearing).

Rachel Simpson
Committee Clerk

Minutes No. 42
Thursday 29 October 2009
Room 1102, Parliament House at 1:00 pm

1. Members present
Mr Ian West *Chair*
Mr Trevor Khan *Deputy Chair*
Mr Greg Donnelly
Ms Marie Ficarra
Dr John Kaye
Mr Mick Veitch

2. Confirmation of previous minutes
Resolved, on the motion of Mr Donnelly: That Draft Minutes Nos 40 and 41 be confirmed.

3. Correspondence
The Committee noted the following items of correspondence received – inquiry into substitute decision-making:

- 15 October 2009 – Answers to questions taken on notice from Professor Terry Carney, Sydney Law School, University of Sydney
- 21 October 2009 – Letter from Mr Alan Kirkland, Chief Executive Officer, Legal Aid NSW, enclosing answers to questions taken on notice
- 22 October 2009 – Letter from Ms Diane Robinson, President, Guardianship Tribunal, enclosing answers to questions taken on notice and additional information as requested by the Committee during the hearing
- 22 October 2009 – Answers to questions taken on notice from Ms Anne-Marie Elias, Policy and Communications Manager, Council on the Ageing
- 26 October 2009 – Answers to questions taken on notice from Ms Imelda Dodds, Acting Chief Executive Office, NSW Trustee and Guardian
- 26 October 2009 – Answers to questions taken on notice from 22 October 2009 – Answers to questions taken on notice from Mr Graeme Smith, Public Guardian, NSW Public Guardian

Resolved, on the motion of Ms Ficarra: That, according to section 4 of the Parliamentary papers (Supplementary Provisions) Act 1975 and Standing order 223(1), the Committee authorise publication of answers to questions on notice received from:

- Professor Terry Carney, Sydney Law School, University of Sydney
- Mr Alan Kirkland, Chief Executive Officer, Legal Aid NSW
- Ms Diane Robinson, President, Guardianship Tribunal
- Ms Anne-Marie Elias, Policy and Communications Manager, Council on the Ageing
- Ms Imelda Dodds, Acting Chief Executive Office, NSW Trustee and Guardian
- Mr Graeme Smith, Public Guardian, NSW Public Guardian

4. Publication of submissions – inquiry into substitute decision-making

Resolved, on the motion of Mr Khan: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee:

- Authorise publication of submission nos. 32 to 37 and 39 to 40
- Authorise partial publication of submission no 38 with confidential information suppressed, at the request of the author
- Authorise partial publication of submission no 42 with the appendix suppressed
- Keep submission No 41 confidential, at the request of the author.

5. Witnesses at hearings to be held on 4 and 5 November 2009

Resolved on the motion of Mr Khan: That the following people be invited to attend public hearings on 4 and 5 November 2009 at Parliament House, as well as any other witnesses approved by the chair in consultation with the Committee:

- Professor Ron McCallum, Professor of Industrial Law – Sydney Law School
- Ms Belinda Reeve, Researcher - Sydney Law School
- Mr Ross Ellis, Executive Director - Trustee Corporations Association of Australia plus representatives from Trustee Corporations
- Professor Ian Hickie, Executive Director, Brain and Mind Research Institute, University of Sydney
- Mr Robert Goncalves, Legal Officer - Land and Property Management Authority
- The Hon Greg James QC, President - Mental Health Review Tribunal
- Ms Imelda Dodds, Acting Chief Executive Officer - NSW Trustee and Guardian
- Associate Professor Cameron Stewart, Sydney Law School and Faculty of Medicine, University of Sydney
- Professor Duncan Chappell, Professor of Law - University of Wollongong

Resolved on the motion of Mr Khan: That the following people be invited to participate in the public hearings on 5 November 2009 via videoconference:

- Ms Brenda Lee Doyle, Provincial Director - Office of the Public Guardian for Alberta, Alberta, Canada
- Ms Colleen Pearce, Public advocate - Victorian Office of the Public Advocate
- Ms Pauline Bagdonavicius, Public advocate - Western Australian Office of the Public Advocate

6. Consideration of draft report outline – inquiry into substitute decision-making

The Committee considered the draft report outline for the inquiry into substitute decision-making.

