STANDING COMMITTEE ON SOCIAL ISSUES
Inquiry into substitute decision-making for people lacking capacity

QUESTIONS ON NOTICE
(Remaining from questions sent pre-hearing)

People with Disability Australia Inc.
Submission 4

Human Rights

2. In your submission you state "to the extent that guardianship and estate management laws limit the autonomy-related rights of persons with impairment and disability as a specific population group, they are arbitrary and in violation of the right to equality before the law."[1]

- **Could you explain further why you hold this view and how it relates to NSW legislation?**

As outlined in our submission, this view is in line with international human rights law. We strongly argue that the Committee needs to clearly identify "the human rights context for this Inquiry and in particular the human rights and state obligations that are engaged by the Inquiry" (section 2.1, page 7). Our submission sets out the human rights context in section 2, with specific reference to the Convention on the Rights of Persons with Disabilities (CRPD).

Article 12 of the CRPD, *Equal recognition before the law*, is a specific application of the traditional right of all persons to recognition everywhere as a person before the law, and its primary sources are Article 6 of the Universal Declaration of Human Rights (UDHR) and Article 16 of the International Covenant on Civil and Political Rights (ICCPR). Recognition as a 'person before the law' is a fundamental element of the rule of law. It demands recognition of every person as having a unique legal personality that is entitled to bear rights and duties on the same basis as every other person.

The UDHR, the ICCPR, and the CRPD each specify that this right operates 'everywhere'; there are no circumstances permissible under international human rights law where a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited.

Under international human rights law, permissible limitations to this right must be 'prescribed by law' and any law prescribing a limitation to a human right must be of general application. In other words, a law prescribing a limitation to a human right must apply equally to the whole population. The law cannot operate in an arbitrary way, such as only applying to a specific population group.

Guardianship and estate management laws in NSW do limit the right of equal recognition before the law for persons with impairment and disability as a specific population group. The *Guardianship Act* 1987 stipulates that a guardian may only be appointed for a person 'who, because of disability, is totally or partially incapable of managing his or her person.' The former *Protected Estates Act* 1984 and the new *NSW Trustee and Guardian Act* 2009 applies to persons with acute mental illness who are the subject of involuntary treatment.

Guardianship and estate management laws in NSW are laws of specific application to persons with disability, and to the extent that they limit autonomy related human rights, they are

[1] Submission 4, People With Disability/Mental Health Coordinating Council, p 12

arbitrary. In these respects they are in violation of Article 5, *Equality and Non-Discrimination*, and Article 12 of the CRPD.

- **How could NSW legislation be amended to address this issue?**

PWD argues that Australia's international human rights obligations, in particular Articles 5 and 12 of the CRPD, ought to lie at the heart of this Inquiry. We are strongly opposed to 'tinkering' at the edges of our existing laws and institutions, as conformity with Article 5 and 12 of the CRPD will require fundamental reform in the area of substitute decision-making and legal capacity.

In Section 4.1 of our submission, we outline the significant problems with NSW legislation in relation to legal capacity. Rather than propose amendments to existing legislation to address these problems, we provide in section 4.2 a strategic approach that we believe NSW legislation should take. In section 4.3 to 4.7, we make some specific observations in relation to the test of capacity in the *NSW Trustee and Guardian Act* 2009.

In sections 1.1 to 1.3, we also refer the Committee to the United Kingdom's *Mental Capacity Act* 2005. Although not the best piece of legislation in every respect from a human rights perspective or in terms of its scope and application, that Act reflects the international high-water mark of law and policy in relation to persons with impairment or disability impacting on their decision-making. That Act is a good comparator for the scale and scope of reform required in NSW, notwithstanding the need for both the strategic approach and aspects of the Act's detailed content to be considered in light of the requirements of the CRPD.

The Committee should also consider the *Code of Practice* in relation to mental capacity developed under the *Mental Capacity Act* 2005 and a supplement to this *Code* that deals with deprivation of liberty specifically – the *Deprivation of Liberty Safeguards.*

However, as stated in our submission, we propose that the Committee recommend to the Attorney-General that this area of public policy be referred to the NSW Law Reform Commission for Inquiry (section 1.18, page 6). This has been the direction taken in Queensland, Victoria and Tasmania. A longer and more detailed review by the NSW Law Reform Commission would provide the opportunity for the Government to properly consult with and engage persons with disability in the law reform process. Such consultation and participation is a fundamental instrumental dimension of Australia's international human rights obligations under the CRPD (section 1.19, page 6).

