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

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

NSW Public Guardian
Submission 7

Public Guardian functions

4. In your submission to this inquiry you note that good guardianship involves actively seeking out appropriate options for the person under the guardianship order.
    - Can you give the Committee some examples of how the Public Guardian does this?
    - Does this principle apply to all persons for whom the Public Guardian has been appointed guardian?
    - Are there any features of guardianship orders that restrict the Public Guardian's efforts to be proactive?

Response:

When a person is placed under the guardianship of the Public Guardian (PG) the PG assumes a duty to make decisions in the best interests of the person. This requires the PG to investigate the needs of the person, to identify the service or accommodation options that best meet the person's needs and to make a decision that will secure for the person the best possible outcome. An example may be in the choice of aged care facility for a person who has dementia and needs full supported accommodation. The person's cultural and linguistic needs will form part of the service requirements and the PG will seek an accommodation option that meets those needs. For example, a culturally specific aged care facility which has specialist dementia care may be chosen over a facility which costs less, is more easily accessible for family members but fails to meet all of the person's needs and is demonstrably not in the best interests of the person.

The principle of seeking the best outcome for a client in relation to decision making applies to all people placed under the guardianship of the Public Guardian.

There are no features of a guardianship order which seek to constrain the guardian from seeking the best possible outcome for person under guardianship.

Delegation of guardianship powers

5. The recent amendment to section 77 of the *Guardianship Act 1987* allows the Public Guardian to delegate its functions to other person.
    - What mechanisms are there in place for the assessment of the suitability of persons who may be delegated decision-making powers by the Public Guardian?
    - In your view is there a need for guidelines in relation to the recruitment, training, monitoring and ongoing supervision of persons delegated such powers?

Response:

The delegation provision referred to is a new provision and seeks to enhance existing delegation provisions that provide for the Public Guardian to delegate his powers under a specific section of the Guardianship Act (See Part 5) and also to delegate his powers his staff. (see S78). Currently all staff supporting the Public Guardian are officers of the Department of Justice and Attorney General. There are extensive guidelines covering the recruitment, training and on-going supervision of the Public Guardian's staff. 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.*** *An authorised Community Guardian who is delegated power by the Public Guardian is in precisely the same position as a member of the Public Guardian's own staff. That is, they will be recruited in the same manner as a staff member, subject to the same screening, training and supervision requirements as a staff member. Any decisions made by a Community Guardian will be decisions of the Public Guardian and therefore reviewable by the Administrative Decisions Tribunal. They will be subject to strict conditions contained within a standard employment contract. In the event that a Community Guardian fails to meet the required standard of performance their delegation can be revoked and the employment contract terminated. However, they will not be employees of the Department.*

I believe guidelines covering the recruitment, screening, training and supervision of Community Guardians can be made part of the regulation creating the class of persons to be known as Community Guardians.

Duration of orders

6. It has been argued that the fact guardianship orders can be made for a maximum of 5 years (under s 18 (1A) (b) of the Guardianship Act) whereas financial management orders can be made for an indefinite period of time is inconsistent and unjustified and that the indefinite period of financial management orders conflicts with the general principles of the *Guardianship Act, the NSW Trustee and Guardianship Act,* and the United Nations Convention on the Rights of Persons with Disabilities, particularly that the least restrictive alternative should be chosen and the autonomy of the person should be respected. What is your view on this issue?

Response:

To be in line with the United Nations Convention on the Rights of Persons with Disabilities financial management orders should be made for the shortest possible time and subject to regular review by a competent Tribunal and should intrude into a person's life to the least extent possible.

Community guardian program

7. In your submission to this inquiry you recommend the development of a 'Community Guardian Program'
    - How would community guardians be identified, trained, supervised and provided with ongoing support?
    - What safeguards would exist to identify inappropriate community guardians?
    - Can you provide the Committee with more detail about the Pilot program you mention in your submission?
    - Would NSW legislation need amendment to provide for such a program?