7. Adjournment

The Committee adjourned at 1:42 pm, until 4 November 2009 (public hearing).

Rachel Simpson
Committee Clerk

Minutes No. 43
4 November 2009
Room 814/815, Parliament House at 9:15 am

1. Members present

Mr Ian West *Chair*
Mr Trevor Khan *Deputy Chair* (from 1:39 pm)
Dr John Kaye
Mr Mick Veitch

2. Apologies

Mr Greg Donnelly
Ms Marie Ficarra

3. Inquiry into substitute decision-making – public hearing
Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following representatives from Sydney Law School were sworn and examined:
- Professor Ron McCallum, Professor of Industrial Law, Sydney Law School
- Ms Belinda Reeve, Researcher, Sydney Law School

Professor McCallum tendered a document titled 'Convention on the Rights of Persons with Disabilities and its Optional Protocol', Sydney Law School

The evidence concluded and the witnesses withdrew.

The following representatives from Trustee Corporations Association of Australia, Perpetual Ltd and Trust Company Ltd were sworn and examined:
- Mr Ross Ellis, Executive Director, Trustee Corporations Association of Australia
- Mr Ian Pendleton, General Manager, Perpetual Ltd
- Peter Whitehead, National Manager, Perpetual Ltd
- Paul O'Neill, Business Development Manager, Trust Company Ltd
- Peter Bryant, Group Legal Counsel, Trust Company Ltd

The evidence concluded and the witnesses withdrew

The following representative from Brain and Mind Research Institute, University of Sydney was sworn and examined:
- Professor Ian Hickie, Executive Director, Brain and Mind Research Institute, University of Sydney

The evidence concluded and the witness withdrew.

The following representative from Land and Property Management Authority was sworn and examined:
- Mr Robert Goncalves, Legal Officer, Land and Property Management Authority

The evidence concluded and the witness withdrew.

The following representatives from Mental Health Review Tribunal were sworn and examined:
- Hon Greg James QC, President, Mental Health Review Tribunal
- Ms Maria Bisogni, Deputy President, Mental Health Review Tribunal

The Hon James QC from Mental Health Review Tribunal tendered the following documents:
- Answers to Questions on Notice provided pre-hearing
- Consent to medical treatment – patient information
- Section 6 – Electroconvulsive Therapy
- Section 7 – Applying for consent to surgery or special medical treatment

The evidence concluded and the witnesses withdrew.

The following representatives from NSW Trustee and Guardian were sworn and examined:
- Ms Imelda Dodds, A/Chief Executive Officer, NSW Trustee and Guardian
- Mr Paul Marshall, Manager, Quality Service and Community Relations, NSW Trustee and Guardian

The evidence concluded and the witnesses withdrew.

The public hearing concluded.

The public and media withdrew.

4. Acceptance and publication of documents tendered during the public hearing
Resolved, on the motion of Mr Veitch: That the Committee accept and publish, according, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1) the following document tendered during the public hearing:

- Mental Health Review Tribunal: answers to Questions on Notice provided pre-hearing

5. Adjournment
The Committee adjourned at 4:18 pm, until 5 November 2009 (public hearing).

Jonathan Clark
Clerk to the Committee

Minutes No. 44
5 November 2009
Waratah Room, Parliament House at 9:00 am

1. Members present
Mr Ian West *Chair*
Mr Trevor Khan *Deputy Chair*
Dr John Kaye
Mr Mick Veitch

2. Apologies
Mr Greg Donnelly
Ms Marie Ficarra

3. Inquiry into substitute decision-making – public hearing
Witnesses, the public and media were admitted.

The following representative from the Office of the Public Guardian, Alberta, Canada was sworn and examined via teleconference:

- Ms Brenda Lee Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada

The evidence concluded and the witness withdrew.

The following representatives from The Aged-Care Rights Service were sworn and examined:

- Mr Stephen Newell, Principal Solicitor, The Aged-Care Rights Service
- Ms Margaret Small, Solicitor, The Aged-Care Rights Service

The evidence concluded and the witnesses withdrew

The following representative from Sydney Law School was sworn and examined:

- Associate Professor Cameron Stewart, Sydney Law School

The evidence concluded and the witness withdrew.