Restrictive practices

3. In your submission you state that "a primary reason for the appointment of a guardian is to authorise the use of restrictive practices upon a person with disability" including "chemical, mechanical and physical restraint, detention, seclusion and exclusionary time out" and that "capacity legislation is an inappropriate and insufficient basis for the regulation of these practices."[2] Could you elaborate on this view and provide the Committee with some examples?

As we point out in our submission, 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 (section 6.2, page 27). Without regulation and safeguards, restrictive practices can, and do result in violence and abuse of people with disability.

[2] Submission 4, People With Disability/Mental Health Coordinating Council, p 28

In NSW, there is no legislation or regulation that explicitly regulates the use of restrictive practices used on people with disability. The *Guardianship Act* 1987 (NSW) does not deal explicitly with restrictive practices or their permissible and impermissible uses. The only power the Guardianship Tribunal has in relation to restrictive practices is to appoint a guardian to consent or not consent to such practices, and it may also provide some directions and recommendations about restrictive practices in the guardianship order. This is a very weak form of regulation and monitoring for practices that may lead to violence and abuse, and that in many other contexts are viewed as human rights abuses. A guardian's willingness to consent or not consent to restrictive practices is immaterial to whether a restrictive practice should be permissible in the first place.

In any event, this weak form of regulation and monitoring only applies to people with disability who fall within the jurisdiction of the Guardianship Tribunal and who in fact come before it. It does not apply to people who do not have a decision-making disability sufficient to activate the guardianship jurisdiction. For example, there are a large number of people with disability living within a family context, in the specialist mental health, brain injury and disability service systems and in licensed boarding houses, who do not have a guardian but who are subject to restrictive practices.

The jurisdiction of the Guardianship Tribunal also does not apply to people who might be subjected to restrictive practices in the mental health system. The *Mental Health Act* 1998 deals with involuntary treatment of persons with acute mental illness (including detention and compulsory treatment, but it does not deal with other restrictive practices used in acute mental health settings. Aside from compulsory administration of medication through Community Treatment Orders, it also does not deal with the use of restrictive practices in community based settings.

As we outline fully in our submission, we recommend that specific NSW legislation is enacted to regulate the use of restrictive practices and to prohibit certain restrictive practices entirely (section 6.7 and 6.8, page 28); that an independent, statutory office of Senior Practitioner be established to regulate the use of restrictive practices in NSW (section 6.9 and 6.10, page 29); and that the legislation ought to provide that all non-prohibited restrictive practices are subject to explicit approval, monitoring an review arrangements, that the use of restricted practices must comply with human rights standards and only be for the purpose of fulfilling a human rights related goal and that the improper use of restrictive practices ought to be proof that the practice is unlawful(section 6.11, page 30).

Assisted/Supported decision-making versus substitute decision-making

4. In your submission you state that NSW laws "do not mandate, and provide for, supported decision-making arrangements."[3]

- **Could you elaborate on the concept of 'supported decision-making' as opposed to 'substitute decision-making'?**

In dot point 4 in section 3.29 of our submission, we make the point that the *Guardianship Act* 1987 recognises 'persons responsible' who are able to provide consent to some medical and dental treatments. This role does not extend to other areas of life, such as financial management. However, this role is framed in terms of providing informal substitute consent, rather than in terms of support for the person to exercise legal capacity, including decision-making.

We provide the following definitions[4] relating to the exercise of legal capacity, which is a broader concept but inclusive of decision-making:

[3] Submission 4, People With Disability/Mental Health Coordinating Council, p 16

- Supported exercise of legal capacity involves an individual adopting a course of action, or making a decision with the assistance of another person. The assistance provided may involve explaining the issues in easy to understand form, identifying options, and outlining benefits and risks. It may also involve making recommendations about a course of action. However, the person is genuinely free to adopt a course of action or make a decision contrary to such advice. The person, rather than their assistant, is responsible and accountable for the action or decision.

- Substitute exercise of legal capacity involves a proxy adopting a course of action or making a decision on behalf of the person. The proxy ought to respect the rights, will and preferences of the person in deciding on a course of action but it is the proxy who takes the action or makes the decision. It is also the proxy who is responsible and accountable for that action or decision.