Response:

An authorised Community Guardian who is delegated power by the Public Guardian will be in precisely the same position as a member of the Public Guardian's own staff. That is, they will be recruited in the same manner as a staff member, subject to the same screening, training and supervision requirements as a staff member. Any decisions made by a Community Guardian will be decisions of the Public Guardian and therefore reviewable by the Administrative Decisions Tribunal.

They will be subject to strict conditions contained within a standard employment contract. In the event that a Community Guardian fails to meet the required standard of performance their delegation will be revoked and their employment contract terminated. They will not be employees

of the Department and will not be full time. Community Guardians will be supervised closely by an experienced Principal Guardian from the Public Guardian's permanent staff. This will ensure that any inappropriate or poor performance can be identified quickly and dealt with.

Community Guardians will be recruited in the same manner in which members of staff of the Public Guardian's office are currently recruited. They will be trained and supervised in the same manner as existing staff members. They will have access to the same range of supports including technology as members of the Public Guardian's staff.

Existing 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.

A copy of the proposal covering the Pilot Program is attached. Please note that some aspects of the proposal will have changed due to the length of time that has elapsed since its development. It should also be noted that there has been extensive consultation with relevant groups in relation to the proposal and it has received unqualified support.

It should be noted that the NSW Community Guardian proposal is for the engagement of community members in the process of guardianship for people for whom the Public Guardian is re-appointed after an initial appointment during which the Public Guardian has made all major decisions but where on-going monitoring is required. These people will not replace the need for increasing numbers of specialist professional guardianship staff employed by the Public Guardian.

For the benefit of the Inquiry it should be noted that there is a significant difference between the proposed NSW model and the Western Australian model. The Western Australian model is one where the Community Guardian is appointed by the Tribunal. Having been so appointed they are private guardians.

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.

Elder law

8. It is estimated that by 2050 approximately 1.13 million Australians will be affected by dementia. What provisions, if any, should NSW making to accommodate the likely increase in demand for substitute decision-making from this group of people?

Response:

Current activity:
Towards 2030: Planning for our changing population is a whole of NSW Government strategy to actively plan for the ageing of the population. The CEO of NSW T&G (formerly representing the OPC and OPG) is a member of the Interdepartmental Working Group, with a focus on substitute decision making for people with impaired capacity.
Strategy 1:
Getting in early and planning for change is of most relevance to the Public Guardian. This strategy includes ensuring government, business, community and individuals adequately plan for the future (Strategy 1.1). The Public Guardian, along with NSW T&G, the Guardianship Tribunal, NSW Health and ADHC and other peak bodies meet regularly in the Planning for Later Life Forum. The focus of this forum is to ensure a coordinated approach to informing the community about planning ahead, including making arrangements for
substitute decision making if required in the future.

The Public Guardian actively promotes planning ahead through enduring guardianship, and provides a comprehensive do-it-yourself guide Enduring Guardianship: Your way to plan ahead, as well as producing fact sheets and appointment forms for the general community. In addition, the Public Guardian promotes enduring guardianship regularly at community education sessions.

The Public Guardian is involved in consultation with NSW Health, about the process of planning ahead, using advance care directives and end-of-life issues within the health system. The Public Guardian provided input on issues for substitute decision-makers in health care.

The Public Guardian anticipates increased demand for its services over time consistent with the ageing of the population and the increased incidence of dementia in the wider community. However in line with the CRPD the Public Guardian anticipates that orders will be for the shortest time possible and be the least intrusive into a person's life as possible.

It is worth noting that NSW currently has more than twice the number of people under public guardianship than does Victoria and yet has less new orders each year. The reason for this is that in NSW the Public Guardian has people under guardianship for much longer due to the high number of re-appointments.

Recommendations for future provisions:

- *All stakeholders should continue their commitment to the Towards 2030 strategy, including the provision of timely, accessible and accurate information about planning ahead mechanisms*
- *The process for appointing enduring guardians should be as simple and accessible as possible*
- *The use of community guardianship to provide a broader range of options in an environment of increasing demand*

Ministerial responsibility

9. In your submission to this inquiry you suggest that the most appropriate Minister for the Public Guardian to report to is the Attorney General, rather than the Minister for Disability Services and argue that such a change would "bring the principles of guardianship into line with the principles of the UN Convention on the Rights of Persons with Disabilities."
    - Given that such a change would entail shifting responsibility for administering the *Guardianship Act* from the Minister for Disability Services to the Attorney General, would the functioning of the Guardianship Tribunal change in any way?