The following representative from the University of Sydney was sworn and examined:

- Professor Duncan Chappell, University of Sydney

The evidence concluded and the witness withdrew.

The following representative from Victorian Office of the Public Advocate was sworn and examined via teleconference:

- Ms Colleen Pearce, Public Advocate, Victorian Office of the Public Advocate

The evidence concluded and the witness withdrew.

The following representatives from Western Australian Office of the Public Advocate were sworn and examined via videoconference:

- Ms Pauline Bagdonavicius, Public Advocate, Western Australian Office of the Public Advocate
- Ms Gillian Lawson, Manager Guardianship, Western Australian Office of the Public Advocate

The evidence concluded and the witnesses withdrew.

The public hearing concluded.

The public and media withdrew.

4. Acceptance and publication of documents tendered during the public hearing

Resolved, on the motion of Mr Veitch: That the Committee accept and publish, according, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1) the following document tendered during the public hearing:

- Adult Guardianship and Trusteeship Act (AGTA): PowerPoint presentation from the Office of the Public Guardian for Alberta, Canada

5. Deliberative meeting

Resolved, on the motion of Mr Khan: That the Committee write to NSW Police and ambulance Service of NSW, seeking their views on the NSW Public Guardian's recommendation regarding the use of 'reasonable force' by NSW Police.

6. Review of videoconference

7. Adjournment

The Committee adjourned at 5:03 pm, until 22 February 2010 (report deliberative meeting).

Jonathan Clark
Committee Clerk

Draft Minutes No. 45
Monday 22 February 2010
Room 814/815, Parliament House at 9:30 am

1. Members present

Mr Ian West *Chair*
Mr Trevor Khan *Deputy Chair*
Mr Greg Donnelly
Ms Marie Ficarra
Dr John Kaye
Ms Helen Westwood

2. Confirmation of previous minutes

Resolved, on motion of Mr Khan: That Draft minutes No. 43 and 44 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence.

Received

- 29 October 2009 - Letter received from Hon Robyn Parker, Chair, General Purpose Standing Committee 2, regarding a Vulnerable Witness Protocol for LC Committees
- 1 December 2009 – Email to the Chair from Rev Dr Joseph Parkinson, Director, L J Goody Bioethics Centre regarding the scope of the inquiry into substitute decision-making
- 7 December 2009 – Letter from Ms Brenda Lee Doyle, Provincial Director, Office of the Public Guardian, Government of Alberta, Canada, enclosing documents which were discussed during the hearing 4 November 2009.

- 10 December 2009 - Email to the Chair from Mr Ray Campbell, Director, Queensland Bioethics Centre regarding advanced health care directives
- 18 December 2009 – Email to the Chair from Mr Gregory Pike, Director, Southern Cross Bioethics Institute regarding advanced medical directives
- 15 February 2010 – Letter forwarded by Hon. Trevor Khan, from Mr Michael Vescio, National President, Oppressed People of Australia (Inc.) regarding the inquiry into substitute decision making
- 10 November 2009 – from Jim Simpson, NSW Council for Intellectual Disability, with answers to questions on notice taken at hearing 29 September 2009
- 10 November 2009 – from People With Disability, with answers to questions on notice
- 18 November 2009 – from Ms Pauline Bagdonavicius, Public Advocate, Justice Western Australia, with answers to questions on notice Parts 1 and 2 taken at hearing 5 November 2009
- 26 November 2009 –from Professor Ron McCallum, University of Sydney, with answers to questions on notice taken at hearing 4 November 2009
- 26 November 2009 – Mr Ben Fogarty, Principal Solicitor, Intellectual; Disability Rights Service Inc, with answers to questions on notice taken at hearing 29 September 2009
- 2 December 2009 - from Mr Warwick Watkins, Registrar General, Department of Lands, with answer to question on notice and additional information
- 3 December 2009 - from Ms Imelda Dodds, Acting Chief Executive Officer, NSW Trustee and Guardian, with answers to questions on notice
- 3 December 2009 - from Mr Stephen Newell, Manager Legal Service/Principal Solicitor, The Aged-care Rights Service (TARS) with answers to questions taken on notice
- 7 December 2009 – from the Office of the Public Advocate, Victoria, with answers to questions on notice and additional information
- 13 December 2009 – from Ms Janene Cootes, Executive Officer, Intellectual Disability Rights Service, with answers to questions on notice

Sent

- 9 November 2009 – Letter sent to Police NSW and NSW Ambulance Service, seeking their views on the NSW Public Guardian's recommendation regarding the use of 'reasonable force' by NSW Police.