- **How could NSW legislation be amended to better provide for supported decision-making?**

In section 4.2 our submission, we outline the strategic approach that the law related to the exercise of legal capacity should take, including at dot point 10:

> "It 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. This would include measures such as recognition of informal support to exercise capacity, recognition of advance directives, and the provision of professional support to persons with disability to assist them to develop the skills and insight to exercise capacity"

Such an approach will require new legislative and institutional arrangements for NSW that cannot be achieved by amending existing laws and institutions in NSW. As discussed in response to question 2 under the heading, Human Rights above, we refer the Committee to the United Kingdom's *Mental Capacity Act*, as a comparator for the scale and scope of reform required in NSW, despite the requirement for both the strategic approach and aspects of the Act's detailed content to be considered in light of the requirements of the CRPD.

Conformity with Article 12 of the CRPD will require fundamental reform in the area of substitute decision-making and legal capacity in NSW. We urge the Committee to recommend to the Attorney-General that this area of public policy be referred to the NSW Law Reform Commission for Inquiry (section 1.18, page 6).

Ministerial responsibility

9. In your submission you state that the current arrangement in which the Public Guardian is required to report to the Minister for Disability Services limits the Public Guardian's ability to "vigorously challenge disability service providers" and thereby protect the human rights of people with a disability.[5] Can you elaborate on this view?

In section 5.1 of our submission, we outline the current structural arrangements for administration of the Office of the Public Guardian – although situated with the Department of Justice and Attorney-General, the Office must also report to the Minister for Disability Services under section 80 of the *Guardianship Act* 1987. The Minister for Disability Services and the Department of Ageing, Disability and Home Care (DADHC) are also responsible for the

---

[4] French, P, *Everyone, Everywhere: Recognition of Persons with Disability as Persons before the Law*, People with Disability Australia, 2009, p.8

[5] Submission 4, People With Disability/Mental Health Coordinating Council, p 24

provision, funding or licensing of specialist disability services in NSW. This results in both a perceived and actual conflict of interest as most persons with disability who come before the Guardianship Tribunal, and for whom the Public Guardian is appointed, would be persons who rely upon these services.

In section 5.2 of our submission, we outline the limitation this structural arrangement places on the Public Guardian's ability to vigorously challenge disability service providers, including the Minister for Disability Services and DADHC, where such challenge is required to secure or protect the human rights of persons with disability.

The example we provide relates to the inappropriate pressure that is often placed on the Public Guardian by DADHC to consent to placements of people with disability in accommodation services, which the Public Guardian may view as compromising the human rights of the people concerned. If one of the Public Guardian's roles is to ensure that persons under guardianship are placed in appropriate accommodation environments, then he or she should be challenging service providers, including the Minister for Disability Services and DADHC on placement options, such as institutions and boarding houses that are inappropriate for the persons concerned.

To be an effective safeguard of the human rights of persons with disability, it is essential for the Public Guardian to have a very high degree of structural separation and independence from disability services.

Public Guardian functions

10. The Public Guardian has recommended that section 21A of the *Guardianship Act 1987,* allowing the Public Guardian to authorise members of the NSW Police Force to move a person under a guardianship order from one place of residence to another, be amended to specify that the Police may use "all reasonable force."[6] Can you comment on this proposal?

11. The Public Guardian has recommended that the *Guardianship Act 1987* be amended to allow the Public Guardian to pro-actively investigate matters where it becomes aware a vulnerable person may be in need of a guardian.[7] Can you comment on this proposal?

12. The Public Guardian has recommended the *Guardianship Act 1987* be amended to allow the Public Guardian to assist people with decision-making disabilities without the need for a guardianship order.[8] Can you please comment on this proposal?

PWD supports the principles underlying the proposals in questions 10, 11 and 12 above.

In relation to questions 11 and 12 specifically, we strongly agree with these proposals. The Guardianship Tribunal's investigative functions are limited to the pre-hearing process, and they do not avoid the need for a Guardianship Order. Yet many problems faced by people with disability can be resolved by advocacy assistance and do not require the person to be unnecessarily place under guardianship. In comparison, the Public Advocate in Victoria can intervene, investigate and attempt to resolve an underlying problem without the need to make a Guardianship Order.

In section 5.13 of our submission, we recommend that the Public Guardian be provided with more extensive roles, functions and powers that include investigation and public advocacy functions at least equivalent to those of the Victorian Public Advocate; and that there is a name change to the NSW Public Advocate to reflect this new organisational profile.