Response:

No. The constitution of the Tribunal, together with the composition and proceedings before the Tribunal are covered by the Act. 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. There is no evidence at all to suggest that the Attorney intends to change any of the provisions relating to the Tribunal. There is no reason to believe that the Attorney would be more likely to make changes to the Tribunal than would the current Minister. 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.

10. It has been argued by another inquiry participant that the current arrangement in which the Public Guardian is required to report to the Minister of 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. Can you comment on this view?

Response:

The Public Guardian, as an advocate for the many people under his guardianship is frequently required to challenge the policies, procedures, assumptions and actions of major government and non-government service providers when advocating for an individual or for systems change.

In Victoria recently the Public Advocate criticised the system of regulation of private for profit residential services for people with disabilities after receiving a number of complaints from female residents who have been the victim of a sexual assault. 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 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.

Restrictive practices

11. In your submission to this inquiry you describe the protective function of the Public Guardian "when exercising the authority of a guardian on an annual basis to maintain the status quo" in cases that "typically focus on the use of restrictive practices and/or a locked door."
    - Could you elaborate further on this function of the Public Guardian?
    - Would you envisage this function of the public guardian being delegated to community guardians if a Community Guardian Program was established?

Response:

In certain circumstances restrictions may be placed on the freedom of decision and freedom of action of a person with a disability. This may be necessary to protect the person from harm. In these circumstances it would be unlawful for a service provider to place such restrictions on a person without lawful excuse or authority. The Public Guardian is frequently appointed with the authority to consent to such restrictions where it is demonstrated that it is in the person best interests. 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.

It is proposed that Community Guardians will only be assigned to cases where the Public Guardian has been reappointed following an initial appointment. However it is possible where restrictive practices are on-going within the context of a long term plan that a Community Guardian could be delegated to consent to the plan.

From questions to all witnesses:

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 a 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 you think it should address this issue?

Response:

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"Respecting the person's right to make bad decisions" is an unnecessarily cynical characterisation of the concept of assisted decision making. 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****. Within the general discourse surrounding guardianship in NSW there is frequent reference to informal arrangements or informal decision making. Informal decision making falls into two broad areas. Firstly, assisted decision making where a family or circle of friends will help a person with impaired decision making capacity to explore the options, consider the consequences and risks associated with a decision and assist the person to make their own decision. The second is unauthorised substitute decision making.*

Unauthorised substitute decision making occurs every day in NSW. For example, an elderly person in hospital who requires admission to an aged care facility but is incapable of making an informed decision. The hospital will discuss the care requirements with family members. If the family are in agreement, the decision is made. The family makes the decision. Only if there is no family or some members of the family disagree with others will an application for a guardian be made. Another example would be where the parents of a young person with an intellectual disability apply for respite care. The service is designed to provide respite for the family/carer that has the responsibility for caring for the young person. However, the decision also represents an accommodation decision for the young person but frequently they are not consulted. The decision is actually made by the family. These are examples of when a supported decision making model could be applied.

If legislation were to be introduced covering assisted decision making I believe it should contain some of the following features.

- *Comprehensive guidelines should be developed covering the various forms of supported or assisted decision making.*
- *Where a person with a decision making incapacity enters into an arrangement with a supported decision making network or a representative agreement these arrangements should be reviewable by the Guardianship Tribunal upon application from a person with a genuine interest in the welfare of a person with a disability.*
- *People engaged in the process of supported or assisted decision making on behalf of another person should have access to advice and support from the Public Guardian's Private Guardian Support Unit.*
- *The Public Guardian should be resourced to provide community education in the field of supported or assisted decision making.*
- *The Public Guardian should be empowered to investigate complaints against those engaged in supported or assisted decision making where it is asserted that a person's welfare or interests are being compromised.*

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.
    - 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?