Resolved, on the motion of Ms Ficarra: That according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and standing order 223(1), the Committee authorise the publication of Answers to questions on notice from:

- Jim Simpson, NSW Council for Intellectual Disability
- People With Disability inc
- Ms Pauline Bagdonavicius, Public Advocate, Justice Western Australia
- Professor Ron McCallum, University of Sydney
- Mr Ben Fogarty, Principal Solicitor, Intellectual; Disability Rights Service Inc
- Mr Warwick Watkins, Registrar General, Department of Lands, with additional information
- Ms Imelda Dodds, Acting Chief Executive Officer, NSW Trustee and Guardian
- Mr Stephen Newell, Manager Legal Service/Principal Solicitor, The Aged-care Rights Service
- Ms Janene Cootes, Executive Officer, Intellectual Disability Rights Service

Resolved, on the motion of Ms Ficarra: That according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and standing order 223(1), the Committee authorise the publication of Answers to questions on notice from Office of the Public Advocate, Victoria with certain information kept confidential:

4. Submissions

Resolved, on the motion of Mr Khan: That according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission No. 44 and the partial publication of Submission No 43 with name suppressed, at the request of the author.

5. Consideration of draft report – inquiry into substitute decision-making for people lacking capacity

The Chair tabled his draft report entitled *Substitute decision-making for people lacking capacity,* which having been previously circulated was taken as being read.

Chapter 1 read

Resolved, on the motion of Ms Ficarra: That Chapter 1 be adopted.

Chapter 2 read

Resolved, on the motion of Mr Donnelly: That Chapter 2 be adopted.

Chapter 3 read

Resolved, on the motion of Dr Kaye: That Chapter 3 be adopted.

Chapter 4 read

Resolved, on the motion of Mr Khan: That Chapter 4 be adopted.

Chapter 5 read

Resolved, on the motion of Ms Westwood: That Chapter 5 be adopted.

Chapter 6 read

Resolved, on the motion of Mr Khan: That Recommendation 7 be amended by omitting the words 'relating to personal information about the person for whom an order is being sought'.

Resolved, on the motion of Mr Khan: That Recommendation 9 be amended by omitting the words 'to explicitly require the Tribunal to consider the adequacy of existing informal arrangements when determining the need for a guardianship order' and inserting instead the words 'so that, when considering the need for another person to be appointed as guardian, the Tribunal is to consider the adequacy of existing informal arrangements'.

Mr Khan moved: That Recommendation 14 be amended by omitting the words 'explicitly state' and inserting instead the word 'clarify' and inserting the words 'whether that be a friend or family member or a commercial trustee corporation' after the words 'private manager'.

Question put.

The committee divided.

Ayes: Mr West, Mr Donnelly, Ms Ficarra, Mr Khan, Ms Westwood,
Noe: Dr Kaye.

Question resolved in the affirmative.

Resolved, on the motion of Mr Khan: That Recommendation 15 be amended by inserting the words 'That the NSW Government consider in particular the additional burden such an amendment may make on the resources of the Guardianship Tribunal' as a new paragraph after the first paragraph.

Chapter 7 read

Resolved, on the motion of Dr Kaye: That Recommendation 17 be amended by omitting the words 'to remove the requirement that the Mental Health Review Tribunal routinely consider a person's capability to manage their own affairs following their detention in a mental health facility arising from a mental health inquiry or review of a forensic patient's case, and instead require that such consideration occur in this context only where there is a perceived need for such consideration and inserting instead the words 'so that the Mental Health Review Tribunal is not required to automatically consider a person's need for a financial management order when the Tribunal conducts a mental health inquiry following a person's detention in a mental health facility or conducts a review of a forensic patient's case, unless evidence of a need for such order arises during an inquiry or review'.