---

[6] Submission 7, Office of the Public Guardian, p 19
[7] Submission 7, Office of the Public Guardian, p 14
[8] Submission 7, Office of the Public Guardian, p 13

However, we argue that there is a need for fundamental reform in this area that cannot be addressed through amendments to current legislation. In sections 5.7 to 5.10, we outline the key elements that would be required for new institutional arrangements that would need to be established to implement such reform.

Responsible person

13. The *Guardianship Act 1987* provides a hierarchy of people who may be considered the "person responsible" for another person, and who must be contacted - for example, by a dental or medical practitioner - to obtain substitute consent for treatment. This hierarchy allows for more than one person to be equally considered the "person responsible" potentially leading to difficulties if they disagree on the treatment being suggested.

- **Are there any advantages to having more than one person qualify equally as the "person responsible"?**
- **What is your comment on any proposal to amend the Act to ensure that only one person can be deemed the "responsible person"?**

14. The Public Guardian has recommended consideration be given to expanding the legal authority of a "person responsible" for another person under the *Guardianship Act 1987* so that in addition to making decisions regarding medical care, the "person responsible" could also make decisions related to accessing services or deciding where to live.[9] Could you comment on this proposal?

Questions 13 and 14 deal with overlapping issues that make it problematic to provide a simple and straightforward response. We again make the point that fundamental reform that enables conformity with CRPD cannot be achieved through amendments to the existing legislation. It is within this context that we offer the following view:

- We support the legislation allowing a person with disability to nominate and register a 'person responsible'.
- We do not support the legislation providing for recognition of 'persons responsible' unless such persons are subject to an explicit duty to protect and secure the human rights of persons with disability, to act only in that person's best interests (as understood in a human rights context), and to support the person to exercise legal capacity with as much autonomy as possible.
- All arrangements for the recognition of 'persons responsible' must also be subject to safeguards to prevent abuse, as required by Article 12 (4) of the CRPD. These safeguards must ensure that such arrangements:
    - 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.
- Safeguards must be proportional to the degree to which measures relating to the exercise of legal capacity affect the person's rights and interests. In other words, the more intensive the support to exercise legal capacity is, the more intensive the safeguards must be.

[9] Submission 7, Office of the Public Guardian, p 20

- The recognition of 'persons responsible' should not prevent another person with a genuine concern from intervening.

15. The *Guardianship Act 1987* provides that the "person responsible" for another person shall ensure that any medical and dental treatment shall be for the purpose of "promoting and maintaining their health and well-being."[10] This effectively prevents the "person responsible" from authorising the withdrawal of life sustaining medical treatment in circumstances where continuing such treatment would not be in the person's best interests.

- **Do you think that "persons responsible" under the Act should be able to authorise the withdrawal of life sustaining medical treatment?**
- **With whom do you think the authority to withdraw life sustaining medical treatment should reside?**

PWD does not support any person or authority being provided with the power to order the withdrawal of life sustaining medical treatment.

People with disability face discrimination in health care and health service delivery on a daily basis. They are devalued as human beings, and often referred to as 'burdens', as people to be 'pitied', and as having a life not worth living. Withdrawal of life sustaining medical treatment constitutes passive or non-active involuntary euthanasia, which we argue presents significant risks to people with disability.

This position is consistent with Article 25, *Health* of CRPD. Article 25 (f) states that States Parties shall "prevent discriminatory denial of health care or health services or food and fluids on the basis of disability".

Safeguards and monitoring

16. In your submission you state that NSW law should "provide effective protection against abuse, neglect and exploitation from those who provide support to persons with cognitive impairment..."[11]

- **What protection does NSW law currently provide in this regard?**
- **How could NSW legislation be amended to better provide this protection?**

In dot point 7 in section 3.29 of our submission we state that NSW laws do not provide for the effective oversight of informal supported decision-making arrangements to prevent against abuse, neglect and exploitation. In this respect they fail to respect, protect and fulfil Article 12 of the CRPD. In general, there is also no specific legal and institutional framework for the protection, investigation and prosecution of abuse, neglect and exploitation of 'vulnerable' adults in NSW or Australia.