Response:

The Guardianship Tribunal is the competent body to determine where on the spectrum a person is located. Substitute decision-making arrangements could be constructed to accommodate the fact that a person's capacity may vary from time to time and situation to situation by the application of a simple test to be applied by the substitute decision maker.

For the purposes of determining whether a person has capacity to make an informed decision in a particular situation, a person is incapable of making an informed decision if the person:
(a) is incapable of understanding the general nature and effect of the proposed decision, or
(b) is incapable of indicating whether or not he or she consents or does not consent to the proposed decision being carried out.

The Tribunal will make an order which is life domain specific. It would be up to the substitute decision maker to determine whether the person has capacity for a specific decision.

Restrictive practices

3. It has been argued by another inquiry participant 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. It has been further argued that an independent public office be established to regulate the use of restrictive practices in NSW.
    - Can you comment on the use of restrictive practices in NSW in the context of guardianship orders?
    - What provisions are there in existing NSW legislation to regulate the use of restrictive practices?
    - Do you think there is a need to amend NSW legislation in relation to the use of restrictive practices?

Response:

Approximately 7% of the orders currently appointing the Public Guardian empower the Public Guardian to consent to restrictive practices. Both the Guardianship Tribunal and the Public Guardian publish detailed practise guidelines which relate to consenting restrictive practices. Restrictive practices are sometimes employed in both the disability services sector and the aged care sector. The 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. These practices are confined to circumstances where a person's freedom of action is restricted to protect them from harm.

In certain limited circumstances the Public Guardian does 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.

The use of restrictive practices without lawful excuse/consent may represent a crime of assault or a civil wrong in the form of false imprisonment or battery.

I believe the law could be strengthened to provide a specific regulation under the Guardianship Act to cover the use of restrictive practices.

Advanced Medical (Care) Directives

4. NSW has no legislative provisions for advanced care directives; however, NSW Health provides advice on how to develop a document that would be valid at common law.
    - Could you comment on the status of advanced medical directives in NSW?
    - Do you believe there is a need for NSW legislation relating to advanced medical directives?
    - Are doctors generally willing to comply with the directives?
    - How do advanced care directives and guardianship or enduring powers of attorney interact?

Response:

In these matters the Public Guardian is guided by the policies of NSW Health. Relevant NSW Health publications include Using Advance Care Directives 2004, Decisions relating to No Cardio-Pulmonary Resuscitation (CPR) Orders 2008 and Guidelines for end-of-life care and decision-making 2005. The Public Guardian understands that if a person, who has capacity, has written an advance care directive that is specific and current, then the treating medical practitioner is bound by common law to abide by the person's stated wishes. This situation has been upheld recently in case law (Supreme Court ruling Hunter and New England Area Health Service v A [2009] NSWSC 761). In this ruling, Judge McDougall upheld the patient's right of self-determination even where withdrawal of treatment would have life threatening consequences. 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.

In the Public Guardian's experience doctors are generally willing to comply with directives if it is clear that the person had capacity at the time of writing their directives, and the document meets the criteria regarding specificity and currency. The Public Guardian has been involved in recent consultation with NSW Health on the subject of advance care planning, and the role of advance care directives was clearly embedded in current practice within the health system.

There 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. Many people will make an enduring guardianship appointment, and refer to or attach an advance care directive at the same time. In other circumstances, guardians may be appointed after a person loses capacity, but consideration still needs to be given to any previously written advance care directives.

If a person loses capacity and requires substitute consent to medical treatment, in the absence of a guardian, the doctor can identify a "person responsible" to provide consent as defined by Part 5 of the Guardianship Act. The person responsible would also be required to consider any advance care directives written by the person when they had capacity.

There is no relationship between advance care directives and enduring powers of attorney, as powers of attorney relate only to financial matters and have no bearing or authority in relation to health care or medical decision making.

Public Advocate

5. 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?

Response:

The Public Guardian supports the creation of the office of Public Advocate.

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.

*The functions of a Public Advocate are currently being performed by the Public Guardian only for people under the guardianship of the Public Guardian. The Public Advocate is **not** confined to advocating only for people under his/her guardianship but may be an advocate for any person with a disability.*