Chapter 8 read

Resolved on the motion of Mr Donnelly: That Chapter 8 be adopted.

Chapter 9 read

Resolved on the motion of Dr Kaye: That Chapter 9 be adopted.

Chapter 10 read

Resolved, on the motion of Dr Kaye: That Recommendation 28 be amended by inserting the words 'where all other means have been exhausted and where the action is necessary to protect the well being of the person or others' at the end of the recommendation.

Resolved, on the motion of Dr Kaye: That Chapter 10, as amended, be adopted.

Chapter 11 read

Resolved, on the motion of Ms Ficarra: That Chapter 11 be adopted

Chapter 12 read

Resolved, on the motion of Mr Donnelly: That the introductory paragraph of Chapter 12 be amended by inserting an additional sentence at the end of the paragraph to read 'As these issues were not explicitly canvassed in the inquiry's terms of reference, the Committee acknowledges that the evidence provided on these matters was limited'.

Resolved on the motion of Mr Donnelly: That paragraph 12.18 be amended by inserting the word 'broad' before 'consultation' and inserting an additional sentence at the end of the paragraph to read: 'The Stakeholders that would be consulted should include NSW Health, medical officers, the Mental Health Review Tribunal, non government organisations, community groups and families of people detained under the *Mental Health Act 2007*'.

Resolved on the motion of Mr Donnelly: That Recommendation 34 be amended by omitting the four dot points after the first paragraph:

- That the MHRT be enabled to authorise medical treatment in the 'limbo' period between a person having the status of an 'assessable person' and their having the status of an 'involuntary patient.'
- That section 84 of the *Mental Health Act 2007* be amended to clarify that an authorised medical officer may authorise medical treatment other than mental health treatment and may authorise that treatment to occur in a place other than a mental health facility.
- That provisions for the treatment of all categories of persons admitted to a mental health facility be contained in one Act, namely the *Mental Health Act 2007*.
- The manner in which substitute consent for termination of pregnancy is deal with under the *Guardianship Act 1987* and the *Mental Health Act 2007* be harmonised including that the criteria for treatment in the *Mental Health Act 2007* be bought into line with the stricter criteria in the *Guardianship Act 1987*.

and by inserting a new paragraph to read: 'That the NSW Government consult broadly on the need for such amendments, including with NSW Health, medical officers, the Mental Health Review Tribunal, non government organisations, community groups and families of people detained under the *Mental Health Act 2007*'.

Resolved on the motion of Mr Donnelly: That paragraphs 12.82, 12.83 and Recommendation 35 be omitted.

Question put.

The committee divided.

Ayes: Mr Donnelly, Ms Ficarra
Noes: Mr West, Dr Kaye, Mr Khan, Ms Westwood

Question resolved in the negative.

Resolved on the motion of Mr Donnelly: That paragraph 12.83 be amended by inserting the

words 'the majority of' before the words 'the Committee'.

Mr Khan moved: That paragraphs 12.81, 12.82 and 12.83 and Recommendation 35 be amended by inserting the words 'and advance care directives' after the words 'end-of-life decision-making' wherever occurring.

Question put.

The Committee divided.

Ayes: Mr West, Dr Kaye, Mr Khan, Ms Westwood
Noes: Mr Donnelly, Ms Ficarra

Question resolved in the affirmative

Resolved, on the motion of Mr Donnelly: That dissenting statements be submitted to the Secretariat 24 hours after circulation of the draft minutes.

Resolved, on the motion of Mr Khan: That the draft report, as amended, be the report of the Committee presented to the House, together with transcripts of evidence, submissions, tabled documents, minutes of proceedings, answers to questions on notice and correspondence relating to the inquiry, except for documents kept confidential by resolution of the Committee.

Resolved, on the motion of Dr Kaye: That the Executive Summary be amended by the secretariat in consultation with the Chair to reflect the amendments made to the report, and be adopted.

6. Adjournment

The Committee adjourned at 12:41pm, *sine die*.