Protection against abuse, neglect and exploitation from those who provide support to persons with cognitive impairment will require new legislative and institutional arrangements for NSW that conform to the CRPD.. As we point out in dot point 6 in section 4.1, widespread abuse, neglect and exploitation of persons with cognitive impairments is caused by the lack of appropriate arrangements to support their capacity to manage their affairs and make important decisions, and as well as the poor design, delivery and monitoring of supported and substitute decision-making arrangements.

---

[10] *Guardianship Act 1987*, s 32 (a)

[11] Submission 4, People With Disability/Mental Health Coordinating Council, p 22

In dot point16 in section 4.2, we argue that new legislative arrangements must include appropriate mechanisms for the investigation of potential exploitation, abuse and neglect across all relevant contexts. This will also require the designation of specific criminal offences related to exploitation, abuse and neglect of persons with cognitive impairment who are subject to supported and substitute decision-making arrangements.

We have outlined the key elements for legislative and institutional arrangements that are required in relation to the regulation of restrictive practices in section 6 of our submission. Such arrangements are critical to provide a framework for those who provide support to persons with cognitive impairment.

In section 7 of our submission, we argue that criminal law should also be amended to create specific offences related to violence and abuse perpetrated as a result of the unlawful or abusive use of restrictive practise, and in relation to financial exploitation. In section 7.2, 7.3 and 7.4 we outline formulations for offences that address restrictive practices, deprivation of liberty and the unlawful or reckless use of chemical restraints. In section 7.5, we call for an amendment to the *Crimes Act* 1900 to include a "new offence against property that proscribes conduct by a duty bearer that results in the serious neglect of the estate of a person with cognitive impairment, or which represents a serious failure to use that person's property for their benefit".

Assisted/Supported decision-making versus substitute decision-making

1. In relation to 'assisted' decision-making as opposed to 'substitute' decision-making, there is a question as to whether an assisted decision-maker would make decisions that they (the assisted decision-maker) thought were right, or that were the wishes of the person being assisted. The second of these alternatives is sometimes referred to as respecting the person's right to make bad decisions.

- **Can you comment on this issue?**
- **If legislation providing for assisted decision-making were to be introduced in NSW how do think it should address this issue?**

In line with the definition we provide in response to question 4 above, 'assisted' or supported decision-making enables a person to make their own decision, regardless of the view of the person providing assistance. A person requiring assistance is genuinely free to adopt a course of action or make a decision, regardless of whether the person providing assistance views the decision as the right one or as 'bad'. The person requiring assistance is also responsible and accountable for their action or decision.

Our submission outlines the approach that new legislation and institutional arrangements should take in relation to legal capacity and adherence to the CRPD. It will involve a paradigm shift that cannot be addressed within the current legislative and institutional framework, as the questions in this section imply. In particular, section 4.2 provides the key elements for legislation related to legal capacity that would be understood in the context of the CRPD. Within this strategic approach, legislation would incorporate a presumption of legal capacity and would explicitly recognise the human rights of persons with disability. This paradigm shift in understanding the exercise of legal capacity would involve supported or 'assisted' decision-making arrangements taking precedence over substitute decision-making arrangements, and these concepts would be clearly defined to ensure that people providing support clearly understood their role.

However, our point remains that reform in this area would be best considered by a comprehensive review process, and in this respect we urge the Committee to recommend to the Attorney-General that this area of public policy be referred to the NSW Law Reform Commission for Inquiry

Capacity

2. It has been suggested to the Committee that decision-making capacity should be regarded as a spectrum with complete autonomy at one end and substitute decision-making at the other.[12]

- **Who do you believe is qualified to assess where on this spectrum a person may be and what information is required in order to make this assessment?**
- **In practice, how could substitute decision-making arrangements be constructed to accommodate the fact that a person's capacity may vary from time to time and situation to situation?**

These questions appear to be made in the context of the current legislative and institutional framework for considering 'capacity'. We argue that this is an inappropriate starting point for considering 'capacity', given in section 3.29 of our submission we outline how NSW laws with respect to legal capacity and financial management currently breach, are inconsistent with, or fail to fulfil, Australia's international human rights obligations..

Our submission provides a strategic approach that should be considered for comprehensive reform. In section 4.2, in relation to the assessment of legal capacity, including decision-making capacity, we make the following points about an appropriate legislative framework that include:

- The law ought to incorporate a presumption of capacity for all adults, and it ought to apply this presumption in relation to persons with impairment and disability specifically (note s 1 of the *Mental Capacity Act* 2005);
- It ought to provide a single, overarching, definition of capacity that is applicable in all civil law contexts;
- It ought to establish principles and a process for the assessment of capacity. These principles and this process must apply human rights standards;
- It ought to provide 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's fundamental procedural rights related to a 'fair trial'.