Rachel Simpson
Committee Clerk

Appendix 6 Dissenting statements

DISSENTING STATEMENT – HON MARIE FICARRA MLC

1. I dissent from Committee's decision to adopt the Recommendation replicated hereunder:

   Recommendation 35 adopted by the Committee

   That the NSW Government consider the need for an inquiry focussing specifically on the provisions for advance care directives and end-of-life decision-making in NSW and consider referring such an enquiry to the NSW Law Reform Commission.

2. I strongly believe that should the recommendation be effected it will cause ethical and moral dilemmas for the medical profession.

3. I oppose the adopted recommendation and any subsequent legislative changes based on past case law, that the position is currently clear pursuant to common law and I am also mindful that in Australia, the lack of proper consideration by some in the medical profession is apparent and evidenced in the Supreme Court of New South Wales case *Northridge v Central Sydney Area Health Service [2000] 50 NSWLR* 549.

4. If the recommendation is enacted and leads to legislative change this would significantly alter the common law.

5. I understand through my experience as a scientist that health carers may commence or continue treatment on a person who is unconscious or otherwise lacks the capacity to consent, where no next of kin is available, provided it is in the best interests of the patient.

6. I am further of the belief that the common law principle that every competent patient has the right to refuse medical treatment provided he or she does not do so with the intention of committing suicide is an accepted norm in our society.

7. I am under the apprehension that it would require very powerful considerations indeed to persuade a court to extend a remedy to prevent doctors from saving the life of a person and I concur with such a position.

8. I am concerned that should the recommendation and subsequent legislation enacted this may lead to allowing a person to commit suicide with assistance from health carers which I believe is a criminal offence for anyone to aid and abet a suicide, thus placing the medical profession in an invidious position

9. As an example, if P, a person in good health, but who desires to commit suicide, made an advance decision that if he were found unconscious as a result of a suicide attempt, no life saving treatment was to be administered, then presumably by operation of certain Clauses, the health carer's desire to save P's life would be over ridden and any treatment in defiance of the advance decision would be unlawful – this places the medical profession in an untenable position and I believe is a serious infringement on ethical medical practice.

10. As someone who has also worked in community and welfare services I am well aware that often successful suicides are performed by people suffering a mental condition, usually depression. I believe it is reasonable to presume that persons found to be attempting suicide, about whom nothing is known of their state of mind, are suffering a mental disorder, so therefore, again the issue of health carers saving lives in this regard is most relevant and I believe if the

Recommendation and subsequent legislation to facilitate this is enacted it could create law that compels a health carer to adhere to a directive which is made by a person not in a fit state of mind.

For the above mentioned reasons, I dissent to Recommendation 35.

DISSENTING STATEMENT – HON GREG DONNELLY MLC

With respect to the inquiry report there are some particular issues that I wish to express concern about.

I am particularly concerned that as outlined in the final sentence of the introductory paragraph in Chapter 12 of the inquiry report, the Committee proceeded to make recommendations relating to matters where it was acknowledged there was limited evidence presented either by submission or oral testimony. With such acknowledged limitations, it is my view that the Committee should not have made recommendations on such matters.

With respect to "advance care directives" and "end-of-life decision-making", it is my view that these matters fall outside the terms of reference of the inquiry. I note that these matters are explicitly canvassed in Recommendation 35. I further note that such matters, at least in part, potentially involve acts of omission or commission that could lead to the death of another human being. Euthanasia and physician assisted suicide are grave matters in that they involve the taking of human life. I oppose such practices or similar practices in the strongest possible terms.

Furthermore, it should be acknowledged that matters relating to "substituted consent" and "authorised medical treatment" can arise in the context of "advance care directives" and "end-of-life decision-making". On the specific issue of "substituted consent for termination of pregnancy" I make the following point. Termination of a pregnancy involves the taking of a life; the life of the unborn. Termination of a pregnancy cannot in truth be described euphemistically as a "surgical procedure" or "medical treatment". It is neither. What it is, is the killing of the unborn. I and no doubt a number of my parliamentary colleagues, to say nothing about the New South Wales community at large, treat the issue of the life of the unborn very seriously. It is my view that there should be no changes made to any New South Wales laws that would or could endanger the life of the unborn.