In section 5.8, we provide a strategic profile for new institutional arrangements associated with reform in this area. Key points in this section highlight the focus of such arrangements:

- focus on promoting and supporting relevant persons to effectively assert and exercise legal capacity, and on safeguarding against abuse and exploitation in both informal and formal supported decision-making arrangements;
- continue to have a residual role in substitute decision-making for persons genuinely unable to make decisions for themselves, even with support;
- primarily be involved in identifying and removing environmental barriers to the exercise of legal capacity, in assisting relevant persons to exercise their legal capacity, including by assisting them to develop the skill and insight to do so, and in tailoring appropriate alternatives to substitute decision-making.

In relation to the construction of substitute decision-making arrangements that would accommodate the fact that a person's capacity may vary from time to time and situation to situation, we provide the following points, as outlined in section 4.2 in our submission:

---

[12] Submission 3, Intellectual Disability and Rights Service, p 3

- Legislative arrangements should specifically affirm that all persons with disability have legal capacity, unless a Court or Tribunal has determined that they do not have capacity with respect to a specific issue or subject matter.
- Legislative arrangements should impose an obligation on 'everyone' to recognise that persons with impairment and disability have legal capacity. Where a Court or Tribunal has determined that a person does not have capacity with respect to a specific issue or subject matter, it should require 'everyone' to recognise that the person has legal capacity in all other areas of life.
- Legislative arrangements should provide for the least possible interference with the autonomy of the person consistent with the attainment of their other human rights – such as protection from exploitation, abuse and neglect.
- Legislative arrangements should explicitly recognise that both supported and substitute decision-making arrangements may involve restrictions or limitations on the human rights of persons with disability to non-discrimination and equality before the law. It therefore should establish that any such 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. Among other things, a proportionate response is one that would be limited in scope (or targeted) to the specific issues (or issues) of concern, and time-limited to that period in which support is required.
- A specific 'proportionality test' ought to be incorporated into legislation for purpose stated in the previous dot point.
- It ought to provide that any restriction or limitation to a human right must be subject to regular periodic review.

Public Advocate

3. It has been proposed that an office of the Public Advocate be established in NSW to promote and protect the interests of people with disabilities, such as exists in some other Australian jurisdictions.

- **Could you comment on this proposal**
- **From your knowledge of the role such an office would perform, how would such an advocate interact with existing entities in NSW such as the Guardianship Tribunal, the Mental Health Review Tribunal, the NSW Trustee and Guardian, the Public Guardian and the NSW Ombudsman?**
- **Are any of the functions such an advocate would perform currently being performed by other entities in NSW?**

We strongly support the proposal for the establishment of an office of the Public Advocate. In section 5.13 of our submission, we recommend that the Public Guardian be provided with more extensive roles, functions and powers that include investigation and public advocacy functions at least equivalent to those of the Victorian Public Advocate; and that there is a name change to the NSW Public Advocate to reflect this new organisational profile.

A public advocacy function would be focused on alternatives to guardianship. It would prevent persons with disability from being placed unnecessarily under guardianship, when the person's real need is for advocacy assistance to deal with a particular problem. It would also ensure that structural problems identified in the provision of guardianship services are properly identified to government for action.

In the context of the broader reform that we outline in our submission, a public advocacy function would exist as part of the new institutional arrangements required to administer the legislative framework relating to legal capacity. However, if the Government is unlikely to embrace the broader reforms required, then a Public Advocate would need to interact with existing entities in NSW in the following ways including, but not limited to:

- Providing education and training addressing the human rights issues related to the exercise of legal capacity;
- Providing advice and assistance to support agencies to meet the human rights of person with disability in relation to legal capacity;
- Identifying structural, policy and procedural problems within agencies and assisting with the development of solutions to address these problems;
- Undertaking a range of advocacy activities to protect and promote the rights of persons with disability;
- Collaborating with agencies on projects and programs to achieve human rights outcomes for persons with disability; and
- Undertaking research and policy focused on human rights best practice in the exercise of legal capacity.

A Public Advocate would also need to interact in a similar way with non-government individual and systemic advocacy organisations.